1-18-17

STATE OF NEW JERSEY

In the Matter of Betty Gene Johnson-Taylor	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2015-2424 OAL Docket No. CSV 03143-15	

ISSUED: FEB 08 2017 (SLK)

The appeal of Betty Gene Johnson-Taylor, an Assistant Personnel Director with the City of Paterson, of her removal, on charges, was heard by Administrative Law Judge Joann LaSala Candido (ALJ), who rendered her initial decision on December 14, 2016. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on January 18, 2017, accepted and adopted the Findings of Fact as detailed in the initial decision. However, the Commission did not adopt the ALJ's recommendation to modify the removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant was removed, effective January 16, 2015, on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant misrepresented her income on an application for the Home Paterson Pride Program (Home Program). Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in her initial decision that Barbara Blake-McLennon, Director of Community Development (Community Development), testified that the

appellant applied for grant money under the Home Program to help low-income residents in Paterson repair their homes. At the time of the appellant's application, her annual income was below the maximum allowable amount of $53,750. However, just after her income was re-verified, the appellant's salary was increased to $80,340. Blake-McLennon indicated that her loan was approved based on her initial income and the appointing authority did not re-verify her income at closing. She confirmed that the appointing authority prepared all of the loan documents.

Nellie Pou, Business Administrator, testified that the Passaic County Prosecutor's Office (Prosecutor's Office) and the Office of the Inspector General, U.S. Department of Housing and Urban Development (HUD) found no criminal intent on the part of the appellant. Pou stated that the appointing authority sought to terminate the appellant because of her position's high profile, her misrepresentation on her grant application, and the need to maintain the public trust. She reiterated that since the appellant's income exceeded the maximum allowable amount at the time of closing, the grant should not have been approved and the funds should not have been dispersed.

Domenick Stampone, Esq. testified that the Paterson Municipal Council and he (Committee) investigated certain monetary payments made to compensate elected and appointed officials for hours worked during Hurricane Irene and Tropical Storm Lee, which occurred in September 2011. The Committee found that the appellant lacked a fundamental knowledge of the department she managed, allowed overtime payments without proper documentation, allowed employees to receive overtime compensation when called into service even with the appointing authority being closed, and received inappropriate overtime payments herself. Although the appointing authority required these overtime payments to be returned, no formal or even informal disciplinary charges were ever brought against appellant.

Yvonne Scott, Senior Clerk, testified on behalf of the appellant. She indicated that she suggested to the appellant that she apply for the Home Program since she thought the appellant was eligible. Scott stated that Cheryl Brown at Community Development, who was in charge of eligibility, advised her that the appellant would still be eligible once her salary increased as she indicated that eligibility goes back to the original date of application.

Lanisha Danielle Mackle Ridley testified on behalf of the appellant. In September 2010, she was the Acting Director of Community Development. She stated that the Home Program needed re-certification at six-months intervals and she would not have signed the re-certification if appellant's income was not accurate.

The ALJ found that when the appellant submitted her application for the Home Program on December 22, 2009, she reported her income as $52,811 which was under the maximum allowable annual income of $53,750. In June 2010, Community Development verified that the appellant's income was below the maximum allowable amount. Thereafter, on July 13, 2010, the appellant was appointed Acting Director of Personnel and her annual salary increased to $80,340. On December 1, 2010, the appellant signed a loan document indicating her annual salary as $53,868.12. On December 10, 2010, a loan in the amount of $43,141 was disbursed to the appellant based on her salary being $53,868.12 annually. In October 2011, the appointing authority found that the appellant allowed overtime payments to be made without proper documentation and that she received improper overtime payments. The appellant was not threatened with any disciplinary action or termination, nor were charges ever field against her. On June 14, 2012, the Paterson City Council passed a resolution to terminate her from her position as Acting Director of Personnel. However, she was returned to her permanent title, Assistant Personnel Director and was reinstated on July 23, 2012 with back pay.

The ALJ noted that the appellant signed her name to the final loan application and affidavit of income certifying that the estimated income of $53,868.10 on her application was truthful and complete to the best of her knowledge. She did this even though she knew she was given a considerable pay raise in July 2010 and that the income stated on the closing documents, which she certified as correct, was in fact untrue. Based on the foregoing, the ALJ sustained the charge that the appellant engaged in conduct unbecoming a public employee. The ALJ indicated that since the appellant was never formally charged in regard to the allegations that she mismanaged funds in 2011, that she lacked any history of disciplinary action. The ALJ found that the appellant's offense was not so severe to warrant removal given that the appointing authority's own witnesses admitted that the appellant did not draft the loan documents herself. Additionally, the ALJ commented that the Prosecutor's Office and HUD found that the appellant did not have criminal intent and declined to bring charges. The ALJ stated that her signing a misleading loan application was action she took as a private citizen and that the appointing authority did not present sufficient evidence indicating that the appellant was unsuitable for her position. The ALJ emphasized that the appellant did not prepare the loan document and did not produce any false documents when her income was verified. Therefore, this being her first offense, under the principle of progressive discipline, the ALJ concluded that removal was not warranted. Accordingly, the ALJ recommended that the removal be modified to a six-month suspension.

In its exceptions, the appointing authority asserts that the ALJ ignored the appellant's misrepresentation on an affidavit and received $43,141 to which she was not entitled. The appointing authority disagrees with the ALJ's findings that the appellant had an unblemished disciplinary record as she had to defend herself

against the charges of misappropriation of funds in 2011 to the Committee. Further, while represented by counsel, she testified under oath to the Committee, admitting that she approved overtime payments for exempt employees, including herself. Although the Paterson City Council resolved to terminate the appellant, the Commission directed that the appellant be restored to her permanent title of Assistant Personnel Director as she was not apprised of the charges against her in compliance with Civil Service law and rule. However, it emphasizes that she was removed from Acting Personnel Director, which is tantamount to a demotion.

Additionally, the appointing authority argues that the appellant's misconduct was so severe that it warrants termination. It represents that the appellant's duties included being in charge of payroll, processing all changes for all of the appointing authority's employees, and being responsible for income verification of loan applications, including verification of loan applications for the same grant loan received by the appellant. Consequently, by the appellant executing documents falsely representing her income and receiving $43,141 to which she was not entitled, she brought into question her trustworthiness, honesty and truthfulness. It states that an Assistant Personnel Director who commits fraud and submits false documents cannot present an image of personal integrity and dependability to the public. Further, it indicates that the appointing authority will need to commence legal action against the appellant since she has not repaid the improper loan.

In reply, the appellant asserts that the appointing authority did not submit any evidence concerning its compliance with or adherence to her due process rights in regard to its Committee proceedings concerning misappropriation of overtime payments. The appellant emphasizes that the Committee's disciplinary hearing did not conform to Civil Services regulations and an employee cannot be found guilty of charges without proper notice by the appointing authority. She highlights that the ALJ correctly noted that the appointing authority prepared the mortgage packet and she did not submit any false or inappropriate documentation. The appellant presents that she submitted evidence that the affidavit in question was not required for the closing and although she signed an affidavit that incorrectly stated her income, the appointing authority knowingly prepared this affidavit and backdated her income to the date of her application. The appellant contends that her loan advisor knew or should have known that the appellant's income increased because of a promotion. Further, it can be inferred that the loan advisor prepared the affidavit so that her loan could withstand a HUD audit as this is the only reasonable explanation for including and requiring unnecessary documents in the file. Consequently, as the appointing authority admitted that the appellant did not prepare the loan documents, the ALJ was correct in determining that removal was not appropriate.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. Clearly, the appellant's misrepresentation of or her failure

to correct the income on the final loan application and affidavit of income dated December 1, 2010 was conduct unbecoming a public employee. However, as discussed further below, the Commission does not adopt the ALJ's recommendation to modify the appellant's removal to a six-month suspension.

Although the appellant argues in her exceptions that the affidavit she signed was not even required for the loan and that it was prepared by the appointing authority, she clearly attested to the fact that her projected income in 2010 was $53,868.12, but her salary was increased to $80,340 in July 2010. It is irrelevant that she did not prepare the affidavit or even if it was necessary to perfect the loan as she attested to the veracity of the information. Indeed, if the information was not correct, it was incumbent upon the appellant to correct this information or not sign, swearing to its truthfulness.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the Commission finds that the appellant's actions were sufficiently egregious to support removal. While the ALJ relied on the fact that the appointing authority appeared to bear some responsibility since it prepared the loan documents, it is clear that the appellant knew her income exceeded the threshold for the grant. Moreover, the fact that her improper actions occurred outside of her employment and did not result in criminal charges are of no moment. In this regard, it is clear that Civil Service employees are subject to disciplinary action for improper actions both in conjunction with and outside of their employment. Moreover, criminal charges are not required to sustain administrative disciplinary charges as the standards to prove guilt are significantly different. While said factors can be used to mitigate the penalty imposed, the Commission does not find these factors persuasive in this matter. Further, a review of the Examples of Work under the Job Specification for an Assistant Personnel Director indicate that incumbents in this title assist in the handling of personnel and employee relations problems and act as a liaison between the appointing authority and the Commission

in personnel matters, including appointments, promotions, transfers, demotions, dismissals, and disciplinary matters. As such, her falsification makes it very difficult for the appointing authority to continue to trust her ability to do her job, which involves sensitive and confidential personnel matters. The Commission notes that it need not decide whether the appointing authority's Committee's findings that she had engaged in inappropriate conduct stemming from a 2011 incident constitutes discipline for the purposes of progressive discipline since her actions in this matter were clearly sufficiently egregious to support removal. Accordingly, based on the seriousness of the appellant's offense as it relates to her position, the Commission concludes that removal is the appropriate penalty.

ORDER

The Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18th DAY OF JANUARY, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03143-15

IN THE MATTER OF BETTY GENE JOHNSON-TAYLOR, CITY OF PATERSON, DIVISION OF BUSINESS ADMINISTRATION.

Neal Brunson, Esq., for appellant

Steven S. Glickman, Assistant Corporation Counsel, for City of Paterson (Domenick Stampone, Corporation Counsel, attorney)

Record Closed: November 18, 2016 Decided: December 14, 2016

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

This matter involves disciplinary charges filed against Betty Gene Johnson-Taylor (appellant), who was formerly employed by respondent, the City of Paterson ("City"), as an assistant personnel director. The appeal as transmitted to the Office of Administrative Law (OAL) arises from the Final Notice of Disciplinary Action, dated January 16, 2015. On November 3, 2014, appellant was issued a 31-A Preliminary Notice of Disciplinary Action charging her with violations of N.J.A.C. 4A:2-2.3(a)(6) and (12), conduct unbecoming a public employee and other sufficient cause, for misrepresenting her income on an application for the Home Paterson Pride

Rehabilitation Program ('HOME"), which resulted in the appellant's removal from employment effective January 16, 2015.

PROCEDURAL HISTORY

In February 2015, Johnson-Taylor appealed her removal to the New Jersey Civil Service Commission (CSC). The case was transmitted to the Office of Administrative Law on March 3, 2015, and hearing dates were held on December 7, 2015, and February 2, and July 6, 2016. After months of waiting for transcripts, the parties were finally able to submit their respective post-submission briefs on November 18, 2016, on which date the record closed.

Issues Presented

1. Did appellant violate N.J.A.C. 4A:2-2.3(a)(6) and (a)(12) by misrepresenting her income on an application for the Home Paterson Pride Rehabilitation Program ("HOME")?

2. If so, is removal the appropriate penalty?

TESTIMONY

The following is intended to summarize the testimony of the witnesses relevant to the issues in this matter:

Barbara Blake McLennon

Barbara Blake-McLennon, director of Community Development, testified on behalf of the City. She oversees federal grant programs. Blake-McLennon testified that on December 22, 2009, appellant applied for the Paterson Pride Rehab Program that provides low-income residents of Paterson grant monies to help repair their homes. The amount of the grant depends upon the applicant's income and household size. At

the time of the application, appellant's annual income was below the maximum allowable of $53,750 under the HOME program. She resided with her nephew in the same household.

Blake-McLennon described, in general terms, the application process. Once an application is submitted, it remains in review status, which is done every six months and until the funds are dispersed. The application and a booklet of instruction are given to the applicant. The applicant then meets with a loan officer to ensure that taxes, utilities, and any mortgages are paid to date. If satisfactory, then an inspector schedules a visit to the home. The City is then obligated to verify the applicant's income at six-month intervals until closing, using an income-verification form filled out by the Office of Personnel when the applicant is an employee of the City. Here, the appellant met with loan officer Sheryl Brown, and provided her with the requisite proofs. The application was then submitted to the program on December 22, 2009, for consideration.

Blake-McLennon stated that appellant's salary was increased from $52,811 to $80,340, effective July 13, 2010. This occurred just after the June 2010 re-verification of income. On December 1, 2010, Pearl Halestock, the chief loan officer of HOME, and Lanisha Makle, its community development director, approved appellant's application according to the June income verification, which showed a monthly income of $4,489 and annual income of $53,868. Because the loan closed in the beginning of December 2010 rather than at the end of the month when re-verification would have been necessary, the City did not verify appellant's income at the closing. On the approval documentation, there was an incorrect entry that stated that appellant was not an employee of the City, when in fact she was. This was not corrected. On December 9, 2010, the documents were again reviewed before the loan was dispersed. Blake-McLennon confirmed on cross-examination that the City prepared and typed all of the closing documents and that it did not verify appellant's annual income, since a review would not have been needed until December 22, 2010. She also stated that it was unclear if and when the City began applying the income limit set by the United States Department of Housing and Urban Development (HUD).

Nellie Pou

The City's business administrator, Nellie Pou, testified on its behalf. She has held that position since July 1, 2014. Pou explained that a memorandum was written by Blake-McLennon on August 6, 2014, as requested by the Paterson mayor Jose Torres concerning a review of appellant's HOME application file. (P-3.) The matter was referred to the Passaic County Prosecutor's Office for its review since appellant's annual income, at closing, exceeded the allowable maximum amount. The Prosecutor's Office determined that there was no criminal intent; no charges were brought. The Office of Inspector General, U.S. Department of Housing and Urban Development, also found no criminal intent on the part of appellant. (P-4.)

Pou testified that she felt that appellant misrepresented information on her application, although she did not request an investigation. Corporation counsel reviewed Blake-McLennon's memorandum. Pou testified that appellant's income in 2009, at the time of the application, was in excess of the $51,200 annual maximum income allowed under the program and appellant's application should have been rejected. Her annual income in 2009 was $53,846.

Pou further stated that the affidavit of income verification for the closing of the grant is filled out by the Department of Community Development before going to the personnel director. Blake-McLennon was asked by the mayor to prepare a memorandum to address the issue concerning appellant's application, which may have had a discrepancy. The memorandum was forwarded by Blake-McLennon to City corporation counsel Domenick Stampone. Stampone forwarded the findings to the Passaic County Prosecutor's Office, who found no criminal intent on behalf of appellant. HUD simultaneously also found no criminal intent.

Pou stated that the City sought to terminate appellant from her position as acting director of personnel because of the position's high profile, her misrepresentation of income on the HOME application, and the need to maintain the public trust.

Because Taylor earned $53,846 at the time of the application and $80,000 at the time of closing, which was above the program's allowable limit, appellant never should have been approved for the grant, nor should funds have been dispersed. Pou asked Stampone to prepare charges for appellant's removal. Accordingly, in November 2014 a Preliminary Notice of Disciplinary Action was prepared and signed by him.

Yvonne Scott

Yvonne Scott, a senior clerk in the Registry division of the City, testified on behalf of appellant. Scott worked for appellant in the Personnel division until sometime in 2013. Scott suggested to appellant that she should apply for the HOME program because she thought appellant would be eligible. Scott asked Cheryl Brown at Community Development, who was in charge of eligibility, if appellant was approved. Scott also asked Brown in July 2010 if appellant would still be eligible once her salary increased, since appellant was promoted to personnel director. Brown said it was fine, since eligibility goes back to the original date of application.

Domenick Stampone, Esq.

Domenick Stampone, corporation counsel for the City, testified on its behalf. He stated that he was contacted by Blake-McLennon sometime during the summer of 2014 to review documentation pertaining to appellant's application for a construction loan under the HOME program.

Prior to this, during October 2011, Stampone and the Paterson Municipal Council convened a Committee of the Whole ("Committee") to investigate certain monetary payments made to compensate elected and appointed officials for hours worked during Hurricane Irene and Tropical Storm Lee, which occurred in September 2011. (R-12.) Upon its review, the Committee found that appellant lacked a fundamental knowledge of the department she managed, allowed overtime payments to be made without proper documentation, allowed employees to receive overtime compensation when called into service even when the City was closed, and received inappropriate overtime payments

herself. As a result of the Committee's findings, in December 2011 appellant was accused of receiving inappropriate overtime payments of $11,549.12 from July 1, 2010, to June 30, 2011, and $3,326.29 from July 1, 2011, to December 15, 2011. (R-11 at 3-4.) Although the City required that these overtime payments be returned through immediate repayment or pursuant to a reasonable payment schedule, no formal or even informal disciplinary charges were ever brought against appellant and filed with the CSC.

Lanisha Danielle Mackle Ridley

Lanisha Danielle Mackle Ridley also testified on behalf of appellant. In September 2010, Ridley was employed as acting director of the City's Department of Community Development. Ridley testified that the HOME program needed re-certification at six-month intervals, and that she never would have signed the re-certification if appellant's income was not stated correctly.

FINDINGS OF FACT

Based upon consideration of the testimonial and documentary evidence presented and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS**:

1. Appellant, Johnson-Taylor, was hired by the City of Paterson, Division of Personnel, on February 9, 2004.

2. On December 22, 2009, Johnson-Taylor submitted an application for acceptance to the HOME program to secure grant funding for home rehabilitation, after her meeting with loan officer Sheryl Brown. Johnson-Taylor reported her current wages as $52,811. If any of the information supplied was false, she agreed, as part of the application, to repay any and all of the grant funds expended.

3. Under the HOME program, determination of the amount of the grant was based upon income and household size. According to the HOME brochure issued by the Paterson Department of Community Development, at the time Johnson-Taylor filed her initial application, the income limit for a household of two to qualify for grant assistance for home repairs and maintenance was $53,750 per year. (R-3.) However, for the same period of time, the United States Department of Housing and Urban Development, which provided grant money for the program, listed the income limit for a household of two as $51,200. (P-3 at 2.) In 2010, the applicable HUD income limit rose to $51,500.

4. Pursuant to federal guidelines, income level remains important from the time of the application until the disbursement of the loan and must be verified every six months.

5. In June 2010, the Department of Community Development verified at the six-month recertification Johnson-Taylor's income at $52,811, and, applying the income limit listed in the HOME brochure, found her qualified for the HOME loan program. On July 13, 2010, Johnson-Taylor was appointed acting director of Personnel. As a result of the appointment, her annual salary increased to $80,340. (R-5.)

6. On December 1, 2010, Johnson-Taylor signed a loan document, prepared by a secretary, which listed her monthly income as $4,489.01, for an annual salary of $53,868.12. (R-8.)

7. On December 1, 2010, Johnson-Taylor signed an affidavit of income prepared by the City stating that her projected income for 2010 was $53,868.12. (R-10.) Johnson-Taylor's bi-weekly salary was listed as $2,071.85 as a full-time employee of the City of Paterson.

8. The annual income listed on the loan document and the projected income listed in the affidavit is above the income limit for eligibility set by both the HOME

program brochure and by HUD. The income estimate also fails to reflect Johnson-Taylor's salary increase from her appointment as acting director of Personnel in July 2010.

9. A loan in the amount of $43,141 was disbursed to Johnson-Taylor on or about December 10, 2010. (P-1; R-9.) According to the final application signed by Johnson-Taylor on December 1, 2010, and by the chief loan officer and director of Community Development also on December 10, 2010, the application was approved based on Johnson-Taylor's monthly income of $4,489.01 ($53,868.12 annually). (R-8.)

10. Johnson-Taylor would have qualified for the program with $52,811 in annual income on her initial application under the income limit provided by the HOME brochure, although under the HUD limit she would have been ineligible for the program from the very beginning.

11. The matter was referred by the City to the Passaic County Prosecutor's Office, which declined to take criminal action against Johnson-Taylor. The HUD Office of Inspector General also found no criminal intent as a result of its investigation.

12. In October 2011, the Paterson Municipal Council convened a Committee of the Whole to investigate monetary payments made to compensate elected and appointed officials as a result of hours worked during Hurricane Irene and Tropical Storm Lee, which occurred in September 2011. (R-12.) The Committee found that Johnson-Taylor allowed overtime payments to be made without proper documentation and that she received inappropriate overtime payments of $11,549.12 from July 1, 2010, to June 30, 2011, and $3,326.29 from July 1, 2011, to December 15, 2011. (R-11 at 3–4.) During the Committee's investigation, Johnson-Taylor was not threatened with disciplinary action or termination, nor were any charges ever filed against her.

13. On June 14, 2012, the Paterson City Council passed a resolution to terminate Johnson-Taylor from her position as acting director of Personnel. (R-13.) On July 12, 2012, business administrator Charles Thomas sent a memo to the municipal council president regarding Johnson-Taylor's employment status. (R-14.) Because she was returned to her permanent civil-service title of assistant personnel director, based upon the direction of the NJ CSC, Johnson-Taylor was reinstated on July 23, 2012, with back pay. (R-15.)

14. On November 3, 2014, Johnson-Taylor was issued a 31-A Preliminary Notice of Disciplinary Action alleging conduct unbecoming a public employee and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(6) and (a)(12). (R-1.) The possible penalties cited were suspension, removal, or demotion. A 31-B Final Notice of Disciplinary Action removing Johnson-Taylor was dated January 16, 2015, and served on January 23, 2015. Johnson-Taylor was removed from employment as an assistant personnel director for the City effective January 16, 2015.

LEGAL DISCUSSION AND CONCLUSION

Under N.J.A.C. 4A:2-2.3(a)(6) a public employee can be disciplined for conduct unbecoming a public employee. Whether an employee's behavior "constitutes conduct unbecoming a public employee is primarily a question of law." Karins v. Atlantic City, 152 N.J. 532, 553 (1998). Conduct unbecoming is an extremely fact-specific issue and describes any conduct that undermines public confidence in municipal employees or services. Id. at 554. The appointing authority must establish that the employee engaged in conduct unbecoming a public employee by a preponderance of the credible evidence. Washington v. City of Trenton, CSV 4211-03, Initial Decision (November 3, 2005), adopted, Merit Sys. Bd. (December 13, 2005), <http://njlaw.rutgers.edu/collections/oal/>.

Here, although appellant did not prepare the loan documents herself, she knew that her income had increased since her initial application in December 2009. (Tr. 1 at

74:2–8). The final loan application contained a certification regarding truth and completeness under penalty of perjury, which appellant signed and dated on December 1, 2010. (R-8.) No evidence in the OAL hearing record indicates that she was instructed by the loan brochure itself or by any individual that her income needed to be updated throughout the application process. However, appellant signed her name to the final loan application and affidavit of income certifying that the estimated income of $53,868.10 noted on the application was truthful and complete to the best of her knowledge. She did this even though she knew she was given a considerable pay raise in July 2010 and that the income stated on the closing documents, which she certified as correct, was in fact untrue. (R-10.)

Accordingly, I **CONCLUDE** that the City has established by a preponderance of the credible evidence that appellant engaged in conduct unbecoming a public employee based on the misrepresentation of or her failure to correct the income reported on the final HOME loan application and affidavit of income dated December 1, 2010.

We next turn to the disciplinary action of removal sought by the City. Since appellant was never formally charged in regard to the allegations that came to light in 2011 of her alleged mismanagement of funds, she lacks any history of disciplinary action. The theory of progressive discipline provides that "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)). An employee's past record includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously called to the attention of and admitted by the employee." Bock, supra, 38 N.J. at 523–24. Although disciplinary issues may be informally adjudicated, "[i]t is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority," and "[t]he *de novo* hearing on the administrative appeal is limited to the charges made below." Id. at 522. As the court said in Orange v. DeStefano, 48 N.J. Super. 407, 419 (App. Div. 1958), "where . . . an employee entitled

to notice and hearing before discharge is tried on specified charges, but is found guilty solely of other charges never specified nor actually tried before the original hearer or on appeal to the Civil Service Commission, the matter must be reversed." Dep't of Law & Pub. Safety, Div. of Motor Vehicles v. Miller, 115 N.J. Super. 122, 126 (App. Div. 1971).

"[P]rinciples of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct." Herrmann, supra, 192 N.J. at 30. In In re Carter, 191 N.J. 474 (2007), the Court held that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." See Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). Thus, the question for the courts is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Polk License Revocation, 90 N.J. 550, 578 (1982) (considering punishment in license-revocation proceeding) (quoting Pell v. Bd. of Educ., 313 N.E.2d 321, 327 (1974)).

Unlike in Carter and Rawlings, the offense appellant committed was not so severe as to warrant removal. Given that the City's own witnesses admitted that appellant did not draft the loan documents herself, removal was disproportionate to the offense. Additionally, the Passaic County Prosecutor's Office and the HUD Office of Inspector General found that appellant did not have criminal intent and declined to bring charges. (P-4.)

As for past misconduct, the only example provided was appellant's receipt of alleged improper overtime compensation in 2011 as found by the Committee. (R-11.) However, appellant was not charged with any official misconduct, nor were any formal disciplinary charges ever filed. No testimony or exhibits in the record indicate that she was ever charged. The Committee should have explicitly notified appellant that it was seeking to discipline her, citing the specific reasons for imposing such disciplinary action. Nothing in the record reflected such a disciplinary hearing, nor a hearing held by the Paterson City Council to address the Committee's findings. In such instance,

appellant would have had an opportunity to contest those charges, present witnesses in her behalf, or cross-examine the City's witnesses. However, because no hearing ever occurred, the CSC set aside the penalty of removal and reinstated appellant to her position as assistant personnel director.

Accordingly, under the standards articulated in Bock, it must be considered that appellant has an unblemished disciplinary record. Her removal from her position for signing a misleading loan application, which by the way indicated that she was a private citizen, had nothing to do with her job performance or official duties. Since there had not been a formal instance of official misconduct prior to the issue of the loan application, no habitual misconduct existed. Therefore, the concept of progressive discipline, as noted above, became applicable. This being her first offense, removal was not warranted, and I so **CONCLUDE**.

That said, a disciplinary penalty should be imposed under the facts presented here. In In re Olivo, 95 N.J.A.R.2d (CSV) 223, a construction official was ultimately given a reprimand after appealing his removal for forging the signatures of a secretary and zoning official on a zoning permit given to an applicant. Similarly, in In re Haggerty, 95 N.J.A.R.2d (CSV) 240, a probation officer was reinstated with a six-month suspension on appeal from his removal for regularly placing sports bets with an illegal bookmaking operation. The Merit System Board reduced the penalty from removal to a six-month suspension given Haggerty's exemplary record of public service for twenty-two years. "[J]udicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, supra, 192 N.J. at 33. The City has not proven that appellant's conduct was so severe as to ignore the principle of progressive discipline. In the cases cited above, forgery and illegal betting were more severe offenses than appellant signing documents, prepared by someone other than herself, that misstated an income estimate. Yet in both cases cited above, a reprimand

and suspension were deemed appropriate penalties rather than removal despite the severity of those offenses.

Since appellant lacked a disciplinary history, the City offered no credible evidence that appellant's improper signature of loan documents makes her unsuitable to continue as assistant director of personnel or that her continued employment will be contrary to the public interest. In fact, competency was not mentioned at all in the preliminary or final notices of disciplinary action. The only evidence proffered was testimony from Pou stating that the position is high profile and involves public trust and a letter from the State claiming that payroll function was "extraordinarily poor." (Tr. 1 at 99:1–7; R-11 at 3.) However, Pou's statement was not sufficient to establish by a preponderance of the credible evidence that appellant was unsuitable for the position. Additionally, the county prosecutor and HUD both determined that there was no criminal intent to defraud. Appellant did not prepare the loan documents, did not fill in the income figures, and did not produce any false documents when her income was verified in December 2009 or again in June 2010. Appellant's failure to provide additional documents prior to the closing of the loan did not provide sufficient grounds for removal since the City was unable to provide any evidence that she was asked to provide such documents. Furthermore, there was no evidence offered either in the loan brochure or by way of testimony establishing that appellant should have, on her own, produced updated income documents when they had never been requested.

For the reasons stated above, the City has established by a preponderance of the credible evidence that appellant violated N.J.A.C. 4A:2-2.3(a)(6) and (a)(12) when she failed to correct her estimated income on the HOME loan application. As a result, I **CONCLUDE** that appellant is subject to discipline. Removal is not appropriate under the principle of progressive discipline or under the particular circumstances of this case. Appellant should not have signed a document that did not reflect the correct pay information, nor should the City have prepared the incorrect salary amount, or accepted the application in the first place, since her income at the onset was above the maximum allowable under the program.

Accordingly, I **CONCLUDE** that a six-month suspension without pay is the appropriate penalty in this particular case. The City justifiably charged appellant with conduct unbecoming a public employee and other sufficient cause; however, for the reasons stated above, the penalty should be modified.

ORDER

Based upon the foregoing, I hereby **ORDER** that the charges of conduct unbecoming a public employee and other sufficient cause are **AFFIRMED**, but that the penalty of removal is **MODIFIED** to a six-month suspension without pay.

I further **ORDER** that appellant be restored to her position at the completion of the six-month suspension, with back pay due, if any.

I further **ORDER** that appellant has a duty to mitigate damages to receive any back pay due after completion of the six-month suspension without pay. Appellant shall file a certification with the appointing authority detailing her employment, if applicable.

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.

December 14 2016
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: Dec. 14, 2016

Date Mailed to Parties: DEC 14 2016

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

WITNESSES

For Appellant

For Respondent

EXHIBITS

For Appellant

P-1 Memorandum to approving officers from Cheryl Brown dated November 22, 2010

P-2 Home Paterson Pride

P-3 Memo to Domenick to Barbara Blake-McLennon dated August 6, 2014

P-4 Report of Investigation dated March 27, 2012

P-5 Same as P-4

P-6 Memorandum of Interview dated August 4, 2011

For Respondent

R-1 Preliminary Notice of Disciplinary Action dated November 3, 2014

R-2 Home Paterson Pride Rehabilitation Program preliminary credit application

R-3 Department of Community Development HOME program brochure

R-4 General Program Rules

R-5 Nine employee names and salaries

R-7 Home Paterson Pride checklist

R-8 Application of Betty Taylor for Home Pride dated December 10, 2010

R-9 Borrower Affidavit dated December 1, 2010

R-10 Affidavit of Income dated December 1, 2010

R-11 Letter to Mayor and City Council dated December 15, 2011

R-12 Findings and recommendations, the Committee of the Whole, dated October 11, 2011

1-18-17

STATE OF NEW JERSEY

In the Matters of Michael Mulcahy, *et al.*, City of Bayonne	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2016-819, *et al.* OAL Docket No. CSV 13798-15	

ISSUED: FEB 10 2017 (HS)

The appeals of Michael Mulcahy, Housing Inspector, Gary Parlatti, Field Representative Citizen Complaints,[1] and Michael Smith, Field Representative Citizen Complaints, of their layoffs from the City of Bayonne, effective July 17, 2015, were heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on November 2, 2016. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellants.

Having considered the record and the ALJ's initial decision and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL) and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on January 18, 2017, did not adopt the ALJ's recommendation to reverse the layoffs. Rather, the Commission upheld the layoffs.

DISCUSSION

Bayonne presented a layoff plan to the Division of Agency Services (Agency Services) via letter, indicating that due to reasons of economy and severe budget shortfalls, a layoff of its employees was necessary. The plan was approved in June 2015 and the General and Individual Notices of Layoff were subsequently

[1] Agency records indicate that Parlatti was appointed from the special reemployment list for Field Representative Citizen Complaints, effective July 19, 2016.

distributed. As a result, Mulcahy and Smith were separated from employment and Parlatti was demoted in lieu of layoff to the title of Keyboarding Clerk 1. Upon the appellants' appeals to the Commission, the matters were transmitted to the OAL for hearings as contested cases and were then consolidated.

In the initial decision, the ALJ noted that the appellants performed property code enforcement and handled citizen complaints. The appellants would respond to complaints and, when appropriate, issue warnings and summonses for code violations, and would appear in municipal court where the summonses were returnable. The ALJ also noted that the appellants' jobs were currently being performed by their co-worker Thomas Keyes, a Field Representative Citizen Complaints.

The ALJ found that although Bayonne had a budget deficit and needed to cut costs, it did not effectuate the layoffs due to reasons of economy and severe budget shortfalls. Bayonne offered, as the reason for the layoffs, a change in philosophy in the enforcement of the property maintenance code to a less aggressive approach. However, the ALJ determined that there was no credible evidence that this change in philosophy was put into place. Specifically, the ALJ found that neither the appellants, Robert Wondolowski, former Director of Municipal Services and the appellants' supervisor, nor Keyes were informed of the change in philosophy. Moreover, he found that no one from Bayonne ever issued a written memorandum regarding this change in philosophy. In addition, the ALJ determined that Bayonne did not do what it stated it would in its submission of the proposed layoff to Agency Services. Specifically, it did not reduce or eliminate stipends, it did not reduce overtime, all intern positions were not eliminated and the one intern that was eliminated was then hired by the Bayonne Municipal Utilities Authority, and it did not offer any seasonal positions to the appellants. The ALJ also noted that since the layoffs, Bayonne hired more than 100 new employees, promoted and granted raises to several employees and continued to hire seasonal employees, some of whom had been hired as full-time employees.

The ALJ deemed the testimony of all witnesses credible, with the exceptions of Wondolowski and Joseph DeMarco, City Administrator. With respect to Wondolowski, the ALJ determined that he contradicted his direct testimony on cross-examination. On direct examination, he stated that he did not speak with DeMarco regarding layoffs, that he did not discuss enforcement of property maintenance violations with DeMarco and that he did not tell the appellants to stop writing property maintenance violations. However, on cross-examination, he stated that he did discuss the budget and possibility of layoffs, that he did know of a change in philosophy regarding property maintenance code enforcement, that he recalled speaking with DeMarco about the number of violations issued and the need to be more passive in enforcement and that he told the appellants to stop writing property maintenance violations on several occasions. With respect to DeMarco, the

ALJ found his testimony regarding the change in philosophy not credible. Specifically, while DeMarco stated that he discussed this change in philosophy with others, there was no memorandum regarding any such meeting or meetings and there was no memorandum circulated to employees regarding this change in philosophy. The ALJ determined that DeMarco was the only witness who testified that there was a change in philosophy. All other witnesses, including Wondolowski, were unaware of the change in philosophy. Further, the ALJ found it inconceivable that there was no cost-benefit or savings projection analysis done or that a layoff plan could be conceived and implemented without any writing of any kind other than the letter to Agency Services. Based on the foregoing, the ALJ found that the appellants had demonstrated bad faith and found that the only reasonable conclusion for the layoffs was to remove the appellants from employment. The ALJ noted that although it was not established why Bayonne wished to remove the appellants, it was clear that the purpose of the layoff plan was their removal rather than for purposes of economy or budget shortfalls. Accordingly, as Bayonne did not effectuate the layoffs for reasons of economy, efficiency or other related reasons, the ALJ recommended reversing the layoffs.

In its exceptions, Bayonne maintains that the ALJ erroneously found Wondolowski not credible. In this regard, it notes that Wondolowski never testified on direct examination that he did not speak to DeMarco about the layoffs. Rather, he testified that he spoke to DeMarco about the budgets and inefficiencies in his department. It also notes that Wondolowski could not have testified on direct that he did not discuss enforcement of property maintenance violations with DeMarco and that he did not tell the appellants to stop writing property maintenance violations since he was not asked about these issues on direct examination. As such, Bayonne contends that there was no factual basis to find that Wondolowski's cross-examination contradicted his direct testimony.

Bayonne additionally maintains that the ALJ erroneously found DeMarco not credible. The ALJ stated that DeMarco was the only witness who testified that there was a change in philosophy. However, as Bayonne also states in greater detail below, multiple Bayonne employees testified that there was a change in philosophy after the Davis Administration took over in 2014. Bayonne also contends that the ALJ incorrectly relied on the fact that there was no memorandum or analysis regarding the layoff or change in philosophy. In this regard, it maintains that there is no statute, regulation or policy that requires Bayonne to produce an actual physical memorandum or analysis when instituting a layoff for reasons of economy, efficiency or other related reasons.

Bayonne also disputes the ALJ's finding of a lack of evidence that there was a change in the philosophy of aggressive property maintenance code enforcement. In this regard, Wondolowski testified that Bayonne was going to take a more passive approach to dealing with code violations and that the change in philosophy was to

issue fewer tickets. In addition, Keyes testified that Bayonne underwent a change in philosophy between administrations. Keyes testified that prior to the Smith Administration, he did not actively and punitively enforce the code. After the Smith Administration took over in 2008, he was told to start actively looking for code violations. Keyes testified that it was standard practice under the Smith Administration to write multiple summonses on a property owner even if the summonses were repetitive. After the Davis Administration took office in 2014, the program became less punitive and "went back to the way the job was supposed to be, which was to be rehabilitative to the neighborhood." Further, Laura Kline, a Personnel Technician, who worked directly with the appellants, testified that it was her understanding that when Mayor Davis took office, there was a determination not to actively look for property maintenance violations. Kline testified that there was a change in philosophy from the old administration and that she was in at least one or two meetings where Wondolowski told Keyes and the appellants to stop actively looking for property maintenance violations.

Bayonne argues that for reasons of efficiency, the change in philosophy necessitated a reduction in the number of employees handling code violations back to the same number of such employees prior to the Smith Administration when Bayonne was taking a more rehabilitative approach in enforcing and issuing code violations. It argues that the appellants did not offer evidence necessary to overcome Bayonne's presumption of good faith.

In their reply to exceptions, the appellants maintain that the ALJ's initial decision should be upheld. In a subsequent submission, the appellants also contend that the ALJ's initial decision became the final agency decision because the Commission's extension of time to consider the initial decision was not obtained prior to the expiration of 45 days following receipt of the initial decision.

Initially, the Commission will address the appellants' claim that the extension of time to consider the initial decision was untimely. Per *N.J.A.C.* 1:1-18.6(a), the agency head has 45 days to consider the initial decision. A request for an extension of this time period must be submitted no later than the day on which that time period is to expire. *N.J.A.C.* 1:1-18.8(b). In computing any period of time fixed by rule, the day of the act or event from which the designated period begins to run is not to be included. *N.J.A.C.* 1:1-1.4. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or legal holiday. *Id.* An agency head may request a single extension of the time limit for filing a final decision for good cause. *N.J.A.C.* 1:1-18.8(e). He or she shall sign and forward a proposed order to the Director of the OAL. *Id.* If the Director of the OAL approves the request, he or she shall within 10 days of receipt of the proposed order sign the proposed order and return it to the transmitting agency head, who shall issue the order and cause it to be served on all parties. *Id.* In this case, the

Commission received the initial decision on November 2, 2016. Because 45 days from this date fell on Saturday, December 17, 2016, the time period to consider the initial decision ran until Monday, December 19, 2016 per *N.J.A.C.* 1:1-1.4. As such, December 19, 2016 also became the last day to request an extension, per *N.J.A.C.* 1:1-18.8(b). Here, the record reflects that the Commission requested the extension on December 19, 2016, and the request was approved on December 20, 2016. Per the approval, the time limit was extended to January 31, 2017. Therefore, the Commission secured a timely extension of time to consider the initial decision, which, therefore, did not become the final agency decision.

N.J.S.A. 11A:8-4 and *N.J.A.C.* 4A:8-2.6(a)1 provide that good faith appeals may be filed based on a claim that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons. When a local government has abolished a position, there is a presumption of good faith and the burden is on the employee to show bad faith and that the action taken was not for purposes of economy. *Greco v. Smith*, 40 *N.J. Super.* 182 (App. Div. 1956); *Schnipper v. North Bergen Township*, 13 *N.J. Super.* 11 (App. Div. 1951). As the Appellate Division further observed, "That there are considerations other than economy in the abolition of an office or position is of no consequence, *if, in fact, the office or position is unnecessary, and can be abolished without impairing departmental efficiency.*" *Schnipper, supra* at 15. (emphasis added). The question is not whether the plan or action actually achieved its purpose of saving money, but whether the motive in adopting a plan or action was to accomplish economies or instead to remove a public employee without following *N.J.A.C.* 4A:8-1 *et seq.* Thus, a good faith layoff exists if there is a logical or reasonable connection between the layoff decision and the personnel action challenged by an employee. Additionally, it is within an appointing authority's discretion to decide how to achieve its economies. *See Greco, supra.*

Upon its *de novo* review of the record, including the testimony provided at the hearing, the Commission does not agree with the ALJ's recommendation to reverse the layoffs, and thus, upholds those actions. 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 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 the

credible evidence. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). The Commission finds that in this case, this strict standard has been met.

Therefore, based on its review of the testimony and the entire record, the Commission makes the following findings:

1) Wondolowski and DeMarco discussed citizen complaints regarding the number of tickets being issued. Those conversations resulted in a determination that the Municipal Services Department would take a more passive approach to dealing with code violations. This meant that employees would not go out looking for violations any longer.

2) Wondolowski was of the view that passive code enforcement did not require the same number of inspectors as was required under active code enforcement.

3) Wondolowski told the appellants to stop writing tickets. Appellant Smith indicated that there was a meeting at which DeMarco said that he wanted them to stop writing so many tickets and this was a change in philosophy. Appellant Mulcahy indicated that he was at a meeting with DeMarco where he was told to slow down.

4) Terrence Malloy, Chief Financial Officer, observed that the Davis Administration had a different philosophy compared to the previous administration. Malloy indicated that the property maintenance codes were being enforced by being reactive. If a citizen complaint came in, it would be looked at and an attempt would be made to rectify it. However, there were no longer roving patrols out looking to write tickets.

5) Kline observed that when Mayor Davis took office, there was a determination not to actively look for property maintenance violations, representing a change in philosophy compared to the previous administration.

6) Keyes observed that when Mayor Davis took office, the program returned to being rehabilitative.

7) Ganet Michane, Court Administrator, observed a diminishment in the number of tickets being written from the Municipal Services Department because there was only one person writing them.

In this case, upon review of the entire record, including the testimony provided at the hearing, the Commission finds that there is sufficient evidence in the record to overturn some of the ALJ's credibility determinations. In this regard, a review of the testimony reveals that Wondolowski's testimony was consistent. Specifically, he testified on direct examination that he spoke with DeMarco about budgets and inefficiencies and testified on cross-examination that he discussed the budget and the possibility of layoffs. As to the issues of whether Wondolowski discussed enforcement of property maintenance violations with DeMarco and whether he told the appellants to stop writing property maintenance violations, Wondolowski was not asked about these issues on direct examination. Accordingly, the Commission finds that it was unreasonable for the ALJ to have found Wondolowski not credible for that reason under these circumstances.

The Commission also disagrees with the ALJ's assessment of DeMarco's credibility. Contrary to the ALJ's finding, multiple witnesses, as indicated above, testified that there was a change in philosophy from active to passive code enforcement and that this change went into effect. In other words, these witnesses provided corroboration for DeMarco's testimony regarding the change in philosophy. As such, whether DeMarco prepared an additional memorandum noting the change in philosophy or a cost-benefit or savings projection analysis was performed, are not, in this particular case, relevant to his credibility. Thus, the Commission finds that it was unreasonable for the ALJ to have found DeMarco not credible under these circumstances.

Based on the foregoing, the Commission does not find that the layoffs were enacted in bad faith. Credible testimony indicated that Bayonne underwent a shift in its philosophy as to how it would enforce its property maintenance code, and this change was effected notwithstanding that it was not written. The change entailed a move from active code enforcement to passive code enforcement. Under the passive approach, Bayonne did not send employees into the field to look for violations and write tickets. Once Bayonne moved to the passive approach, it was reasonable for it to conclude that it no longer needed to maintain the same staff level. In addition, the actions taken by Bayonne such as other hirings, promotions and similar actions are not evidence of bad faith as it is clearly more efficient not to have three employees whose primary function is no longer required. Moreover, an appointing authority has discretion as to how it runs its operation. Furthermore, the appellants have not presented credible or convincing evidence to demonstrate that

their positions were targeted for discriminatory or other invidious reasons. Therefore, they have not met their burden of proof. *See e.g., In the Matter of Bergen County Layoff*, Docket No. A-5281-03T5 (App. Div. July 15, 2005) (The Appellate Division upheld the elimination of the position of Assistant Tax Administrator for Bergen County and found that it was based on legitimate budgetary reasons, finding that the appellant did not present any evidence that he was targeted for layoff based on his political affiliation). Accordingly, the ALJ's recommendation in this matter cannot be sustained, and the layoffs are upheld.

ORDER

The Civil Service Commission finds that the appointing authority's actions in imposing layoffs were justified. Therefore, the Commission upholds those actions and dismisses the appellants' appeals for the reasons noted above.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JANUARY, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13798-15

MICHAEL MULCAHY, GARY PARLATTI,
AND MICHAEL SMITH,
Appellants,
v.
CITY OF BAYONNE, MUNICIPAL SERVICES,
Respondent.

Peter J. Cresci, Esq., for appellants (Cresci Law Firm, attorneys)

Alan C. Roth, Esq., and **Heather Knipper**, Esq., for respondent (Roth D'Aguanni, attorneys)

Record Closed: September 26, 2016 Decided: November 2, 2016

BEFORE: **THOMAS R. BETANCOURT**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellants appeal their layoff from employment by respondent alleging said layoffs were not done in good faith.

A prehearing conference was held on October 15, 2015, and a Prehearing Order was entered on October 19, 2015.

Respondent, through counsel, filed a motion to disqualify appellants' counsel, Peter J. Cresci, Esq., due to an alleged conflict with respondent, City of Bayonne. Said issue of conflict was raised via letter received by the OAL on January 26, 2016, from respondent's counsel. Appellants, via letter from appellants' counsel, also dated January 26, 2016, responded to the same. A formal motion to disqualify was filed by respondent on January 29, 2016. A formal response thereto was filed on February 3, 2016, which requested monetary sanctions pursuant to N.J.A.C. 1:1-14.14(b).

Attached to appellants' response to the motion to disqualify was a motion by appellant Gary Parlatti to his layoff/demotion. No response was filed regarding this motion. No order was entered regarding this motion. Appellant Parlatti again raises this motion in the written summation filed by appellants. Respondent was afforded the opportunity to respond to said motion. The motion will be addressed within the context of this Initial Decision.

Oral argument on the motion was held on February 4, 2016.

An Order denying the motion was entered on February 4, 2016. An Amended Order denying the motion was entered on February 17, 2016.

Respondent filed a request for interlocutory review of the Order denying the motion to disqualify counsel with the Director of OAL on February 11, 2016. The Director granted the request for interlocutory review by Order dated February 19, 2016. By Order dated March 7, 2016, the Director affirmed the Order denying respondent's motion to disqualify appellants' counsel

The hearing was held on April 1, 2016, April 11, 2016, and June 1, 2016. The record was kept open to permit the filing of written summations. Respondent filed its summation on September 1, 2016.

In appellants' summation, filed September 7, 2016, appellant Parlatti revisited his motion to repeal the layoff/demotion. Respondent was permitted to respond to the

motion and filed a responsive brief on September 26, 2016. The record was closed on September 26, 2016.

ISSUES

Were the layoffs of appellants conducted by respondent done in good faith; and, was notice of the layoff of appellant Parlatti served in accordance with N.J.A.C. 4A:8-1.6(a) and N.J.S.A. 11A:8-1(a).

SUMMARY OF RELEVANT TESTIMONY

Robert T. Wondolowski testified as follows:

He is the former director of municipal services for the City of Bayonne. He was in that position from July 1, 2014, to January 8, 2016. Municipal services covers the building department, parks, recreation, health department, office on aging, public library, planning and zoning, land use and permits. He supervised approximately fifty to sixty employees.

He knows the appellants. He knows they were laid off. Appellants were responsible for quality of life issues. They helped people with different needs. They were an arm of constituent services. They were responsible for heat complaints at some point. Appellants also worked on a task force regarding illegal apartments. He never had occasion to discipline appellants.

Mr. Wondolowski does not recall a layoff plan. He did speak with Business Administrator DeMarco, but not about layoffs. He and Mr. DeMarco spoke of inefficiencies. He never did a report on what layoffs would save the city of Bayonne. He did calculate savings if appellants were laid off. Mr. Wondolowski estimated the savings at $180,000 to $200,000, not including the costs of benefits.

Fine from violations issued by the appellants in the course of performing their jobs did not equal their salaries, but the total fines were close to the total salaries of appellants. There was no mandate to write summons to bring in money from fines.

He had regular meetings with appellants, and other employees. He spoke with appellants every day. Meetings were held with the entire health department about once per quarter. Appellants worked for municipal services. Mr. Mulcahy was the point person for Mr. Wondolowski.

Simon Sturgeon is an employee in municipal services. Mr. Sturgeon works more with the health department. He looks into complaints regarding bedbugs and hoarders. Mr. Sturgeon was not laid off and is currently employed by the City of Bayonne. Mr. Wondolowski did not think appellants' jobs were in jeopardy.

In May 2015 appellants took continuing education courses, were given a clothing allowance, and a stipend for cell phone use. He was not aware appellants would be laid off.

No one ever discussed with Mr. Wondolowski a philosophy of not enforcing property maintenance codes.

He discussed with appellant Smith wherein Smith asked about attending school for construction code enforcement. He thought it would be a good idea.

Mr. Wondolowski did not serve appellants with their respective layoff notices. The layoff notices were dated June 2, 2015. He spoke with appellant Mulcahy after the layoff notice regarding his cell phone stipend.

During his tenure with Bayonne Mr. Wondolowski gave a differential raise to Rich Belinsky when he became the acting construction official. His salary was raised from $85,000 to $102,000. He was not sure if other employees received differential raises or stipends during his tenure with Bayonne.

He hired Jennifer Seabach with the permit group in municipal services at approximately $32,000. He also hired another in the permit group at the same salary.

Mr. Wondolowski thought Tom Keys "would pick up the slack" when appellants were laid off. He does not know why Mr. Keys was not laid off.

He was never told the Fire Department would inspect one and two family homes.

Several employees under his supervison were granted overtime. Overtime for the clerk to the zoning board and planning board could have been avoided by changing the times of meetings. This was not done.

Ramon Veloz was hired during Mr. Wondolowski's tenure to handle heat complaints on weekends. Mr. Wondolowski was unsure of the pay rate, but it was "maybe" $16 per hour. Mr. Veloz would check the heat complaint hot line to see if there were any complaints.

Appellants also took photographs of properties for use on tax appeals. He was not sure who did this task after appellants were laid off.

Appellants were union members. The collective bargaining agreement (CBA) governed wages, stipends, clothing allowances, cell phone stipends, and other matters.

There were no memorandum or other writing regarding a change in philosophy regarding property maintenance code enforcement.

Deborah Falciani testified as follows:

She is employed by the City of Bayonne as a confidential assistant and works in the personnel department. She works with the mayor and business administrator.

She was unaware of a budget deficit for the City of Bayonne. She was not told there was a need to save money.

Since appellants were laid off more than one hundred employees have been hired by the City of Bayonne. All receive health insurance and pension benefits. All employees, whether union or non-union, receive a yearly one-and-one-half percent raise. This raise is in the CBA.

She served appellant Smith with the layoff notice personally. She sent appellant Parlatti his layoff notice as an attachment in a text message sent to Mr. Parlatti's cellular telephone. Mr. Parlatti was on vacation at the time. Mr. Parlatti did acknowledge he received the text message and attachment. She personally handed Mr. Parlatti the layoff notice when he returned from vacation. Mr. Parlatti signed the layoff notice the following week, but dated it June 2, 2015. She knew that the statute required a forty-five-day notice prior to a layoff. Mr. DeMarco served Mr. Mulcahy with his layoff notice. She was present at the time.

Ms. Falciani was not aware of any memos or other writings regarding layoffs. She had no discussions regarding layoffs. She is also unaware of a passive enforcement policy regarding property maintenance code enforcement. She was never told of budget shortfalls. She was never told of implementing a hiring freeze, furloughs, or reducing working hours.

Vincent Rivelli was hired as the Health Officer at a salary of $150,000 after appellants were laid off. There were other new hires after appellants were laid off. She prepared the letter from Mr. DeMarco to the Civil Service Commission (CSC) regarding the proposed layoffs. (R-1.) She prepared the lists of new hires and terminations. (R-20, R-21, and R-24.)

She was never told of a hiring freeze, or about furloughs or about less work hours. She was never told about a budget shortfall. There was one intern position eliminated and that person was then hired in the Bayonne Economic Development

Authority. New seasonal employees were hired. Appellants were not offered seasonal positions.

Ramon Veloz testified as follows:

He was hired as a part time housing inspector in October 2014. His employment with the City of Bayonne ended in April 2015. He worked weekends checking on heat complaints and was trained by appellant Mulcahy. He requested a part-time job from a city councilman after working on the current mayor's election campaign. He was never told not to write summonses. He never saw a job announcement. He was not interviewed for his position. He was hired by Mr. Wondolowski and then shown what to do.

Charles Freyer testified as follows:

He has been employed by the City of Bayonne for twenty years. He is presently a mechanic in the Department of Public Works (DPW). He is the president of the union local. Other than appellants and Rose Lillo he is unaware of any other layoffs. He had a meeting with Mr. DeMarco regarding the layoffs. He was informed of a meeting, but not told why. He was not provided with any writing regarding the proposed layoffs of what the cost savings would be. He never spoke with Mr. Wondolowski about the layoffs. He was not aware overtime would be curtailed. The DPW gets overtime. Employees still receive $1,500 stipend for cellular telephone. Tom Keys still uses a city vehicle. The use of the vehicle stopped for a short time, but was reinstated after the layoffs. Seasonal employees were not eliminated. Seasonal employees are hired around Memorial Day. Some stay on as seasonal employees after six months with being hired full time.

Joseph Nichols testified as follows:

He is the tax assessor for the City of Bayonne and has been since 2000. He is also an attorney and works for the Bayonne Municipal Utilities Authority (MUA) as

general counsel. He knows appellants and has interacted with them on tax appeals. Appellants took photographs of properties for tax appeals. Appellants were helpful and performed well.

He receives a $750 stipend for possessing his license. He was never asked to relinquish the stipend. He was never told the city property maintenance code would not be enforced. This was never discussed at a council meeting.

Laying off three employees would not solve Bayonne's budget problem. Hiring more than 100 employees without generating income would have a negative effect on the budget.

Gina Persia testified as follows:

She is employed by the City of Bayonne as a senior accountant. She reviewed the new employee process. New hire information is received from Debbie Falciani. Salaries are established by the director of the department. Since July 1, 2014, she believes around 100 new employees were hired. She is aware that some employees lost stipends. She is aware that some employees were promoted and that some raises were given. There were no permanent hires in the Municipal Services Department except for one: Teresa Troglio in the Office on Aging.

Brian Kotter testified as follows:

He is a firefighter in the Bayonne Fire Department and has been for nine years. He also works as a State housing inspector on his days off. In that position he inspects multiple dwelling units. He does not inspect one- and two-family homes. He has worked with appellants on an illegal apartment task force on a couple of occasions.

Gary Chmielewski testified as follows:

He is the director of DPW and has been since 2007. He has been a city employee since 1997. He sees appellant Parlatti at work but does not know what his present job is. Appellant Parlatti has worked for him in the past. DPW continues to use seasonal employees. Three seasonal DPW hires are now permanent employees. They were hired to replace retiring employees. These positions were not offered to appellants.

Tom Keys is a property maintenance inspector. He signs in at DPW but does not work at DPW. He works in the Health Department. He is not sure why. He does not know if Mr. Keys has a city vehicle.

When Mr. DeMarco became business administrator he told Mr. Chmielewski to reduce overtime and cut costs where he could.

Laura Kline testified as follows:

She is employed by the City of Bayonne in the Health Department. She has worked with appellants. She explained Spatial Data Logic (SDL), a computer program used by Bayonne for tracking property code enforcement. Mr. Wondolowski told her that the city was not going to enforce property maintenance violations. This was before appellants were laid off. She is not aware of a policy where inspectors were to write sufficient violations to generate fines to cover their salaries. She was at a meeting a month or two before the layoffs, where Mr. Wondolowski told appellants their jobs were safe.

Tom Keys still does inspections and uses a city vehicle. He does not write summonses anymore and does not go to court. This has been the case since appellants were laid off.

Thomas Keys testified as follows:

He is employed by the City of Bayonne and has been for thirteen years. His title is Citizens Complaints. He was not affected by the layoffs. He works under DPW. Appellants are his peers. He works out of the Health Department. He still does property maintenance inspections. No one told him to discontinue this. At one point there were six inspectors, then four. Now he is the only one. He drives a city vehicle and takes it home after work. SDL is the computer program used to enter code violations. Mr. Wondolowski never asked to see an SDL report.

Ganet Michane testified as follows:

She is employed by the City of Bayonne as the Certified Court Administrator. She is an employee for forty-one years. She prepared R-24, R-26, and R-27. These are breakdowns of the number of tickets each appellant wrote, the amount of fines assessed, and the amount of fines collected. She described the appellants' role in a court proceeding regarding any code enforcement tickets they wrote.

Terrence Malloy testified as follows:

He is the Chief Financial Officer (CFO) for the City of Bayonne. He became aware of the layoffs the day it happened: July 2, 2015. He attended meetings where layoffs were discussed in general, but not specific to the appellants. He recalls discussing savings of $70,000 to $100,000 per employee laid off. There were no reports prepared regarding cost savings for the layoff of appellants. The number of employees have increased during the present administration. He is aware the employees have been promoted. He is aware that seasonal employees have been hired. Overtime has not been eliminated. Stipends have not been eliminated. He had no specific communication with Mr. DeMarco regarding the layoff of appellants. There were no discussions regarding the non-enforcement of the property maintenance code. Non-union employees receive the same raises that union employees receive pursuant to the Collective Bargaining Agreement (CBA). Appellant Parlatti was not terminated.

He was demoted. He does not know why. Vincent Rivelli was hired as the Health Officer at a salary of $150,000. Mr. Rivelli is the health officer for several municipalities but paid by Bayonne. Bayonne is to receive reimbursement from the other municipalities pursuant to a shared services agreement. To date there has been no reimbursement. There has been a $1.2 million increase in personnel costs from 2015 to 2016.

Vanessa Lynn Bryant-Dale testified as follows:

She is employed by the City of Bayonne as a Municipal Services Clerk. She knows appellants. They worked in the Health Department and handled complaints. She reported to Mr. Wondolowski. There was no meeting to discuss layoffs. She is in charge of cell phone stipends. All three appellants received cell phone stipends. All three appellants had the use of a city vehicle. There were no meetings to discuss enforcement of the property maintenance code.

Joseph DeMarco testified as follows:

He is the City Administrator for Bayonne. He was appointed in July 2014 when the newly elected mayor took office. He had several meetings with the city attorney, the CFO, the personnel department, Mr. Wondolowski, and the mayor to discuss layoffs. There are no memoranda or writings regarding these meetings. He wrote the letter to CSC regarding the proposed layoffs. He hired seasonal employees in the Department of Public Works. Overall over 100 new employees have been hired since July 2014. Seasonal employees were hired full time in DPW after appellants were laid off. These positions were not offered to the appellants. He reviewed several new hires and promotions. There was no memorandum regarding passive enforcement of the property maintenance code. He did discuss passive enforcement with others. Appellant Parlatti had "bumping rights" to a lower civil service position when the layoffs occurred. He bumped Rose Lillo, who was laid off. He met with the union president to advise him of layoffs. There is no written memorandum of the meeting. He was never served with a grievance regarding the layoffs by the union.

Gary Parlatti, testified as follows:

He is employed by the City of Bayonne and has been since 2007. He has been a full-time employee since December 2009. He had been working as a field representative for citizen complaints since February 2012. He did enforcement of all non-police-related ordinances. Prior to that he was a Key Boarding Clerk II. This included heating complaints, housing violations. He also did community service by speaking with constituents. He was also part of an illegal apartment task force. He worked in the third ward of the city. The summonses he wrote were returnable in Bayonne Municipal Court. He worked with Tom Keys and the two other appellants. Simon Sturgeon also worked with him in the Health Department regarding animal-related issues.

On June 2, 2015, he received a telephone call from Donna Russo from the law department. He was on vacation at that time. He was advised at this time he was being laid off. He believes he signed the notice of lay off on June 8, 2015, when he returned from vacation. Debbie Felciani handed him the notice. He received the notice as an attachment to a text message on his phone on June 2, 2015. He had bumping rights to the position held by Rose Lillo. She was laid off. He receives $12,000 less in salary from his previous position. He never received anything in writing regarding enforcement of property maintenance violations.

Rose Lillo worked in the building department. He has never reported to the building department. He has never performed Rose Lillo's job. Rose Lillo was not working when she was bumped.

Michael Smith testified as follows:

He became an employee for Bayonne in February 2012. Prior to that he worked at the MUA. He was laid off as a field representative where he had handled citizen complaints. He covered the second ward of the city. Tom Keys covered the second

ward. He never received a memorandum regarding a change in philosophy regarding the enforcement of the property maintenance code.

Michael Mulcahy testified as follows:

He was hired in January 2011 as a housing inspector. Initially he only answered complaints. Three more individuals then came on board: Appellant Parlatti; Appellant Smith; and Tom Keys. They were already Bayonne employees and transferred. He trained them. He was the supervisor of appellants Parlatti and Smith. In May 2015 Mr. Wondolowski told him he was doing a good job. He told the same to appellant Smith. He never heard of a change in philosophy regarding the enforcement of the property maintenance code. He also took photographs of properties for property tax appeals. He received a cell phone stipend and a clothing allowance prior to the layoff. He received his layoff notice on June 1, 2015.

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); In re Polk, 90 N.J. 550 (1982). 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 in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

Robert Wondolowski was not credible. On direct examination he stated he did not speak with Business Administrator DeMarco regarding layoffs. He also stated he did not discuss enforcement of property maintenance violations with Mr. DeMarco. On cross-examination his testimony directly contradicted his direct testimony. On cross he stated he did discuss the budget and possibility of layoffs. He also stated on cross that he did know of a change in philosophy regarding property maintenance code enforcement. He now recalled speaking with Mr. DeMarco about the number of violations issued and the need to be more passive in enforcement. On direct he stated he did not tell appellants to stop writing property maintenance violations. On cross he stated he told appellants to stop on several occasions. He clearly contradicted his own direct testimony on cross-examination. I deem him not credible.

Joseph DeMarco was not credible. His testimony was straightforward and direct. However, his testimony regarding the change in philosophy is simply not believable. While he stated he discussed this change in philosophy with others, there is no memorandum regarding any such meeting, or meetings. There is no memorandum circulated to employees regarding this change in philosophy. Most pointedly, he is the only witness that testified that there was a change in philosophy. All other witnesses, including Mr. Wondolowski, were unaware of the change in philosophy. Further, there are no memorandum regarding the layoffs. It is not conceivable, at least to me, that a layoff plan could be conceived and implemented without any writing of any kind, other than the letter to CSC. There was no cost benefit analysis. There was no savings projection analysis. I deem Mr. DeMarco not credible.

All other witnesses were credible.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellants Smith, Parlatti and Mulcahy were employees of the City of Bayonne.
2. Appellants Smith and Parlatti were employed as field representatives for citizens complaints. Appellant Mulcahy was employed as a housing inspector.
3. Appellants Smith, Parlatti, and Mulcahy were laid off from their positions, effective July 17, 2015. (R-4, R-6 and R-8.)
4. Bayonne requested approval of a layoff plan to layoff appellants from the CSC. (R-1.)
5. Bayonne's layoff plan was approved by CSC on June 1, 2015. (R-2.)
6. Bayonne issued a general layoff notice on June 1, 2015. (R-3.)
7. Bayonne issued individual layoff notices to the appellants on June 1, 2015. (R-4, R-6 and R-8.)
8. Appellant Parlatti had bumping rights to the position held by Rose Lillo. (R-9.)
9. Appellant Parlatti exercised his bumping rights to this position and is currently employed by Bayonne.
10. In its letter to CSC dated May 28, 2015, Bayonne, via Mr. DeMarco, informed CSC it took the following pre-layoff actions: reviewed and is reducing all over time appropriations; review of all provisional titles; reviewed all other expense accounts and made several reductions; eliminated all intern positions; and, review of all upcoming seasonal positions and would offer the opportunity to accept a seasonal position to anyone affected by the layoff.
11. Appellants Smith and Mulcahy were personally served with their respective individual layoff notices on or before June 2, 2015. Appellant Parlatti was not personally served with his individual layoff notice until June 8, 2015. Appellant Parlatti was advised of his pending layoff on June 2, 2015, via a telephone call from Donna Russo from Bayonne's law department. He received

an electronic copy of the individual layoff notice via a test message with the notice attached.

12. Since layoff Bayonne has hired in excess of 100 new employees.

13. Since the layoff Bayonne has promoted and granted raises to several employees.

14. Since the layoff Bayonne has continued to hire seasonal employees, some of whom have been hired as full-time employees.

15. Bayonne has never offered any seasonal employee position to any of the appellants.

16. Bayonne, while asserting a change in philosophy in the enforcement of the property maintenance code to a less aggressive approach, never articulated a change in philosophy to any of the appellants. There was no memorandum regarding the same. There was never a meeting regarding the same.

17. Bayonne did not appreciably reduct overtime payments.

18. Bayonne did not reduce stipends paid to employees.

19. Appellants performed property code enforcement for Bayonne and handled citizen complaints. They would respond to complaints and issue warnings, and summonses when appropriate, for code violations. They would appear in municipal code where the summonses were returnable.

20. The jobs performed by appellants Mulcahy, Smith, and Parlatti are now being performed by Tom Keys.

21. Robert Wondolowski was the direct supervisor of the appellants. He was never apprised of a change in philosophy regarding the enforcement of the property maintenance code. He was never told not to enforce the code. He was never told of any cost savings that would result from the layoff of the appellants.

LEGAL ANALYSIS AND CONCLUSION

An appointing authority may institute layoff actions for reasons of economy, efficiency, or other related reasons. N.J.A.C. 4A:8-1.1(a). On appeal from a layoff, the issue to be determined is limited to whether the appointing authority's action in effectuating the layoff was motivated by good-faith considerations of economy or

efficiency. The burden of proof is on the appellant to demonstrate a contrary or bad-faith motivation. N.J.S.A. 11A:8-4; N.J.A.C. 4A:2-1.4(c). Where it is shown that a layoff action was motivated by a bona fide desire or necessity to effect economy, the action taken is presumed to be in good faith. Greco v. Smith, 40 N.J. Super. 182, 189 (App. Div. 1956); Sieper v. Dep't of Civil Serv., 21 N.J. Super. 583, 586 (App. Div. 1952). Further,

> [t]he mere fact that the removal of an individual from the municipal payroll results in an economy is not the exclusive test, since such removal will always be manifested by a saving. The question is, not narrowly whether a plan conceived and adopted for the purposes of saving money actually, in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following the statutory procedure for removal. City of Newark v. Civil Service Commission, 112 N.J.L. 571, 574 (Sup. Ct. 1934), affirmed, 114 N.J.L. 185 (E. & A. 1935).
>
> [Greco, supra, 40 N.J. Super. at 190.]

Therefore, in proving that an appointing authority has acted in bad faith, the employee must show that the layoffs were not motivated by true considerations of economy and/or efficiency. It is not sufficient to meet the burden of proof for an employee to show that a layoff is uneconomical. Such evidence may assist the establishment of bad faith, but the employee must go further. He or she must show by sufficient proof that the layoffs resulted for reasons other than economy and efficiency. Amodio v. Civil Serv. Comm'n, 81 N.J. Super. 22 (App. Div. 1963); Chirichella v. Dep't of Civil Serv., 31 N.J. Super. 404 (App. Div. 1954); Prosecutors, Detectives and Investigators Ass'n of Essex County v. Hudson County Bd. of Chosen Freeholders, 130 N.J. Super. 30 (App. Div. 1974). Evidence may indicate that a mixture of motives existed in connection with a layoff decision. If other motives besides economy and efficiency were involved, it makes no difference so long as the position involved was useless and its abolition was in the public interest. Pellet v. Dep't of Civil Serv., 10 N.J. Super. 52, 57 (App. Div. 1950).

Other cases further define bad faith as "[g]enerally implying . . . design to mislead or deceive another . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." In re Afolo, Dep't of Children and Family Services, CSV 4145-07, Initial Decision (Mar. 31, 2008) , adopted, Merit Sys. Bd. (May 22, 2008), <http://njlaw.rutgers.edu/collections/oal/> (quoting Brown v. State Dept. of Educ., 97 N.J.A.R.2d (CSV) 537, 541 (1997)). In trying to prove bad faith, the appellant has a very heavy burden to meet because bad faith is "not simply bad judgment or negligence," but the conscious doing of a wrong because of some dishonest purpose. Ibid.

The record established in the instant matter overwhelmingly demonstrates that Bayonne did not effectuate the layoffs due to reasons of economy and severe budget shortfalls. It is not disputed that Bayonne had a budget deficit and needed to cut costs. Bayonne offers as the reason for the layoffs of the appellants due to a change in philosophy in the enforcement of the property maintenance code. This simply does not hold water. There is no credible evidence that this change in philosophy was put into place. The appellants, who enforced the property maintenance code, were not informed of it. Their supervisor, Mr. Wondolowski, was not informed of it. Their co-worker, Tom Keys, was not informed of it. No one from Bayonne ever issued a writing, or other memorandum, regarding this change in philosophy. It is the appellants' burden to show bad faith. Greco, supra, 40 N.J. Super. at 190. In this matter they have done so.

Further, Bayonne did not do what they stated they would, or had done, in their submission of the proposed layoff plan to CSC. They have not reduced or eliminated stipends. They did not reduce overtime. Interns were not eliminated. One intern position was eliminated and that person was then hired by the Bayonne MUA. Bayonne did not offer any seasonal position to the appellants.

The only reasonable conclusion for the layoffs is to remove the appellants from employment. It is not established why Bayonne wished to remove the appellants, but it

is clear that the purpose of the layoff plan was their removal, and not for purposes of economy or budget shortfalls.

I **CONCLUDE** respondent did not effectuate the layoff of appellants for reasons of economy, efficiency or other related reasons. It effectuated the layoff to remove appellants from their employment.

I further **CONCLUDE** that appellants should be restored to their previous positions of employment with Bayonne immediately, and be awarded their salaries from the time of their termination, or in the case of appellant Mulcahy, from the time of his demotions, subject to mitigation for income earned during this period.

Motion to Repeal the Layoff/Demotion

Appellant Parlatti seeks the repeal of his layoff/demotion for failure of respondent to personally serve him his individual notice of layoff or demotion in accordance with N.J.S.A. 11A:8-1(a).

N.J.S.A.11A:8-1(a) states in pertinent part:

> A permanent employee may be laid off for economy, efficiency or other related reason. A permanent employee shall receive 45 days' written notice, unless in State government a greater time period is ordered by the commission, which shall be served personally or by certified mail, of impending layoff or demotion and the reasons therefor.

N.J.A.C. 4A:8-1.6(a) states in pertinent part:

> (a) No permanent employee or employee serving in a working test period shall be separated or demoted as a result of a layoff action without having been served by the appointing authority, at least 45 days prior to the action, with a written notice personally, unless the employee is on a leave of absence or otherwise unavailable, in which case by certified mail. If service is by certified mail, the 45 days shall

be counted from the first date of notice by the United States Postal Service to addressee.

It is undisputed that appellant Parlatti was on vacation at the time the layoff notice was prepared. He was not served personally until June 8, 2015. The layoff took effect July 17, 2015, less than forty-five days from the time he was personally served. While appellant Parlatti acknowledges he knew of the layoff/demotion via a telephone call and text message, it is clear personal service was not effected until June 8, 2015, upon his return from vacation.

However, it is also clear that appellant Parlatti also received the notice via certified mail return receipt requested. The date of the return receipt stamp from the United States Postal Service is unclear. I **CONCLUDE** that service was effected in accordance with statute and rule by the use of certified mail.

Accordingly, I **CONCLUDE** that the motion to repeal the layoff/demotion should be denied.

ORDER

It is **ORDERED** that the appeal of the appellants be granted and that appellants be immediately returned to their positions of employment prior to the layoff, awarded appropriate back pay from the time of the layoff to their reinstatement (subject to mitigation for income earned during this period), benefits, seniority and counsel fees subject to N.J.A.C. 4A:2-2.12.

It is further **ORDERED** that appellant Parlatti's motion to repeal the layoff/demotion for improper service be **DENIED**.

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, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 2, 2016
DATE

THOMAS R. BETANCOURT, ALJ

Db

Date Received at Agency: November 2, 2016

Date Mailed to Parties: November 2, 2016

APPENDIX

List of Witnesses

For Appellants:

Robert T. Wondolowski, former Director of Municipal Services, City of Bayonne
Deborah Falciani, Confidential Assistant, City of Bayonne
Ramon Veloz, Housing Inspector, City of Bayonne
Charles Feyer, DPW employee, City of Bayonne
Joseph Nichols, Tax Assessor, City of Bayonne
Gines Persia, Senior Accountant, City of Bayonne
Brian Kotter, Fire Fighter, City of Bayonne Fire Department
Gary Chimielewski, Director of Public Works, City of Bayonne
Laura Kline, Personnel Department, City of Bayonne
Thomas Keys, Employee, City of Bayonne
Ganet Michane, Court Administrator, City of Bayonne
Terrence Malloy, CFO, City of Bayonne
Vanessa Lynn Bryant-Dale, Municipal Services Clerk, City of Bayonne
Joseph DeMarco, City Administrator, City of Bayonne
Gary Parlatti, Appellant
Michael Smith, Appellant
Michael Mulcahy, Appellant

For Respondent:

None

List of Exhibits

For Appellants:

A-1 Major Discipline Appeal Form Michael Mulcahy

A-2 Major Discipline Appeal Form Gary Parlatti

A-3 Major Discipline Appeal Form Michael Smith

A-4 Letter dated July 14, 2015, from Appellant Smith to Division of Appeals and Regulatory Affairs

A-5 Letter dated July 14, 2015, from Appellant Parlatti to Division of Appeals and Regulatory Affairs

A-6 Letter dated July 14, 2015, from Appellant Mulcahy to Division of Appeals and Regulatory Affairs

A-8 Appellant Mulcahy's personnel file

A-9 List and Salaries of Employees hired from July 2014 through December 31, 2015

For Respondent:

R-1 Letter from Joseph DeMarco to Kenneth Connolly, Director CSC re: Layoff Plan for three appellants, dated 5/28/15

R-2 Letter from Kenneth Connolly to Joseph DeMaraco re: Approval of layoff plan for three appellants, dated 6/1/15

R-3 General Notice of Layoff, All employees Department of Municipal Services, dated 6/1/15

R-4 Individual Notice of Layoff, Michael Mulcahy, dated 6/1/15

R-5 Letter from CSC to Mulcahy, advising of layoff and displacement rights, dated 6/22/15

R-6 Individual Notice of Layoff, Michael Smith, dated 6/1/15

R-7 Letter from CSC to Smith, advising of layoff and displacement right, dated 6/22/15

R-8 Individual Notice of Layoff, Gary Parlatti, dated 6/1/15

R-9 Letter from CSC to Parlatti, advising of layoff and displacement right, dated 6/22/15

R-10 Letter from CSC to Rose Lillo, advising of layoff and displacement right, dated 6/22/15

R-11 Letter from Stacey Walker, CSC to J. DeMarco advising final determination of layoff and excel spreadsheet, dated 7/28/15

R-12 Correspondence from CSC to Parlatti re: receipt of appeal w/ Parlatti's submission, dated 9/8/15

R-13 Correspondence from CSC to Smith re: receipt of appeal w/ Parlatti's submission, dated 9/8/15

R-14 Correspondence from CSC to Mulcahy re: receipt of appeal w/ Parlatti's submission, dated 9/8/15

R-15 Correspondence from Roth D'Aquanni to CSC re: response to appeals with exhibits, dated 10/15/15

R-16 Correspondence from CSC to Mulcahy re: proper determination of seniority and title rights; closing appeal, dated 11/20/15

R-17 Correspondence from CSC to Smith re: proper determination of seniority and title rights; closing appeal, dated 11/20/15

R-18 Correspondence from CSC to Parlatti re: proper determination of seniority and title rights; closing appeal, dated 11/20/15

R-19 Email from Debby Falciani to Stacey Walker, CSC re: City's meeting with Union Reps about Layoff, dated 5/28/15

R-20 City of Bayonne Retirement Termination List, June 2014-January 2016

R-21 City of Bayonne New Hire List, July 2014-March 2016

R-22 CSC House Inspector Job Description

R-23 CSC Field Representative, Citizens Complaint Job Description

R-24 City of Bayonne Department of Municipal Services New Hire List

R-25 Mulcahy-Ticket Report 2011-2015

R-26 Smith-Ticket Report 2011-2015

R-27 Mulcahy-Ticket Report 2011-2015

R-28 Letter from J. DeMarco to Kenneth Connolly, Director of CSC re: proposed Layoff Plan for three appellants, dated 4/21/15

R-29 Michael Mulcahy Personnel File

R-30 Michael Smith Personnel File

R-31 Gary Parlatti Personnel File

R-32 Correspondence from D. Falciani to G. Parlatti re: notification of layoff, dated 6/2/15

R-33 Certified Return Receipt signed by G. Parlatti re: notification of layoff

1-18-17

STATE OF NEW JERSEY

In the Matter of Michael Mylod

CSC Docket No. 2014-2772
OAL Docket No. CSV 6353-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 10 2017 (EG)

The appeal of Michael Mylod, a Senior Recreation Therapy Aide with Monmouth County, of his removal effective May 4, 2014, on charges, was heard by Administrative Law Judge John S. Kennedy (ALJ), who rendered his initial decision on December 8, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on January 18, 2017, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the ALJ's recommendation to uphold the appellant's removal.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant created a disruptive work environment when he used an improper, loud, boisterous, threatening, and demeaning tone toward a volunteer. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

The ALJ found that on November 19, 2013, the appellant got into a verbal dispute with a volunteer regarding the maintenance of a plant and that the appellant believed that the room the volunteer was in was off limits. The appellant

was not the volunteer's supervisor and did not hold any position of authority over the volunteer. Additionally, the dispute took place in the presence of at least three residents and was loud enough to be heard by at least two employees. Further, the appellant had received warnings and discipline about his loud tone, use of foul language, and for arguing with co-workers.

Mary Bogan, a Recreation Therapist, testified that it was her belief that the appellant's removal was motivated by a personal dislike of him by former administrator Allison Marshall. Specifically, she claimed that Marshall had a collage in her office that included a picture of the appellant with a hand-drawn penis near his face and that she would comment about the appellant's weight and the fact that she hated him. However, as no other witness could verify the existence of the collage or the doctored photo, the ALJ did not find her testimony credible. Rather, the ALJ found that the decision to discipline the appellant in this matter was made by the Department of Human Resources, not Marshall. In addition, the ALJ concluded that the appellant's conduct was such that it could adversely affect the morale or efficiency of a government unit or destroy public respect in the delivery of public services. Further, the ALJ found that the appellant also violated a number of department policies, including policies to treat co-workers with courtesy and respect at all times, and that boisterous and disruptive activity in the workplace is to be avoided. With regard to the penalty, the ALJ determined that the appellant's work history revealed that he suffered from severe behavioral problems which presented a risk to the well-being of the vulnerable residents. In this regard, the ALJ stated that the appellant had several prior disciplinary actions for using foul, inappropriate and threatening language towards co-workers, sometimes in the presence of other staff or residents. The ALJ determined that in light of the seriousness of the present matter, and the appellant's disciplinary history, that removal was the proper penalty.

In its exceptions, the appellant argues that there were two administrative hearings that exonerated him that were ignored by the ALJ. The first was a hearing by the New Jersey Board of Nursing, which found that his actions were not abusive towards residents. The second was a hearing by the Unemployment Appeal Tribunal, which found that the appellant was not discharged for misconduct connected with work. Additionally, the appellant argues that the testimony of Theresa Aziz, an Account Clerk, was not credible as it was heavily influenced by Marshall. The appellant also claims that the ALJ erred in disregarding the credible testimony of Lisa Skellinger, a Recreational Aide, Art McGillis, a Building Maintenance Worker, and Bogan. Further, the appellant contends that Marshall's dislike and hatred of him was the reason he received prior discipline.

In response, the appointing authority argues that the ALJ properly determined that Aziz was the most credible witness. Aziz was a new employee who reported the incident and had no bias against the appellant. It adds that the

witnesses presented by the appellant all admitted to being his friends and close workplace colleagues. In regard to the New Jersey Board of Nursing's decision, the appointing authority asserts that the appellant had not introduced such evidence prior to the closing of the record and the ALJ excluded this portion of his post-hearing submission. The ALJ also indicated that the Unemployment Appeal Tribunal decision was not entitled to any preclusive effect as it did not address whether the appellant had engaged in conduct worthy of discipline. Further, the appointing authority asserts that *Oliveri v. Y.M.F. Carpet, Inc.*, 186 *N.J.* 511 (2006) states that unemployment proceedings do not have any preclusive effects in future litigation. Moreover, the appointing authority indicates that the ALJ made a factual finding that no animus between the appellant and Marshall was demonstrated. Thus, it contends that the ALJ properly relied upon the appellant's poor disciplinary record in determining that removal was the proper penalty.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges and his decision to uphold the appellant's removal. In his exceptions, the appellant questions the ALJ's credibility determinations. Specifically, the appellant claims that the ALJ erred in disregarding the testimony of Skellinger, McGillis, and Bogan. In addition, he contends that Aziz's testimony should not have been found credible. In this regard, 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 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 the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. The ALJ explicitly indicated that he found Bogan's testimony as to Marshall's personal dislike of the appellant not credible because her allegation regarding the collage could not be corroborated by other witnesses and the determination to discipline the appellant was not made by Marshall. Further, while the ALJ did not address Aziz's credibility directly, it was clear from his findings of facts that the ALJ found her credible. With regard to the rest of Bogan's testimony and the testimony of Skellinger, McGillis, and the appellant, the ALJ's initial decision does not discount their testimony. Bogan's and Skellinger's testimony both indicated that the appellant was loud and McGillis testified that he was not present for the

entire incident and did not know what happened prior to his arrival. Furthermore, while the appellant claimed he was not yelling, he acknowledged that he was speaking loud enough that Bogan could hear him from the hall and asked him to keep his voice down. Therefore, the Commission has no reason to credit the appellant's contentions that the testimony of these witnesses was discounted. Further, the appellant's contention that his prior discipline was due to animus by Marshall is unpersuasive. In this regard, the Commission notes that the time to argue animus by Marshall for the prior disciplinary actions was when those actions were actively being determined. Moreover, the appellant has not provided any credible or persuasive evidence that Marshall disciplined him in this matter because she disliked him.

Further, while the appellant asserts that the ALJ did not give due deference to the decisions by the New Jersey Board of Nursing and by the Unemployment Appeal Tribunal, the New Jersey Board of Nursing's decision was introduced after the record closed and as such was stricken from his post-hearing submissions. Regardless, the New Jersey Board of Nursing determination appears to dismiss an abuse charge against the appellant but the appointing authority's disciplinary action was based on his creating a loud and disruptive work environment while interacting with a volunteer. Moreover, unemployment proceedings do not have any preclusive effects in future litigation and, in this matter, does not evidence that the appellant was not properly disciplined.

In determining the proper penalty, the Commission's review is *de novo,* and the Commission, in addition to its consideration of the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, the appellant's disciplinary history shows four minor disciplinary actions from 2001 to 2010, and one major disciplinary action, a 40-day suspension, in 2012. Additionally, several of these prior disciplinary actions were for misconduct similar to the appellant's behavior in the current matter. Accordingly, given the appellant's improper conduct in this matter, in conjunction with his disciplinary history, removal is clearly the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was appropriate. Therefore, the Commission affirms that action and dismisses the appeal of Michael Mylod.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JANUARY, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 6353-14
AGENCY DKT. NO. 2014-2772

IN THE MATTER OF MICHAEL MYLOD, MONMOUTH COUNTY DEPARTMENT OF HEALTH CARE FACILITIES.

Philip G. Mylod, Esq., for appellant Michael Mylod

Steven Kleinman, Special County Counsel, for respondent Monmouth County Department of Health Care Facilities (Andrea I. Bazer, County Counsel, attorney)

Record Closed: October 28, 2016 Decided: December 8, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Certified Nurse's Aide (CNA), Michael Mylod (appellant) appeals the action by the Monmouth County Department of Health Care Facilities, Geraldine L. Thompson Care Center (GLTCC) terminating his employment on grounds of conduct unbecoming and other sufficient cause.

Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) on February 5, 2014. A departmental hearing was held on March 10, 2014, after which appellant was advised by a Final Notice of Disciplinary Action, (FNDA) dated May 7, 2014, that he had been terminated effective May 7, 2014. Appellant appealed the termination to the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), as required under N.J.S.A. 40A:14-202(d). The matter was heard over the course of three days, April 23, 2015, July 28, 2015, and April 21, 2016. The parties filed written summations on July 13, 2016. Respondent objected to appellant's post-hearing submission asserting that it attempted to introduce materials not in the record. Appellant objected to the motion on July 27, 2016, and respondent replied on August 26, 2016. Oral argument was heard on September 15, 2016. On October 28, 2016, this tribunal issued an Order striking from the record certain references found in appellant's post-hearing submission and the record closed.

FACTUAL DISCUSSION

Gwendolyn Thomas was the Assistant Nursing Home administrator for Monmouth County. There were two county run nursing homes in Monmouth County at the time of appellant's removal. Subsequent to appellant's removal, both county-run facilities were sold to private entities, which continue to be operated under different names. She has known the appellant since she started working for the county ten years ago. He worked at GTLCC as a Senior Recreation Therapy Aide. GLTCC served a vulnerable population of the elderly and infirm, many of whom were confined to wheelchairs, and/or suffered from chronic psychiatric diagnoses, as well as dementia and Alzheimer's disease. Appellant's job as a Senior Recreation Therapy Aide required him to conduct recreational programs and activities with GLTCC residents, and also to accompany them on trips. He also was certified as a nurse's aide but he held no supervisory or management authority. Appellant would report to a chief recreation therapist, first Allison Marshall (before her promotion to Administrator) and then Dorothea ("Dory") Lewis. The chief recreation therapist also serves as the volunteer coordinator for the facility, and in that capacity would resolve any concerns or disputes that a volunteer had with an employee, or vice versa.

The nursing home industry "is the second most regulated industry behind nuclear energy." GLTCC is regulated on both the federal and state levels, and receives oversight from the New Jersey Department of Health and the Office of the Ombudsman for the Institutionalized Elderly. If any violations are found, it can result in monetary and other penalties to the County, as well as the finding of a "deficiency."

On November 19, 2013, there was an incident between one of GLTCC's regular volunteers, L.S., a widowed senior citizen who had been married to a GLTCC resident, and appellant. Earlier in the day, L.S. had informed her supervisor, Ms. Lewis that a fern in the recreation area was shedding leaves and making a mess. Ms. Lewis went to look for herself, and agreed that the plant needed to be removed. Because Ms. Lewis thought that a staff member might be interested in taking the plant home, instead of throwing it out, she directed L.S. to put the plant in a small room the staff used in the back of the recreation area. This room is a "locker room," and is not used for storing medical records, although there are two dry erase boards for recreation staff to communicate amongst themselves regarding the needs of particular residents. In order to keep that information private, the door to this room is normally kept closed so that guests and family members cannot see what is written on the dry erase boards from the recreation area. Volunteers are able to access the room if needed because they have been trained in patient confidentiality.

Apparently, appellant saw L.S. in the small room in the back of the recreation area, and confronted her because he felt she was somewhere where she should not have been. He also was upset because L.S. was not listening to his wishes about the plant and he felt that she was responsible for its poor condition.

Ms. Thomas was advised about the incident after the fact. She met with Ms. Marshall and appellant and asked him to write a statement. (R-7.) Appellant recognized that his voice got loud and later apologized to L.S. after he discovered she had permission to move the plant. This confrontation occurred in the recreation area in the presence of at least three residents. As a result respondent filed a resident abuse report with the Department of Health and the Ombudsman. The Office of the Ombudsman conducted an investigation and determined that there was sufficient

information to verify staff to resident verbal/mental abuse to two residents. (R-9 and R-10.) The county disciplined appellant based in part upon this incident and in part because of his prior disciplinary history. The decision to discipline appellant came from the County Human Resources Department after the investigation had been completed.

Dorothea Lewis was the Chief Recreation Therapist at the time of the November 19, 2013, incident. She testified that she was appellant's supervisor and also supervised the volunteers. Issues between employees and volunteers are supposed to be reported to her for handling. She was first advised of the altercation between appellant and L.S. on the date of the incident by Theresa Aziz, an employee in the business office that had witnessed the incident and advised Lewis that she heard appellant yelling from her office across the hall. Ms. Aziz was upset because residents were in the recreation area at the time on the incident. Earlier in the day, L.S. had informed Ms. Lewis that a fern in the recreation area was shedding leaves and making a mess. Ms. Lewis went to look for herself, and agreed that the plant needed to be removed. Because Ms. Lewis thought that a staff member might be interested in taking the plant home, instead of throwing it out, she directed L.S. to put the plant in a small room the staff used in the back of the recreation area. She advised appellant after the incident that there was a zero tolerance for yelling in the facility. Ms. Lewis would have expected appellant to complain to her about a volunteers actions and not get into an altercation in the presence of residents.

L.S. gave her own statement on November 21, 2013, which was written down by Ms. Marshall. (R-6.) L.S. explained that a fern she had donated for the recreation area was shedding badly, and at Ms. Lewis's instructions, she put it in the closet. She then stated, "[n]ext thing I know, Michael comes charging out of the room, all 300 pounds of him," and told her that she had no respect for the residents and did not care for them. Id.

Theresa Aziz worked as an account clerk, handling the personal needs accounts of residents. At the time of the incident, Ms. Aziz had only been working at GLTCC for a few weeks, and testified at that point she had not had any substantial prior interaction, either positive or negative, with appellant. Ms. Aziz was assigned an office near the

recreation area, close enough that she could hear it if the television was too loud. Just before the incident occurred, she left her office to go to the front desk, and along the way stopped by the recreation area to speak with resident, N.W., with whom she was friendly. While she was talking with N.W., "all hell broke loose, for lack of a better term." Appellant was storming back and forth in the recreation area, red in the face, while screaming at L.S. Ms. Aziz could not recall exactly what appellant was saying, but confirmed that his voice was "extremely loud" and that "it was "scary." She further observed that during the incident, N.W.'s eyes were bulging and her mouth had dropped open, and that L.S. was visibly upset and shaking. The incident took long enough that she "just wanted to get the residents out of there." Eventually, someone else told appellant to calm down, to which he responded by yelling "get out; it's none of your business." Ms. Aziz assisted N.W. out of the recreation area, who by that time was in tears.

After appellant quieted down, Ms. Aziz spoke with L.S., who was "crying and very upset," and then gave her a hug. Ms. Aziz believed she was obligated to report the incident, and because her immediate supervisor and Ms. Marshall were not there, she spoke with Ms. Lewis and social worker Pat Revlak. Ms. Lewis and Ms. Revlak contemporaneously documented their conversations with Ms. Aziz. (R-3 and R-4.) In her testimony, Ms. Aziz reaffirmed the accuracy of everything contained in her statement and affirmed that she was not pressured by anyone when she prepared it. She further reiterated on cross-examination that appellant's behavior reminded her of "a child having a temper tantrum, like a really, really bad temper tantrum."

Lisa Skellinger is a fellow recreational aide and works closely with appellant. Earlier on the day in question, Ms. Skellinger and appellant where instructed by their supervisor, Ms. Lewis, to keep the locker room door closed, because there is a bulletin board in there were important information is written. She and appellant agreed and went to lunch duty. Upon their return, they found that L.S. was in the locker room and the door was wide open in violation of Ms. Lewis's policy. One of the plants that appellant had been taking care of all the time was dumped in the garbage. Appellant said, "who dumped my plant in the garbage? Why is there dirt all over? You shouldn't be in here." Ms. Skellinger then saw Art McGillis, the janitor, and asked him to clean up

the dirt. Ms. Skellinger had worked at GLTCC for over thirty years and has known appellant since he began his employ in 1997 as a CNA. She was appellant's supervisor until 2001 when Ms. Marshall took over. At the time of the incident, she and appellant were partners and she is lost without him. When asked if appellant was "yelling" at L.S., Ms. Skellinger replied "No". She stated appellant's voice could have been loud but she "didn't think it was loud."

Even though Ms. Skellinger was present during the incident, neither Ms. Marshall nor anyone else asked for her statement. Nonetheless, she wrote a statement of events because she believes appellant was being treated unfairly. (A-2.) In her statement, she indicated voices got loud and that L.S. was yelling at appellant. Ms. Skellinger also testified, as did all witnesses, that appellant is friendly and caring towards all residents. She acknowledged on cross-examination that she has known Michael for thirty-one years and he sometimes can be loud. This is a physical characteristic and has nothing to do with behavior.

Art McGillis is a building maintenance employee and witnessed the Incident on November 19, 2013. Mr. McGillis testified that appellant "told the lady 'we told you several times to stay out that room.'" He was not nasty, just telling her using his normal voice. His testimony was consistent with his statement, dated November 25, 2015. (A-1.) On cross-examination, Mr. McGillis stated that he was not present for the entire incident and does not know what happened prior to his arrival into the room.

Mary Bogan had been employed at GLTCC as a Recreation Therapist until her transfer in March 2016. She previously held the position of Senior Recreation Therapist but was demoted by Allison Marshall after a disciplinary action. Ms. Bogan testified that on November 19, 2013, the television was loud and that as she walked by the recreation area, she heard some raised voices, those voices being both appellant and L.S. Ms. Bogan's testimony as to the events of November 19, 2013, is consistent with her statement to Ms. Marshall. (A-4.) She was not present in the room but stuck her head in the room and asked them to keep their voices down.

Ms. Bogan feels that appellant was removed from his position because Ms. Marshall did not like him. Ms. Marshall made a collage of appellant, which she kept in her office. One of the pictures in the collage was appellant in a pink bunny outfit during Easter. (A-3.) While A-3 is the original photo, the one in the collage included a hand drawn penis near appellant's face. No other employees could verify the existence of the collage or the doctored photo of appellant. Ms. Bogan contends that Ms. Marshall would comment about appellant's weight and would comment that she hates him.

On cross-examination, Ms. Bogan admitted to having been demoted for disciplinary reasons in 2014. (R-38.) She also admitted sending appellant a text message around the time of the incident telling him not to fall into their trap. "Divide and Concur." (R-39.)

Michael Mylod, appellant, began his employment at GLTCC in May 1997. He gave a statement on the incident on November 22, 2013, (R-7) in which he admits having a disagreement with L.S. on how to take care of a plant. He later apologized to L.S. for the misunderstanding when he learned that she had permission to move the plant into the locker room. He was upset that L.S. did not listen to him regarding the plants. Ms. Lewis told him to keep his voice down and no other discipline occurred until Ms. Marshall got involved. She disciplined him for everything and once told him he was lucky to have a job. Ms. Marshall never told him that she hated him and he was unaware of the collage that Ms. Bogan described.

Appellant maintains that he was not yelling at L.S., however, he later admitted regretting not speaking with her privately about the incident, instead of confronting her directly. He also agrees that he was speaking loud enough that Ms. Bogan could hear them from the hall and came in to ask them to keep their voices down.

Allison Marshall, the former administrator at GLTCC testified on behalf of the respondent as a rebuttal witness. She has been living in South Carolina for the past two years and agreed to testify in this hearing via video conferencing. She never told anyone that she hated appellant as she did not hate him or want him fired. She

remembers the photo of appellant in the bunny costume and recalls that appellant loved making the residents smile. She did not have a collage of appellant and did not draw a penis on any picture of him. She treated appellant the same way she treated all of the employees at GLTCC. She made a recommendation as to appellant's discipline but she did not have the final say as to what that discipline would be. That determination is made by the County Human Resources Department. Progressive discipline played a role in the decision to remove appellant. He had been given a fair and final warning letter in 2011 regarding his loud "booming" tones, use of foul language and arguing with a co-worker. (R-11.)

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, I **FIND** that the testimony offered by the Ms. Bogan regarding the motivation behind appellant's discipline is not credible. She insists that Ms. Marshall had a personal dislike of appellant and he was disciplined as a result. Her testimony regarding the collage and Ms. Marshall hating appellant is not corroborated by any other witness, including appellant. Further, the testimony of Ms. Thomas and Ms. Marshall confirms that the County's Department of Human Resources reviewed the allegations and made the final determination to seek removal. This is supported by the FNDA (R-1) and the PNDA (R-2) which was issued by the County Hearing Coordinator, Scott Climer. Therefore, I **FIND** as **FACT** that the appellant's discipline resulting from the November 19, 2013, incident was not motivated by a personal dislike of appellant by Ms. Marshall or anyone at GLTCC.

Based upon due consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional **FACTS**:

On November 19, 2013, appellant got into a verbal dispute with a volunteer at the GLTCC regarding the proper maintenance of a plant and the volunteer's presence in a room that appellant believed was to be off limits to the volunteer. GLTCC served a vulnerable population of the elderly and infirm, many of whom were confined to wheelchairs, and/or suffered from chronic psychiatric diagnoses, as well as dementia and Alzheimer's disease. Appellant was not the volunteer's supervisor and did not hold a position of authority over the volunteer such that he permitted to discipline or correct the volunteer's actions. The dispute, which took place in front of at least three residents, was loud enough to be heard by at least two employees, Ms. Aziz and Ms. Bogan, in other parts of the building. Appellant had been previously warned and disciplined about his behavior, and specifically about his loud "booming" tones, use of foul language and arguing with a co-worker. After completing an investigation, and considering the potential disciplinary options available, GLTCC management recommended removal as the appropriate penalty. In large part, this decision was based upon appellant's prior disciplinary history. The County's Human Resources Department concurred with GLTCC management, and following a departmental disciplinary hearing, his removal was upheld on May 7, 2014. As a result of the incident, respondent filed a resident abuse report with the Department of Health and the Ombudsman. The Office of the Ombudsman conducted an investigation and determined that there was sufficient information to verify staff to resident verbal/mental abuse to two residents. (R-9 and R-10.)

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline,

depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

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

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was appellant's conduct during the November 19, 2013, incident with a GLTCC volunteer. As a result of appellant's conduct, the Office of the Ombudsman conducted an investigation and determined that there was sufficient information to verify staff to resident verbal/mental abuse to two residents. His conduct was such that it could adversely affect the morale

or efficiency of a governmental unit or destroy public respect in the delivery of governmental services.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Specifically, appellant has been charged with violating Monmouth County Policies 522 regarding workplace violence, 701 regarding employee conduct, 703 regarding sexual and other unlawful harassment, 722 regarding workplace etiquette, County policy prohibiting workplace discrimination and harassment, N.J.A.C. 8:39-4.1 and Medicare/Medicaid requirements regarding resident rights. I **CONCLUDE** that appellant violated a number of these policies, specifically, appellant violated Policy 522 which requires employees to treat coworkers with courtesy and respect at all times. Policy 701 was violated in that it prohibits boisterous or disruptive activity in the workplace. Policy 722 directs employees to avoid public accusations and criticisms of other employees and directs employees to address such issues privately. N.J.A.C. 8:39-4.1 and Medicare/Medicaid requirements regarding resident rights state that residents shall be entitled to be free from physical and mental abuse. I **CONCLUDE** that the appointing authority has met its burden of proof that appellant committed an act in violation the aforementioned policies.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J.

Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

A review of appellant's work history reveals that he suffers from severe behavioral problems, presenting an obvious and inherent risk to the well-being of the vulnerable residents of the GLTCC. The November 19, 2013, incident, standing alone, was a serious matter – to the point it triggered a mandatory report to the New Jersey Department of Health for an investigation. Appellant's disciplinary history confirms that this incident is reflective of a pattern of behavior. Appellant received numerous warnings, counselings, reprimands and other disciplinary actions for time and attendance violations but there were several prior instances where he was disciplined for using foul, inappropriate and threatening language towards co-workers, sometimes in the presence of other staff members or residents. Such prior conduct, in and of itself, could have resulted in removal. See, e.g., Benitez v. Passaic Cnty, 2000 WL 286782, OAL Dkt. No. CSV 7157-98 (February 29, 2000) (Care center worker removed from employment in substantial part because he used foul language towards another

employee in a setting where it could be overheard by other employees, patients and members of the public). Appellant was aware his job was on the line if lost control of his behavior again. In July 2011, appellant was called into a meeting, which was intended to "serve as [Appellant's] fair and final warning." See R-11. As then-GLTCC Administrator Diana Czerepuszko reminded him in a written memorandum, "[i]t is expected that you show an immediate, sharp, marked improvement in your conduct otherwise, there will be further, serious discipline." Id. Even after receiving his "fair and final warning," appellant's behavior did not improve, and the County was forced to issue disciplinary charges against him only a few months later, in March 2012. The county did not seek appellant's removal at that time, and decided to give him another chance, and only sought a forty-five day suspension. The suspension was later reduced to forty days via a settlement agreement, which he willingly executed after receiving guidance of legal counsel. As part of that agreement, appellant admitted to numerous instances of inappropriate conduct. (R-17.) This panoply of misconduct also included sick leave abuse (notably, despite nearly fifteen years of service with the County, at the end of 2011 he had only one-half hour left in his sick leave bank), repeated failure to report to work as scheduled, repeated failure to follow County call-in procedures, improperly entering the GLTCC kitchen area on numerous occasions, repeatedly bringing his dog into the facility without authorization, and initiating a confrontation with a speech therapist who was evaluating a resident, repeatedly insulting her. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense and in light of the concept of progressive discipline, and the employee's prior record, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the appointing authority is **AFFIRMED**, as set forth above.

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.

12/8/16
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: December 8, 2016

Date Mailed to Parties: December 8, 2016.

/lam

WITNESSES

For Appellant:

Lisa Skellinger
Art McGillis
Mary Bogan
Michael Mylod, appellant

For Respondent:

Gwendolyn Thomas
Dorothea Lewis
Theresa Aziz
Allison Marshall

EXHIBITS

For Appellant:

A-1 Art McGillis Statement, dated 11/25/13
A-2 Lisa Skellinger Statement, dated 12/5/13
A-3 Easter Photo
A-4 Mary Bogan Statement, dated 11/22/13 starting at 7:54 am
A-4a Mary Bogan Statement, dated 11/22/13 starting at 11:35 am
A-5 Not Admitted Into Evidence per 10/28/16 Order
A-6 Not Admitted Into Evidence
A-7 Correspondence from Karyn Schuchardt, dated 7/15/15
A-8 Not Admitted Into Evidence per 10/28/16 Order

For Respondent:

R-1 Final Notice of Disciplinary Action, dated 5/7/14
R-2 Preliminary Notice of Disciplinary Action, dated 2/5/14

R-3 Statement of Pat Revlak, dated 11/19/13

R-4a Statement of Dorothea Lewis, dated 11/19/13

R-4b Statement of Dorothea Lewis, dated 11/21/13

R-5 Interview of resident N.W., dated 11/21/13

R-6 Statement of L.S., dated 11/21/13

R-7 Statement of appellant, dated 11/22/13

R-8 Statement of Theresa Aziz, dated 11/22/13

R-9 Correspondence from Office of Ombudsman regarding resident V.B., dated 3/4/14

R-10 Correspondence from Office of Ombudsman regarding resident V.B., dated 3/4/14

R-11 Performance Notice issued to appellant, dated 7/27/11

R-12 Monmouth County Policies 522, 701, 703 and 722

R-13 Monmouth County Policy Prohibiting Workplace Discrimination and Harassment

R-14 Appellant's acknowledgement of County Policies

R-15 N.J.A.C. 8:39-4.1 Resident's Rights

R-16 42 C.F.R. 483.1 Resident Behavior and Facility Practices

R-17 to R-37 Appellant's Personnel Record

R-38 Final Notice of Disciplinary Action served upon Mary Bogan, dated April 9, 2014

R-39 Text Message from Mary Bogan to appellant

2-8-17

STATE OF NEW JERSEY

In the Matter of Sabura Alexander, Hudson County, Department of Family Services

CSC DKT. NO. 2015-3327
OAL DKT. NO. CSV 13816-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 10 2017 BW

The appeal of Sabura Alexander, Human Services Specialist 4, Hudson County, Department of Family Services, 30 working day suspension, on charges, was heard by Administrative Law Judge Leland S. McGee, who rendered his initial decision on December 29, 2016. Exceptions were filed on behalf of the appellant and on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 8, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 30 working day suspension to a 15 working day suspension.

Since the penalty has been modified, the appellant is entitled to 15 working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty

was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. Per *N.J.A.C.* 4A:2-2.10, the amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13816-15
AGENCY DKT. NO. 2015-3327

SABURA ALEXANDER,
Petitioner,
v.
HUDSON COUNTY DEPARTMENT OF FAMILY SERVICES,
Respondent.

Seth Gollin, Esq., for Petitioner (Staff Attorney, AFSCME Council 52, attorneys)

Daniel W. Sexton, Esq., Assistant County Counsel for Respondent (Donato J. Battista, County Counsel, attorneys)

Record Closed: May 17, 2016 Decided: December 29, 2016

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent, Hudson County Department of Family Services (Respondent or County), brings a major disciplinary action against the petitioner, Sabura Alexander (Petitioner or Alexander), HSS IV Supervisor, effective May 8, 2015. Respondent alleges that Petitioner's conduct was unbecoming a public employee; that she was

insubordinate; that she neglected her duty; and other sufficient cause exists. Respondent alleges that on May 8, 2015, Petitioner violated a "cease and desist" directive from her director. Specifically, she "took the opportunity . . . to confront, harass, annoy and vex employee Jackie Angione" by chanting, and then chanting and dancing, slogans/statements directed towards Ms. Angione.

On May 8, 2015, Respondent issued a Preliminary Notice of Disciplinary Action against Petitioner. On May 19 an administrative hearing was held and on June 10, 2015, Respondent issued a Final Notice of Disciplinary Action upholding the charges. On September 3, 2015, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on March 31, and April 7, 2016. On May 17, 2016, the record closed.

FACTUAL DISCUSSION

The pertinent facts of this case are not in dispute and as such, I **FIND** the following to be the **FACTS** of this case:

1. On or about March 11, 2015 Petitioner and co-worker, Jackie Angione (Angione) had a dispute regarding certain procedures to be implemented within their office. Both parties testified that they "had no problems" with each other prior to this time and that they "always got along."

2. On or about March 11, 2015, Petitioner sent an email to Angelica M. Harrison, Director of Respondent's Division of Welfare (Harrison). In the email correspondence, among other things, Petitioner complained about co-worker Jackie Angione, alluding to her "unprofessionalism" conduct. (R-1.)

3. On or about April 24, 2015, Harrison responded to the complaint by way of a memorandum to Petitioner. This memorandum also served as a "Cease and

Desist Order" for Petitioner to cease "having contact with Ms. Angione and she with [Petitioner]." (R-2.)

4. The memorandum also made reference to Harrison's "understanding" that Petitioner has shouted at some of her co-workers, and suggested that she "look into controlling [her] anger so that we do not continue these issues in the workplace." (Ibid.)

5. The attendance time sheets for Petitioner and other employees was located in or adjacent to Angione's office and Petitioner was required to walk passed her to sign in. During the period from April 24, 2015, to May 8, 2015, Petitioner waited for Angione to be away from her desk in order to sign in.

6. Sometime during the end of 2014 and early 2015, Angione informed some employees of her intent to retire during 2015.

7. On May 8, 2015, while enter her place of employment, Petitioner walked passed Angione's office and was singing or chanting, "countdown." On her return trip passed Angione's office, Petitioner gleefully continued.

8. On May 8, 2015, Angione wrote a memorandum to R. Knapp, Deputy Director, wherein she complained that Petitioner's conduct was harassing and violated the Cease and Desist Order. (R-3.)

9. On May 8, 2015, co-worker Kathy Cunningham was present when Petitioner passed Angione's office. She hand-wrote a note to "To Whom it May Concern" wherein she memorialized her observation that Petitioner was "singing and dancing countdown" as she passed Angione's office. (R-4.) The implication was that Petitioner was referring to the fact that Angione would be retiring soon.

10. Petitioner acknowledges that she was singing "countdown"; however May 8, 2015, was the Friday of Mother's Day weekend and her reference was to her anticipation of the weekend. There were other co-workers present at the time of the incident. There is no evidence that Petitioner specifically stated or

referenced the fact that Angione was retiring or that Petitioner looked at, or in the direction of Angione as she passed the office.

Credibility Determinations

In assessing a witness's credibility, an Administrative Law Judge must consider his/her testimony in "light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder may reject a witness's testimony "when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (rejecting testimony "inconsistent with other testimony or with common experience" or "overborne by other testimony."); D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). An ALJ may consider the "interest, motive, bias, or prejudice of a witness" but "where such choice is reasonably made, it is conclusive on appeal." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952); Renan Realty Corp. v. State, Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

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.) Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." Perrone, supra, 5 N.J. at 522.

Here, the only conflicting testimony was as to whether Petitioner directing her gleeful exhibition at Angione. Conflicting and irreconcilable testimony requires credibility determinations, based on the totality of the evidence, prior to making findings as to the disputed facts. In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002). Although there were several employees present during the incident, Petitioner was unable to offer any witnesses. She state that she did not

believe that any of the other people present "tell the truth" about what happened. It is clear that, although both Angione and Petitioner stated that they had no problems with each other, there was a rift between the two of them. I do not find Petitioner's was credible when she stated that the "celebration" was not directed at Angione. I **FIND** the testimony of Respondent's witnesses to be more credible than that of Petitioner. Respondent's evidence is more consistent in the manner in which it collectively "hangs together." Petitioner's testimony "contains inherent contradictions which alone or in connection with other circumstances in evidence excite suspicion" as to its veracity. Perrone, supra, 5 N.J. at 521-22. For the foregoing reasons, I **FIND** that Petitioner did engaged in the conduct set forth in the Specifications of the Preliminary Notice of Disciplinary Action and the Final Notice of Disciplinary Action, with the intent to at least annoy Angione if not harass her.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

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 inability to perform duties, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, 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." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

Conduct Unbecoming a Public Employee

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, "unbecoming conduct" is broadly defined as "'any conduct which adversely affects the morale or efficiency of the [governmental unit] [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citations omitted); In re Nicosia, A-5285-04T5 (App. Div. May 17, 2007), <http://njlaw.rutgers.edu/collections/courts/>. The conduct need not be "predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Petitioner admits to engaging in the described "celebration"; however, denies that it was directed at Angione. The undersigned is not persuaded that her conduct was not directed at Angione. Further, she (and Angione) were governed by a Cease and Desist Order and I **CONCLUDE** that Petitioner violated that Order which was a "violation of the implicit standard of good behavior." Therefore I **CONCLUDE** that Petitioner engaged in conduct unbecoming a public employee.

Insubordination and Neglect of Duty

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

I **CONCLUDE** that Petitioner engaged in conduct unbecoming a public employee because she engaged in conduct that violated a directive from her supervisor. I **CONCLUDE** that her conduct constituted insubordination.

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(7). Although not defined by the regulation, it generally means that a person is not performing his or her job. The person may have failed to perform an act that the job requires or may have been negligent in the discharge of a duty. The duty may arise by specific statute or from the very nature of the job itself.

I **CONCLUDE** that there is no evidence that Petitioner failed to perform her job duties. I therefore **CONCLUDE** the charge of neglect of duty should not be sustained.

Appropriateness of Penalty

It is well-established that the employee's past record and any mitigating circumstances may be reviewed in assessing a penalty. See Bock, supra, 38 N.J. 500.

The severity of the infractions must also be balanced against "whether removal or something less is appropriate under the circumstances." In re Figueroa, CSV 3819-01, Initial Decision (October 10, 2003), http://njlaw.rutgers.edu/collections/oal/; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be "bypassed when an employee engages in severe misconduct," especially where the offense involves "public safety" and risks "harm to persons or property." In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, "[t]he overriding concern" is the "public good." George v. N. Princeton Developmental Ctr., 49 N.J.A.R.2d (CSV) 463, 465.

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/; see Henry, supra, 81 N.J. at 571. Counseling, warnings, meetings, etc., do not constitute discipline under merit system rules. See N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-3.1. Here, as the charges resulted from offenses occurring from August to September of 2010, "it was incumbent upon [respondent] to follow the concept of progressive discipline" and advise petitioner that "failure to change [her] behavior could result in termination from employment." Glenn, supra, CSV 5051-03.

Petitioner's underlying conduct was not egregious. The undersigned is persuaded that there was some mutual distain between Angione and Petitioner. Further, Angione was scheduled to retire and may have already done so. As such, the circumstance giving rise to the conflict would be eliminated. Further, Respondent's witness Director Harrison, Division of Welfare, indicated that she believed that the documentary evidence submitted was incorrect. Those documents indicate no prior disciplinary action against Petitioner. (R-5.) For the foregoing reasons I **CONCLUDE** that the penalty of thirty-days' suspension was not appropriate. I **CONCLUDE** that a penalty of five days for the charge of conduct unbecoming and ten days for the charge of insubordination is appropriate.

ORDER

It is **ORDERED** that petitioner, Sabura Alexander, be given a fifteen-day suspension.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

December 29, 2016
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: December 29, 2016

Date Mailed to Parties: December 30, 2016

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

Sabura Alexander

For Respondent:

Angelica Harrison

Jacquline Angione

Kathy Cunningham

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Email from Petitioner dated March 11, 2015

R-2 Memorandum from Angelica M. Harrison dated April 24, 2015

R-3 Memorandum from Jackie Angione dated May 9, 2015

R-4 Handwritten letter from Kathy Cunningham dated May 8, 2015

R-5 Employee Profile for Petitioner

2-8-17

STATE OF NEW JERSEY

In the Matter of Frank Harkcom
Bayside State Prison,
Department of Corrections

CSC DKT. NO. 2016-2769
OAL DKT. NO. CSR 02881-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 10 2017 BW

The appeal of Frank Harkcom, Senior Correction Officer, Bayside State Prison, Department of Corrections, removal effective February 3, 2016, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on December 22, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 8, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Frank Harkcom.

Re: Frank Harkcom

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 02881-16
AGENCY DKT. NO. N/A 2016- 2769

IN THE MATTER OF FRANK HARKCOM,
BAYSIDE STATE PRISON.

William G. Blaney, Esq., for appellant, Frank Harkcom (Blaney & Karavan, attorneys)

Adam K. Phelps, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: November 10, 2016 Decided: December 22, 2016

BEFORE **JOHN S. KENNEDY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Senior Corrections Officer, Frank Harkcom, (appellant) appeals the decision of the Department of Corrections (DOC), Bayside State Prison (respondent, Bayside) to remove him from employment. A Preliminary Notice of Disciplinary Action, (PNDA), dated November 17, 2015, seeks the removal of appellant based on the following charges: N.J.A.C. 4A:2.3(a)6, Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2.3(a)12, Other Sufficient Cause; HRB 84-17 (as amended): C8 Flasification: Intentional misstatement of material fact in conection with work, employment application,

attendance, or in any record, report, investigation; C-11 Conduct unbecoming an employee; D-23, Prohibited by law from possessing or using a fire arm; and E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision.

After a departmental hearing held on January 12, 2016, charges of N.J.A.C. 4A:2.3(a)6, Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2.3(a)12, Other Sufficient Cause; Human Resources Bulletin (HRB) 84-17 (as amended): C8 Flasification: Intentional misstatement of material fact in conection with work, employment application, attendance, or in any record, report, investigation, were sustained and incorporated into a Final Notice of Disciplinary Action (FNDA) 31-C, dated February 1, 2016, with a proposed penalty of removal from employment. Appellant appealed his removal to the Office of Administrative Law (OAL), where it was received on February 24, 2016. The hearing in this matter was originally scheduled to be held on May 2, 2016, and May 3, 2016, but was adjourned at the request of the respondent due to unavailability of witnesses. The matter was then scheduled to be heard on June 16, 2016, but was again adjourned as a result of the departure of the Deputy Attorney General form the Division of Law originally assigned to represent the respondent. Appellant was suspended without pay on November 19, 2015, as a result of the PNDA and remained suspended until his removal. Based upon the appellant's assertion that he was entitled to receive his base pay pursuant to N.J.S.A. 40A:14-201(a) effective May 18, 2016, respondent unilaterally placed him back on pay status on that date. The hearing in this matter was held on July 25, 2016, and August 18, 2016. The parties electronically filed briefs with the court on November 4, 2016 and the record closed on November 10, 2016, after hard copies of the briefs were received.

FACTUAL DISCUSSION

In January 2015 appellant was arrested for suspicion of Driving Under the Influence (DUI) and reckless driving. As a result, respondent issued a PNDA removing him as an officer on February 9, 2015. (R-10.) Appellant was found guilty of reckless driving and his driver's license was suspended for six months. The respondent changed the removal to a ten-day suspension and required appellant to reapply for employment as a officer. On

October 29, 2015, appellant submitted and signed an application for employment with the DOC. (R-1.) Through the application appellant was directed to disclose all court dispositions relative to any charges, including criminal, civil, and family law actions and was required to disclose his arrests, summonses and all negative contact with police, including incidences of domestic violence including temporary restraining orders (TRO) and final restraining orders (FRO) whether active or dismissed. Appellant signed an acknowledgment certifying that the information on the application was complete and accurate to the best of his knowledge and acknowledgeged that any misleading, withheld or incorrect information may be cause for his immediate termination of employment.

On October 29, 2015, respondnet performed a routine investigation of appellant's application and determined that he failed to disclose an active domestice violence complaint, TRO and FRO entered against him in 1990 and well as two harassment charges filed against him in 2012 and 2013. Appellant also failed to disclose prior arrests and convictions he had previously disclosed on his original employment application which he submitted in 1997. Respondent asserted that appellant's failure to disclose the above stated incidents constituted falsification of records and determined not to rehire him. Thereafter, appellant was issued a PNDA on November 17, 2015, seeking his removal and was suspended without pay on November 19, 2015. After a hearing was held, a FNDA was issued on February 1, 2016, terminating appellant. The aforementioned is not in dispute and I therefore **FIND** them as **FACT**.

TESTIMONY

Sergeant James Russo

Sergeant Russo (Russo) testified that at the time of his testimony he was assigned to the DOC's Sergeant Custody Recruitment Unit and handled the backgrounds for custody applicants and other recruiting functions. Russo also conducted his own investigations into reinstatements of employees which included a review of an employee's criminal background, motor vehicle records, and urinalysis prior to returning to work. After reviewing the above material, Russo would make a

determination whether or not to move forward with the rehire. Russo was responsible for reviewing appellant's application for rehire. Upon receipt, he compared the applications against various printouts from the computer background check programs. To assist Russo in his investigation, he produced a Background Investigation Report, which bullet points what was reported on the application versus what was found. (R-2.)

Russo pointed out that appellant did report on his reapplication being charged with disorderly person offenses in 1981 and 1983, as well as a drinking and driving summons for which he was found not guilty. However, Russo testified that a check of appellant's records through the New Jersey Automated Complaint System revealed he was charged with harassment on October 16, 2012, and June 27, 2013. A review of the Family Automated Tracking System indicated that appellant was subject to a FRO from 1990 at the time of his reapplication. Russo relied upon these printouts to determine that appellant had knowledge of the two harassment charges and the FRO and therefore falsified his reapplication by omitting the same. As a result of these findings, Russo came to the decision that appellant should not move forward in the rehire process because he did not disclose his charges of 2012 and 2013 and falsified his reapplication related to the FRO. Russo believed the FRO was significant in the rehiring process because being subjected to an FRO precludes somebody from possession of a firearm due to the Lautenberg Rule, claiming if you have an order of protection against you, you are barred from the possession of firearms by federal law.

Russo indicated he was aware of a draft policy that required rehires to fill out an application prior to reinstatement but he is not aware of an approved policy and only completed appellant's background examination because he was instructed to do so. He did not know the status of appellant prior to the examination. Russo had no personal knowledge of whether appellant was aware of the harassment complaints but did indicate that they appeared to be signed by a citizen, not law enforcement. Upon review of the 2012 complaint, Russo determined the alleged perpetrator was a Mr. W, who resided at M. Avenue, Bridgeton, New Jersey, a location appellant did not reside at during that time frame. Russo had no personal knowledge of whether or not appellant reported these alleged complaints to his supervisors.

Russo reviewed a Certified Copy of the Restraining Order provided by petitioner's counsel and maintained the position that even though it lacked any indication that it was served on appellant that he believed appellant was served. He had no reason to doubt the accuracy of the Family Automated Case Tracking System. Russo did not personally search the system but instead relied upon the printouts made by another DOC employee. Russo was made aware that appellant's FRO was dismissed and that he had no restrictions on carrying a firearm.

Guy Cirillo

Guy Cirillo (Cirillo) is the Director of the Office of Training for the Department of Corrections and is in charge of the State Basic Academy, Recruitment Unit, and the hiring process for the DOC for custody staff. Cirillo outlined the four phases of the investigation process used to evaluate a recruit, once Human Resources (HR) process them. He noted the DOC Rules and Regulations prohibit anybody with a FRO to carry a gun and subsequently be unable to be a corrections officer because it is a condition of employment to be able to carry a weapon. Employees are required to have a valid driver's license in the instance they may have to operate a State vehicle. Upon review of appellant's application, Cirillo determined that appellant failed to identify information about being arrested and having a TRO or FRO however, he had no involvement in the decision to discipline appellant. The range of discipline associated with intentionally falsifying an application is written reprimand to removal. The recommendation for discipline is subject to review and if an applicant neglected to fill something out erroneously, they may receive an official written reprimand.

On cross-examination, Cirillo stated HRB 84-17 (as amended), C-8, states that in order to be charged with a falsification violation, the falsification of an application needs to be intentional. Cirillo is unaware if the policy regarding the rehiring process was ever officially adopted; however it is a policy that is followed. Cirillo admitted that there are corrections officers who are currently employed by DOC who do not have the ability to carry a firearm. Mr. Cirillo does not know if the information gained from the automated

reports is accurate, however they have no choice but to go by the information that they report.

William Saraceni

William Saraceni (Saraceni) is currently a Manager II of the Office of Human Resources, region three, Bayside State Prison. His prime responsibility is records custodian. Appellant's rehire application was necessary because appellant was removed from employment and reinstated. The basis for appellant's removal was a PNDA, dated February 10, 2015. This ultimately led to appellant being suspended from employment for a period of eight months, which Saraceni considered "removed" for HR purposes.

Saraceni was not involved in recommending or implementing disciplinary charges against employees. The first time he saw the TRO and the FRO in appellant's personnel file was a week before the hearing and could not testify as to whether they were part of his file since the beginning of his employment in 1997.

Frank Harkcom

Appellant is a Senior Correction Officer at Bayside State Prison. He has been employed there for nineteen (19) years. In or around 1990, appellant divorced his wife, M.C. Together they had one son. In 1990, he and M.C. had an arrangement for visitation with their son. On his scheduled day to have his son, M.C. gave appellant a problem picking up his son at her family home. Appellant knocked on the door and no one answered. He continued to knock on the door, presumably harder, and knocked an ornament off the door. He was angry and upset but left when nobody answered the door. The next day, M.C. spoke with appellant and indicated her father made her put a restraining order against him and she was working to calm her father down. M.C. advised appellant that her father would let her drop the restraining order if he paid restitution for the broken ornament; which he did. He was under the impression that the issue was resolved after he made restitution. Appellant recalled receiving something

from the Sheriff's office at or around the time of the 1990 incident at his parents' house; however, he does not recall whether or not he opened it. Appellant never took any steps with the court to determine if the TRO was dropped and did not appear in court as required on the TRO. (R-3a.) Sometime prior to him beginning employment with DOC in 1998, appellant had completed a background check. At no point after his background check did anyone ever tell him he had a FRO or a TRO against him. Additionally, appellant stated he has had three additional background checks while employed at DOC and no one had advised him of the restraining orders. Appellant recently took steps to have the FRO lifted and M.C. assisted as she wanted to do anything she could to get it taken care of

With regard to the alleged 2012 harassment incident, appellant testified that he went to his rental property and saw the neighbor yelling at him. The neighbor called the police, who left without issuing any tickets. The compliant filed against him was sent to the address of his rental property where he did not reside. (P-2.) He later received the court notice, but there was no indication of what it was for, so he went to court several times and the judge eventually dismissed the matter. The policy appellant was aware of at the time of the incident, required him only to report arrests and/or incarcerations. HRB 84-19 was amended in 2000 and required employees to report the receipt of summonses filed against them. (R-17.) Appellant asserts that he was unaware of the policy change.

The second alleged harassment incident in 2013, involved the same rental property and the same neighbor who made the first set of allegations in 2012. Appellant recalled that he was blowing leaves off of his property towards a park and some of them drifted onto his neighbor's yard. The neighbor confronted appellant and eventually called the police. The police did not press charges against appellant and advised him that if he wanted the neighbor to stop calling the police he needed to go down and sign a complaint against him. Appellant signed a complaint against his neighbor, which lead to him receiving a notice for neighborhood dispute resolution. The neighbor also signed a complaint against him but appellant alleges to have never received this complaint. (P-11.) He and his neighbor resolved the dispute through

mediation. He never really had an issue with the neighbor, the neighbor had a problem with appellant's renters. Appellant indicated that he did not report the 2012 and 2013 alleged incidents because he did not know he was charged, and he never intentionally misled the DOC.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the additional relevant and credible **FACTS** in this matter: Appellant was aware of his obligation to disclose his arrests and prior incidents and understood he was obligated to disclose all offenses and charges against him including domestic violence charges and restraining orders. Appellant also understood he had to disclose all misdemeanors, including disorderly persons offenses and harassment complaints and understood that his failure to disclose any offenses could result in his termination.

In his reapplication, appellant disclosed two disorderly persons offenses from 1981 and 1983, and his suspicion of DUI arrest from January 10, 2015. He also disclosed that he did not have a valid driver's license but disclosed no other offenses. He did not disclose his criminal mischief charge and conviction from 1981 on his reapplication or his 1989 disorderly conduct even though they were disclosed on his original application in 1997. Appellant signed the Acknowledgement and Affidavit attesting to the accuracy of the information contained in his reapplication.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I do not **FIND** appellant to be a credible witness and his testimony regarding his knowledge of the 1990 TRO and FRO,as well as the 2012 and 2013 harrassment complaints filed against him, is not believable. Appellant testified that he did not know about the 1990 TRO and FRO, or the 2012 and 2013 harassment complaints when he reapplied for employment in 2015. However, appellant was aware of the 1990 restraining orders even though he denies he was served with the TRO or FRO. Even if taken as true that he was not served the documents, appellant admitted his ex wife told him about the TRO, and that he knew the Salem Sheriff had delivered something to his parents' house. That appellant was not aware of or simply forgot about an incident serious enough to raise to the level of a TRO and FRO being entered against him is not credible.

Similarly, appellant testified that he did not purposely fail to disclose the 2012 and 2013 harassment complaints because he was never aware of them. By his own admission, however, appellant went to Court, and mediation, to have the harassment complaints dismissed. As a result, I **FIND** as **FACT** that appellant was aware of the 1990 TRO and the FRO and also the 2012 and 2013 harrassment charges filed against him and failied to disclose them on his 2015 reapplication.

LEGAL ANALYSIS AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

Respondent has sustained charges of violations of N.J.A.C. 4A:2.3(a)6, Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2.3(a)12, Other Sufficient Cause; Human Resources Bulletin (HRB) 84-17 (as amended): C8 Flasification: Intentional misstatement of material fact in conection with work, employment application, attendance, or in any record, report, investigation. Appellant argues that the charges against him can not be proven by credible, competent evidence and that his omissions on his 2015 reapplication were inadvertent and not done so knowingly. He asserts that respondent did not produce a witness to authenticate any of the alleged Court documents it submitted in support of its case and that the documents fail to indicate that they were ever served appellant. The automated reports generated related to appellant alleged 2012 and 2013 summonses were not presented by a custodian of record or supported by a certification. Had appellant's testimony been that none of the events had occurred and respondent were otherwise unable to cooberate any of the incidents, his argument would have some merit. The documents presented, however, were obtained during the course of Russo's background investigation. There has been no evidence that Russo or anyone else manufactured these documents or that Russo harbored any ill will toward appellant. Furthermore, appellant testified as to the events surrounding the documents in question which gives this tribunal the ability to more fully rely upon those documents.

As to the charge of violation of section C-8, "Falsification," the HRB at Page 8 defines Falsification as:

> . . . Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding.

The actions of appellant fit directly within the definition of falsification as set forth in the HRB. It is clear based on the evidence presented that appellant intentionally

misstated facts on his 2015 reapplication. He clearly had knowledge of the 1990 TRO and the FRO and also the 2012 and 2013 arrassment charges. He did not disclose his criminal mischief charge and conviction from 1981 on his reapplication or his 1989 disorderly conduct even though they were disclosed on his original application in 1997. Therefore, I **CONCLUDE** that the appointing authority has met its burden of proof that appellant committed an act of Falsification pursuant to HRB section C-8. He clearly demonstrated an absence of judgment in a sensitive position requiring public trust in the agency's judgment.

Appellant was also charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellant's status as a senior correction officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v.

Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."
>
> [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee when the aforementioned higher standard is applied. Appellant's conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services.

Appellant has further been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct was such that he violated this standard of good behavior. As such, I **CONCLUDE** that appellant's actions fit this charge.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, 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." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record"

includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523-24.

As the Supreme Court explained in In re Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, supra, 192 N.J. at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, supra, 191 N.J. at 486 (citation omitted).

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Civil Service Commission (Commission) modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, supra, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

Although appellant's past employment disciplinary record is relatively short for an employee of nineteen years, he has been disciplined five times since 2010 and has received one commendation in that same time period.

The OAL, Merit System Board, and Appellate Division have consistently maintained that removal is the appropriate penalty for a corrections employee who falsifies a document related to employment. See Warfield v. New Jersey State Prison, OAL Dkt. No. CSV2706-04, at 1-12 (decided September 21, 2005), available a thttp://njlaw.rutgers.edu/collections/oal. (Where the OAL determined that removal was the appropriate discipline for a corrections officer who misrepresented the existence of a wife and child on a benefit application).

For example, in Carter v. South Woods State Prison, OAL Dkt. No. CSV6415-00, (Decided September 11, 2003), the OAL assessed a six-month suspension against Officer Carter, who falsified his application by omitting a prior offense that would have disqualified him from employment. The DOC filed exceptions, and the Merit System Board (MSB) determined that, given the blatant nature of Carter's falsification, removal was the appropriate discipline. Carter appealed, and the appellate division affirmed the board's determination, concluding that Carter's arguments were meritless and did not warrant discussion in a written opinion. See In re Carter, No. A-2599-03T2 (App. Div.

March 2, 2005) (slip op. at 4). The Supreme Court denied certification. In re Carter, 184 N.J. 211, 876 A.2d 284 (2005).

Here, appellant falsified his 2015 reapplication for employment by failing to disclose five separate incidents in which he had been charged or convicted of a violation of the law. He signed an acknowledgment certifying that the information on the application was complete and accurate to the best of his knowledge and acknowledgeged that any misleading, withheld or incorrect information may be cause for his immediate termination of employment. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against appellant with violations of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause, and Human Resources Bulletin (HRB) 84-17 (as amended): C8 Flasification: Intentional misstatement of material fact in conection with work, employment application, attendance, or in any record, report, investigation and I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED**.

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. 40A:14-204.

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.

12/22/16
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: December 22, 2016

Date Mailed to Parties: December 22, 2016.

JSK/dm

APPENDIX

WITNESSES

For appellant:

Frank Harcom, appellant

For respondent:

Sergeant James Russo
Guy Cirillo
William Saraceni

EXHIBITS

For appellant:

P-1 DOC HRB 35
P-2 DOC HRB 39-40
P-3 DOC HRB 41-42
P-4 FNDA, dated October 16, 2015
P-5 Notice of Informal Pretermination Hearing, dated April 17, 2015
P-6 Disciplinary Appeal Proceeding, dated September 2, 2015
P-7 DOC HRB 84-19, dated May 18, 1994
P-8 Decision of Informal Pretermination Hearing, dated April 23, 2015
P-9 Order of Dismissal of Final Restraining Order, dated December 17, 2015
P-10 Harassment Complaint, filed October 9, 2012
P-11 Harassment Complaint, filed April 20, 2013

For respondent:

R-1 Harkcom 2015 Reapplication
R-2 Applicants Investigation Report
R-3 Harkcom 1990 TRO/FRO
R-4 Harkcom Harassment Complaint, dated October 9, 2012
R-5 Harkcom Harassment Complaint, dated April 8, 2013
R-6 PNDA
R-7 Appeal of Major Disciplinary
R-8 Notification of Major Disciplinary
R-9 Decision of Internal Pre-Term Hearing
R-10 DUI PNDA
R-11 Special Custody Report on DUI
R-12 Appeal of DUI
R-13 Disciplinary Appeal (DUI)
R-14 Harkcom Work History
R-15 Harkcom 1997 Application
R-16 1997 Receipt of H.R. Materials
R-17 H.R. Bulletin 94-19
R-18 IMP: Processing of Re-Hires
R-19 DOC Rules
R-20 FRO Order of Dismissal, dated December 17, 2015
R-21 H.R. Bulletin 84-17
R-22 Falsification Discipline Appeal Proceeding

2-8-17

STATE OF NEW JERSEY

In the Matter of Christopher Kelly
Jackson Township,
Department of Public Safety

CSC DKT. NO. 2016-3076
OAL DKT. NO. CSV 05042-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement, with clarification, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05042-16
AGENCY DKT. NO. 2016-3076

IN THE MATTER OF CHRISTOPHER KELLY, JACKSON TOWNSHIP, DEPARTMENT OF PUBLIC SAFETY.

Robert Rosenberg, Esq., for appellant, Christopher Kelly (Rosenberg, Kirby, Cahill, Stankowitz and Richardson, attorneys)

Robert A. Greitz, Esq., appearing for respondent, Jackson Township, Department of Public Safely

Record Closed: November 17, 2016 Decided: December 6, 2016

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on April 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 6, 2016
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 12/6/16

Date Mailed to Parties: 12/6/16

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on November 17, 2016

J-1

ROBERT A. GREITZ, ESQ. (ID# 025631999)
Citta, Holzapfel & Zabarsky
248 Washington Street
Toms River, New Jersey 08754
732-349-1600
Attorneys for Jackson Township

In the matter of CHRISTOPHER KELLY, Appellant, and JACKSON TOWNSHIP, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. CVS 05042-2016 S AGENCY REF. NO. CSC DK#2016-3076 SETTLEMENT AGREEMENT AND RELEASE

WHEREAS THIS MATTER having been opened to the Civil Service Commission based upon an appeal of the disciplinary charges set forth on the Final Notice of Disciplinary Action (Form 31-B) filed by the Township of Jackson ("Township") against **Christopher Kelly** ("Kelly" or "Employee") dated March 3, 2016.

WHEREAS THIS MATTER having been transferred to the Office of Administrative Law as a contested case; and

WHEREAS, Employee exercised his right to be represented by Robert Rosenberg, Esq.; and

WHEREAS, Township has been represented in this matter by the law firm of Citta, Holzapfel & Zabarsky, Robert A. Greitz, Esq. appearing; and

WHEREAS , the Township and Kelly have mutually agreed to enter into this Settlement Agreement and Release ("Agreement") for the purposes of fully disposing of and resolving the outstanding disciplinary charges set forth on the March 3, 2016 Final Notice of Disciplinary Action (Form 31-B):

IT IS THEREFORE on this ___ day of _____, 2016 agreed by and between the **Township** and **Christopher Kelly** to enter into and accept the terms and conditions of this Settlement Agreement and Release which are as follows:

I. The disciplinary charges included within the March 3, 2016 FNDA (Form 31-B) are hereby settled based upon the following terms and conditions.

II. The seventeen (17) day suspension and major discipline set forth on the March 3, 2016 FNDA, Form 31-B) shall be rescinded by the Township. Kelly's personnel record and the records with Civil Service Commission's CAMPS will reflect the rescission of the seventeen (17) day suspension.

III. While not acknowledging any wrongdoing, Kelly acknowledges he has been verbally warned by the Township that his record keeping was a concern for the Township and failure to adhere to the proper record keeping and documentation requirements in the future can result in written disciplinary charges.

IV. Kelly shall reimburse the Township for 170 hours. Kelly shall reimburse The Township by way of deductions from his vacation and or personal time for the next 24 months. All 170 hours shall be reimbursed to the Township by the end of a 24-month period and should Kelly separate from his employment with the Township prior to reimbursing for the full the 170 hours, Kelly acknowledges and agrees the Township

shall have the right to deduct said hours from any potentially accrued and owed time to Kelly.

V. Kelly dismisses and waives his right to appeal the March 3, 2016 FNDA further and waives his right to seek further review by the Civil Service Commission and/or Office of Administrative Law and the Township agrees to rescind said Final Notice of Disciplinary Action.

VI. With respect to the filing of the disciplinary charges which are the subject of this Settlement Agreement and Release, and the subject matter of said charges, Kelly hereby waives, releases and withdraws any and all claims, suits, actions, and/or grievances, whether known or unknown, vested or contingent, civil, criminal or administrative, through the date of this Settlement Agreement and Release, which Kelly has or may have had against the Township, its employees, agents, or assigns, as of the date of the execution of this negotiated Settlement Agreement and Release, including but not limited to any claims for a violation of State or Federal law, common law, contractual right or violation of the collective negotiation agreement.

The Township hereby releases any and all claims, suits, actions, and/or grievances, whether known or unknown, vested or contingent, civil, criminal or administrative, through the date of this Settlement Agreement and Release, which the Township has or may have had against Kelly, related to the disciplinary charges which are the subject matter Settlement Agreement and Release, including but not limited to any claims for a violation of State or Federal law, common law, contractual right or violation of the collective negotiation agreement.

VII. Both parties are solely responsible for any cost or fees incurred by them individually, including but not limited to filing fees and attorney's fees and costs, and there shall be no sharing of any costs.

XIII. If any part of this Settlement Agreement and Release is determined to be unenforceable it shall be severable and all other parts, terms and conditions of the Settlement Agreement and Release shall remain in full force and effect.

By executing this Settlement Agreement and Release below, **Christopher Kelly** and **Jackson Township** hereby acknowledge and agree their entrance into this Settlement Agreement and Release was knowing and voluntarily.

By executing this Settlement Agreement and Release below, **Christopher Kelly** and **Jackson Township** further acknowledge each has been represented by an attorney of their own choosing and has had sufficient opportunity to review this Settlement Agreement and Release with their attorney.

By executing this Settlement Agreement and Release below, both **Christopher Kelly** and **Jackson Township** acknowledge they fully understand the terms and conditions of this Settlement Agreement and Release, and agree the entrance into same is beneficial to each individual party.

9-29-16

CHRISTOPHER KELLY *(dated)*

Robert Rosenberg, Esq.

10/26/16

HELENE SCHLEGEL, Administrator *(dated)*
JACKSON TOWNSHIP

Witness

Angiulo, Nicholas

From: Angiulo, Nicholas
Sent: Wednesday, January 11, 2017 2:10 PM
To: Angiulo, Nicholas
Subject: RE: Christopher Kelly v. Jackson Township - CSC Docket No. 2016-3076; OAL Docket No. 5042-16 - SETTLEMENT

From: Rob Greitz [mailto:rgreitzesq@msn.com]
Sent: Wednesday, January 11, 2017 1:49 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; rkcslaw@comcast.net
Cc: JWHolzapfel@comcast.net
Subject: Re: Christopher Kelly v. Jackson Township - CSC Docket No. 2016-3076; OAL Docket No. 5042-16 - SETTLEMENT

Nick Angiulo-

Officer Kelly has never actually served the suspension days. We knew he intended to appeal the suspension.

I hope this clears up the concern about a Gap. Again, Officer Kelly has not served no days of suspension.

In short, the leave time he is forfeiting is a reimbursement.

-Rob

Robert A. Greitz, Esq.
Citta, Holzapfel & Zabarsky
248 Washington Street
Toms River, New Jersey 08753
(732) 349-1600

From: Angiulo, Nicholas
Sent: Wednesday, December 14, 2016 12:30 PM
To: 'rkcslaw@comcast.net' <rkcslaw@comcast.net>; 'rgreitzesq@msn.com' <rgreitzesq@msn.com>
Subject: Christopher Kelly v. Jackson Township - CSC Docket No. 2016-3076; OAL Docket No. 5042-16 - SETTLEMENT
Importance: High

Mr. Rosenberg and Mr. Greitz:

I am the Assistant Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Christopher Kelly indicating that the 17 working day suspension is being rescinded and the appellant will forfeit 170 work hours of future vacation and/or personal time.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, the 17 suspension days served by the appellant must be accounted for in his personnel record. For example, will those 17 days be considered an approved leave of absence without pay, or something else. Without clarification, the settlement cannot be acknowledged by the Commission.

Please let me know as soon as possible the intention of the parties. An e-mail response is sufficient so long as it is agreed upon by the parties.

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

2-8-17

STATE OF NEW JERSEY

In the Matter of Matthew Kurland, Judiciary	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2016-3099 OAL Docket No. CSV 4006-16	:	

ISSUED: FEB 24 2017 (WR)

The appeal of Matthew Kurland, a Judiciary Clerk 3 with the Judiciary, Somerset/Hunterdon/Warren Vicinage, of his removal, effective February 22, 2016, on charges, was heard by Administrative Law Judge Kimberly Moss (ALJ), who rendered her initial decision on December 12, 2016, modifying the removal to a four-month suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on February 8, 2017, accepted and adopted the findings of fact but did not adopt the ALJ's recommendation to modify the removal to a four-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority issued the appellant a Final Notice of Disciplinary Action (FNDA) removing him, effective February 22, 2016, on charges of conduct unbecoming a public employee, neglect of duty and violation of Judiciary policies and directives regarding jury service. Specifically, the appointing authority alleged that on August 3, 2015, the appellant reported for jury duty from 11:00 a.m. until 11:30 a.m. and failed to follow its procedures regarding jury duty by not contacting his supervisor after he was released with instructions on what to do. It further asserted that he was untruthful about his whereabouts after he was released and did not report back to work. Upon the appellant's appeal, the matter was

transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In the initial decision, the ALJ set forth the testimony of the witnesses, including, in part, Christine Murzdeck, the Jury Manager for Hunterdon County; Bonnie Russo, an Administrative Supervisor for the Judiciary in Somerset County; and Carolyn Shefsky, the Finance Division Manager of the Vicinage. Murzdeck testified that when a Judiciary employee is summoned for jury duty, he must inform the supervisor that he was excused and ask for instructions on whether he should return to work. Russo, the appellant's immediate supervisor, testified that the appellant was entrusted with public monies received from payments such as child support fees and that integrity was important to the appellant's job because if mistakes are made and not acknowledged, a person's civil rights could be violated. She stated that the appellant acknowledged receipt of the Judiciary's jury duty policy annually in 2012, 2013 and 2014 and it requires an employee to notify his supervisor of the time he was required to be present and when he was released from jury duty. She stated that employees ordinarily return to work after being excused from jury duty before 3:30 p.m. Russo testified that she received a voicemail from the appellant at 8:06 a.m. on August 3, 2015, informing her that he had reported for jury duty and would call later. However, he did not contact her the rest of the day. The following day she asked the appellant about his jury service. He initially told her that he was there all day, but later said that his jury service lasted from 11:00 a.m. to 12:30 p.m., failing to tell her that he was actually released at 11:30 a.m. Russo further testified that the appellant told her that he did not return because he did not have a tie and by the time he got one, it was 1:30 p.m. However, the dress code does not mandate that the appellant wear a tie. Further, the appellant told her that he tried to call her, but there was no answer and no voicemail. She stated that when she is unable to answer a call, the call is forwarded to another person, and if that call is unanswered, it goes to her voicemail. Russo testified that the only voicemail she received from the appellant that day was the message that he left in the morning. Shefsky testified that Judiciary employees, such as the appellant, must possess honesty and integrity as they are responsible for processing money. She also testified that at a meeting with the appellant on September 15, 2015, he stated that he was released from jury duty at 12:30 p.m., but then had car trouble so he went home but he did not contact his supervisor.

The appellant testified that he reported for jury duty on August 3, 2015 from 11:00 a.m. to 11:30 a.m. and tried to contact his supervisor after he was released, but the call bounced and nobody answered and the voicemail did not pick up. He stated that after he was released, he had car trouble and went home and did not inform his supervisor that he did not have to report until 11:00 a.m. The appellant did not remember meeting with Shefsky on September 15, 2015 and telling her he went home after he was released because he had car trouble. Finally, he testified that he did not review the jury service policy prior to reporting for jury duty, but did

acknowledge he received it. The ALJ found the testimony of Murzdeck, Russo and Shefsky credible and the appellant's testimony not credible. Based on the foregoing, the ALJ determined that the appointing authority's jury policy requires an employee to contact his supervisor after being released from jury duty. The ALJ found that the appellant was aware of the jury duty policy, but failed to contact his supervisor after being released and instead went home. Finally, the ALJ found that the appellant's duties included collecting payment for child support, fines, filing fees, bail and restitution and that Somerset collected five million dollars in such payments in 2015. As a result, the ALJ upheld all of the charges against the appellant. Observing that the appellant's prior discipline consisted of a written reprimand in 2014, and a four and six working day suspensions in 2015, the ALJ recommended modifying the removal to a four-month suspension.

In its exceptions, the appointing authority argues that the concept of progressive discipline is not appropriate in this matter as the appellant's conduct was sufficiently egregious to justify his removal. In this regard, the appointing authority asserts that the appellant's breach of trust warrants his removal and the four-month suspension imposed by the ALJ fails to account for the grave effect that the appellant's dishonesty has on the Judiciary. It contends that the appellant's position requires absolute honesty and integrity. In reply, the appellant argues that the ALJ correctly imposed a four-month suspension because, while his conduct was improper, his removal was not warranted given his lack of a significant disciplinary record.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's finding of facts as contained in the initial decision and her upholding of the charges against the appellant. In this regard, there is no dispute that the appellant was required to contact his supervisor after he was released from jury duty, failed to do so and was untruthful about the reasons why he did not return to work.

With regard to the penalty, the Commission's review is *de novo*. Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway,* 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not "a fixed and immutable rule to be followed without question." *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, the appellant's removal from employment is appropriate regardless of his prior disciplinary history. Nevertheless, the Commission notes its concern with the appellant's prior disciplinary history due to its relative proximity in time to the events underlying the present matter. The record reflects that the appellant was issued a Preliminary Notice of Disciplinary Action (PNDA) on October 10, 2015 for the events underlying this matter and received the FNDA on February 22, 2016. Regarding his six working day suspension for an incident that occurred on February 26, 2015, he

received a PNDA on June 6, 2015, and a FNDA on July 10, 2015.[1] The fact that the appellant's conduct on August 3, 2015 occurred only a few weeks after receiving his six working day suspension demonstrates his inability to control his behavior and a blatant disregard for the appointing authority's procedures.

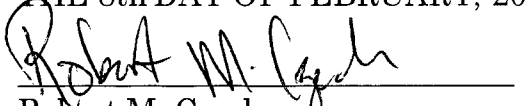
Moreover, the record is clear that the appellant lied to his employer multiple times. He lied to his supervisor that he was at jury duty all day, but later told her that he served only from 11:00 a.m. to 12:30 p.m. However, the record demonstrates that he was released from jury duty at 11:30 a.m. The appellant further lied when he told Russo that he did not return to work because he was not wearing a tie, but told Shefsky at the September 15, 2015 meeting that he did not return to work because he was having car trouble. Finally, the appellant did not call his supervisor after he was released from jury duty and lied when he told his employer that he had called in after being released. The appellant's dishonesty, coupled with the fact that he did not report for work when it appears that he otherwise should have, is by itself troubling. More importantly, the appellant's position is one of trust, as it includes receiving payment monies where even an honest mistake could result in serious consequences. The appellant's dishonesty breached this trust and renders him unfit for his position. Accordingly, the foregoing circumstances provide a sufficient basis to uphold the removal.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Matthew Kurland.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 8th DAY OF FEBRUARY, 2017



Robert M. Czech
Chairperson
Civil Service Commission

[1] For his four working day suspension for an incident that occurred on February 10, 2015, he received a Minor Disciplinary Action on April 9, 2015 and a Final Notice of Minor Disciplinary Action on May 20, 2015.

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT.NO. CSV 04006-16
AGENCY DKT. NO. 2016-~~4051~~ 3099

IN THE MATTER OF MATTHEW KURLAND, SUPERIOR COURT OF NEW JERSEY SOMERSET/ HUNTERDON/ WARREN VICINAGE,

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Francine Ehert, Union Representative appearing pursuant to N.J.A.C. 1:1-5.4(b)(2) on behalf of appellant

Susanna J. Morris, Esq., for Respondent, (New Jersey Courts)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Record Closed: November 21, 2016 Decided: December 12, 2016

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Matthew Kurland (Kurland or appellant), appeals his removal by respondent, Superior Court of New Jersey Somerset/Hunterdon/Warren Vicinage (Somerset or respondent), on charges of conduct unbecoming an employee, neglect of duty, and other sufficient cause, violation of judiciary policies and directives of jury service by the New Jersey Judiciary. At issue is whether Kurland engaged in the

alleged conduct, and, if so, whether it constitutes conduct unbecoming an employee, neglect of duty, and other sufficient cause violation of judiciary policies and directives of jury service by the New Jersey Judiciary that warrants removal.

On October 20, 2016, Somerset served Kurland with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on January 7, 2016. A Final Notice of Disciplinary Action dated February 22, 2016, sustaining charges of conduct unbecoming an employee, neglect of duty, and other sufficient cause violation of judiciary policies and directives of jury service by the New Jersey Judiciary.

Following Kurland's appeal to the Civil Service Commission the matter was transmitted to Office of Administrative Law (OAL). The appeal was filed with the OAL on March 14, 2016. A hearing was held on October 25, 2016. Respondent's closing brief was received on November 18, 2016. Appellant's closing brief was received on November 21, 2016, at which time the record closed.

FACTUAL DISCUSSION

I **FIND** the following stipulated **FACTS**:

1. Matthew Kurland was hired on July 16, 2012, by the State of New Jersey Judiciary, Somerset, Hunterdon, Warren Vicinage, as a Judiciary Clerk 3, and was assigned to the Finance Division.
2. As of August 3, 2015, Bonnie Russo, an Administrative Supervisor 1 was Mr. Kurland's direct Supervisor.
3. The Hunterdon Vicinage issued a Juror Summons to Mr. Kurland for August 3, 2015.
4. At 8:06 a.m., on August 3, 2015, Mr. Kurland telephoned Mr. Russo, and left a voice message advising that he had been selected for jury duty.
5. The Hunterdon Vicinage Jury Management instructed Mr. Kurland to report for jury duty at 11:00 a.m. on August 3, 2015.
6. The Hunterdon Vicinage Jury Management released Mr. Kurland and the other jurors, who had been summoned, at 11:30 a.m. on August 3, 2015.

7. Mr. Kurland's prior disciplinary record is as follows:

a. Written Reprimand, dated December 11, 2014, for violation of N.J.A.C. 4A:2-2.3(a) 1. Inefficiency and failure to perform; and 7. Neglect of duty.

b. Four-day suspension, dated May 30, 2015, for violation of N.J.A.C. 4A:2-2.3 (a) 1. Inefficiency and failure to perform; 7. Neglect of duty; and 11. Other sufficient cause – violation of the Code of Conduct for Judiciary Employees, Canon 1B – Performance of Duties.

c. Six-day suspension, dated July 10, 2015, for violation of N.J.A.C. 4A:2-2.3(a); 6. Conduct unbecoming a public employee; and 11. Other sufficient cause – violation of the Code of Conduct for Judiciary Employees, Canon 1B, and Violation of the Judiciary's Workplace Violence Policy

TESTIMONY

Christine Murzdeck

Christine Murzdeck is employed by the New Jersey State Judiciary as the Jury manager for Hunterdon County. Her job includes creating jury pools, summoned jurors qualifying jurors among other duties. A jury summons was sent to Kurland notifying him to report for jury duty on August 3, 2015. The notice states to call prior to the date of appearance. Kurland was instructed to report for jury duty on August 3, 2015 at 11:00 a.m. Kurland reported for jury duty at 10:44 a.m. The jurors were dismissed at 11:30 a.m. on August 3, 2015. When the jurors are released the time system automatically list the time released as 4:00 p.m.

When a judiciary employee is excused from jury duty, they must contact their supervisor to inform the supervisor that they were excused and ask for instructions whether they should come back to work.

Bonnie Russo

Bonnie Russo (Russo) works for the New Jersey State Judiciary in Somerset in the finance central fee office as the Administrative Supervisor. She supervised six employees. They are entrusted with public monies received from payments such as child support and fees. The payments are reconciled and processed and the money is deposited. Her supervisor is Cathy Tauriello (Tauriello). The vicinage division manager is Caroline Shefsky (Shefsky). Somerset County is in vicinage thirteen along with Hunterdon and Warren Counties. Judiciary Clerk 3's are the majority of the employees she supervises. The work hours are 8:30 a.m. to 4:30 p.m.

Kurland was one of the people Russo supervised. She began supervising Kurland in August 2014 at that time she was the Acting Administrative Supervisor. She prepared Kurland's annual performance advisory in 2015. The expectations for his performance were: responsibility, time management, customer service, communication, initiative, job knowledge, integrity and organization. Integrity was important because if mistakes are made and not acknowledged a person's civil right could be violated. For example, a bail payment not being acknowledged could lead to someone staying in jail. If a mistake is made it must be brought to Russo's attention as soon as possible. Russo went over the performance advisory with Kurland and he was given a copy. Kurland did not ask any questions regarding the performance advisory.

The Judiciary has a jury duty policy (R-8). The jury policy is acknowledged by employees annually. Kurland acknowledged receipt of the jury policy in 2012, 2013 and 2014. The jury policy is not discussed at orientation. The policy requires the employee to bring the summons to his supervisor upon receipt and notify the supervisor if they have to report to jury duty. The employee has to notify the supervisor of the time they are required to be present and when they are released. Ordinarily employees return to work after being excused from jury duty before 3:30 p.m.

In June 2015 Kurland informed Russo that he had jury duty in August 2015. Russo made the time keeper, Barbara Bolick (Bolick) aware of Kurland's jury duty. She

did not discuss the jury duty policy with Kurland at that time. On July 30, 2015, Kurland stated that he would hang out at the Hunterdon County central office until he was selected for a trial. Russo told Kurland that employees were not allowed to work while on jury duty. She did not review the other jury duty requirements with Kurland at that time because she believed that he knew the jury duty requirements and he stated that he would call her the morning of August 3, 2015.

On August 3, 2015, Russo received a voicemail from Kurland stating that he had to go in for jury duty and he would call later. The message was left at 8:06 a.m. Russo contacted Bolick to inform her that Kurland was called in for jury duty. Kurland did not contact Russo for the rest of that day. On August 4, 2015, Kurland provided her with a jury service letter. Russo forwarded the letter to Bolick, who requested the exact time of Kurland's jury service. Russo asked Kurland about his jury service. Initially he said he was there all day. Then he said his jury service began at 11:00 a.m. He later stated that his jury service was from 11:00 a.m. to 12:30 p.m. He stated that he did not return to work because he was not dressed appropriately because he did not have a tie, although the dress code is business casual. There would not have been any problem with Kurland coming into work without a tie after his jury duty concluded. He stated that by the time he went to get the tie it was 1:30 p.m. Kurland did not tell Russo that he was released from jury duty at 11:30 a.m. Kurland stated that he tried to call Russo but there was no answer or voicemail. When Russo is away from her desk her calls go to another person in her department. If that person does not answer, the calls go to Russo's voicemail. Russo did not receive any messages that Kurland called her on August 3, 2015 other than the message that was left at 8:06 a.m. stating that he had to go in for jury duty and he would call later. After this conversation Russo became concerned that Kurland's was not being honest and forthright. She contacted Cathy Toriello regarding her concerns with Kurland's honesty.

Rachel Morejon

Rachel Morejon is employed by the New Jersey State Judiciary as the Human Resources (HR) division manager for vicinage thirteen. When a Judiciary employee

has jury duty, a person in the HR division does the timekeeping in the ECATS system for the employee.

After an employee serves jury duty, he notifies HR. HR then asks how many hours of jury duty did the employee serve. HR would have to unlock ECATS to allow an employee to put in his jury service hours as opposed to HR putting in his jury service hours.

Carolyn Shefsky

Shefsky is the Finance Division Manager of the thirteenth Vicinage of New Jersey Superior Court. The financial division is responsible for all of the finances in the vicinage. In the Somerset office there were 31,000 transactions in 2015 covering payments for child support, bail, fines, filing fees and restitution. Somerset collected five million dollars in 2015. The Judiciary Clerk 3's (JC3) collect the monies at the payment window. The JC3's must have honesty integrity and accuracy. If the JC3 makes a mistake, he must advise the supervisor.

Shefsky was advised on August 4, 2015 that Kurland had called in on August 3, 2015 to advise Russo that he had to serve jury duty that day. He called in the morning. He did not call again on August 3, 2015. He came to work on August 4, 2015. She learned that Kurland initially tried to give the impression that he had jury duty all day. Kurland did not follow the jury duty policy. Shefsky was concerned that Kurland tried to deceive Russo and he did not follow the Judiciary jury duty policy. Kurland was told that the matter was being investigated on September 15, 2015 in a meeting with Taurillo, Shefsky, Kurland and Kurland's union representative. At that meeting Kurland stated that he called his supervisor to tell her that he had jury duty. He reported for jury duty at 11:00 a.m. and was released at 12:30 p.m. He stated that he had car trouble and went home. He stated that he was not aware of the jury duty policy. He did not call his supervisor after he was released from jury duty.

After the meeting Shefsky believed that Kurland was not truthful. She recommended immediate discipline. A notice of immediate suspension was personally given to Kurland on October 16, 2015. Kurland's immediate suspension was upheld by the trial court administrator.

Matthew Kurland

Kurland is a JC3 in vicinage thirteen. He has collected funds for Somerset County vicinage for the past three years. He received a notice to report for jury duty which he gave to Russo, who had been his supervisor for fourteen months. Russo did not review the Judiciary jury duty policy with him at that time. He called Hunterdon County jury control to find out if he had to report for jury duty on August 3, 2015. He was informed that he had to report for jury duty. Kurland left a voice mail for Russo stating that he had to report for Judiciary jury duty. However, he did not tell her that he had to report at 11:00 a.m. At no point did he tell Russo that he might visit a colleague in Hunterdon County. He did not review the jury policy prior to reporting for jury duty, although he had acknowledged receiving the Judiciary jury duty policy.

Kurland reported for jury duty in Hunterdon County on August 3, 2015 at 11:00 a.m. He was released at 11:30 a.m. He tried to call Russo but the phone call bounced, no one answered and voice mail did not pick up the call. He had car trouble and went home.

On August 4, 2015, Kurland reported for work. He gave Russo the jury service paperwork. Two hours later Russo asked him about the actual hours her served of jury duty. He stated that he was there from 11:00 a.m. to 12:30 p.m., this included travel time. He told Russo that he did not have a tie with him and that is why he did not go back to work. On his previous jobs he did not have to report back to work after being released from jury duty. Kurland does not remember the September 15, 2015 meeting with Shesky, Taurilleo, himself and his union representative. He does not remember telling Shefsky that he had car trouble and that is why he did not return to work.

Kurland had received the Judiciary jury duty policy in 2012, 2013 and 2014. He received the Notice for jury duty in June 2015. He never reviewed the Judiciary jury duty policy prior to serving jury duty on August 3, 2015 although it was available on his computer.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant, the resolution of the charges against Kurland requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-522 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Murzdeck, Russo, Morejon and Shefsky to be credible. Murzdeck and Morejon concisely testified as to jury duty procedure for Judicial employees. Russo credibility testified that Kurland gave her different accounts of his jury service and did not call her after he was released from jury service. Shefsky was clear regarding the meeting that took place between her Taurillo, Kurland and his representative on September 15, 2015.

I do not find Kurland to be credible. His testimony regarding calling Russo after he was released from jury duty is contradicted by Russo's testimony. In addition he stated that he had car trouble but he does not remember telling this to Shefsky. He does not remember meeting with Shefsky, Taurillo and his union representative. He never reviewed the Judiciary jury duty policy although he acknowledged receiving it on three occasions and it was available on his computer.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following additional **FINDINGS** of **FACTS**.

Kurland received the Judiciary jury duty policy in 2012, 2013 and 2014. Kurland did not inform Somerset that he was scheduled to appear for jury duty at 11:00 a.m. on August 3, 2015. He left a message stating that he had to report for jury duty. Once he was released from jury duty at 11:30 a.m. on August 3, 2015, he did not contact Russo or anyone at Somerset. Instead, he went home. The Judiciary jury duty policy for Judiciary employees states that when an employee is excused from jury duty they must contact their supervisor and ask for instructions as to whether they should come back to work.

On August 4, 2015, Kurland provided Russo with a jury service letter which Russo forwarded to Bolick. Bolick requested that Russo determine the exact time of Russo's jury service. Russo asked Kurland later that day what was the exact time of his jury service . He initially told her all day. He then told her he reported at 11:00 a.m. He finally told her that he had jury service from 11:00 a.m. to 12:30 p.m. He told her that he did not return to work because he was not wearing a tie. Kurland would have been allowed to work without having a tie. Russo became concerned that Kurland was not being truthful and contacted Taurillo.

On September 15, 2015, a meeting was held with Taurillo, Shefsky, Kurland and Kurland's union representative. At that meeting Kurland stated that he called his supervisor to tell her that he had jury duty. He reported for jury duty at 11:00 a.m. and

was released at 12:30 p.m. He stated that he had car trouble and went home. He stated that he was not aware of the Judiciary jury duty policy. Kurland did not call his supervisor after he was released from jury duty.

The job duties of a JC3 in Somerset included collecting money at the payment window. The payments are for child support, bail, fines filing fees and restitution. Somerset collected five million dollars in 2015.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause violation of judiciary policies and directives of jury service by the New Jersey Judiciary are **SUSTAINED**.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

"Unbecoming conduct" is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

In this matter the charges against Kurland are merged. He acknowledged receipt of the Judiciary jury duty policy on three different occasions in 2012, 2013 and 2014. He failed to inform Russo that he was required to report to jury duty at 11:00 a.m. He initially told Russo on August 4, 2014 that his jury duty service was all day. When pressed he stated that he reported at 11:00 a.m. When further pressed he stated that his jury duty service ended at 12:30 p.m. when it actually ended at 11:30 a.m. He did not contact Russo when his jury service ended, and did not return to work that day. The Judiciary jury duty service policy states that once an employee is released from jury duty service, they are to contact their supervisor to determine whether they should report back to work. Kurland did not follow the policy.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In this case Kurland's conduct was conduct unbecoming a public employee, neglect of duty, and other sufficient cause violation of the jury duty policy and he initially attempted to cover up the violation. During his conversation with Russo on August 4, 2015, he eventually told her close to the accurate hours of his jury service.

Kurland's prior disciplines include a written reprimand, in December 2014, for inefficiency and failure to perform and neglect of duty. A four-day suspension in May 2015, for inefficiency, failure to perform, neglect of duty; and other sufficient cause – violation of the Code of Conduct for Judiciary Employees, Canon 1B – Performance of Duties. A six-day suspension in July 2015, for conduct unbecoming a public employee and other sufficient cause – violation of the Code of Conduct for Judiciary Employees, Canon 1B, and Violation of the Judiciary's Workplace Violence Policy.

Removal is not an appropriate discipline in this matter. Although Kurland's prior disciplines show a pattern of actions requiring discipline from December 2014 to July 2015 the longest suspension he received is a six day suspension. In this instance, the appropriate discipline for Kurland is a four month suspension.

Under the circumstances, major discipline is appropriate; I **CONCLUDE** that the penalty of removal is not appropriate and modify the penalty to a four month suspension.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of respondent to remove appellant, Matthew Kurland from employment is **REVERSED**. It is further **ORDERED** that Kurland be suspended for four months and be reinstated to his position as a JC3 and awarded back pay. The amount of back pay shall be mitigated in accordance with guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

December 12, 2014
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: December 12, 2016

Date Mailed to Parties: DEC 14 2016

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WITNESSES

For Appellant

Matthew Kurland

For Respondent

Christine Murzdeck
Bonnie Russo
Rachel Morejon
Carolyn Shefsky

EXHIBITS

For Appellant

None

For Respondent

R-1 Juror Summons of Matthew Kurland
R-2 Email Dated August 3, 2015 from Michael Brougham to Christine Murzdeck
R-3 Jury Pool Attendance Sheet Dated August 3, 2015
R-4 Jury Service Letter Dated August 3, 2016
R-5 Not in Evidence
R-6 2015 Annual Performance Advisory for Matthew Kurland
R-7 Not in Evidence
R-8 Judiciary Juror Service Policy Dated September 12, 2003
R-9 Judiciary Learning Management System Learning Transcript for Matthew Kurland
R-10 Vicinage 13 Financial Division Organizational Chart

R-11 Email from Bonnie Russo to Cathy Tauriello and Cathy Shefsky Dated August 3, 2015

R-12 Not in Evidence

R-13 Immediate Notice of Suspension without Pay Dated October 16, 2015

R-14 Not in Evidence

R-15 Preliminary Notice of Disciplinary Action Dated October 20, 2015

R-16 Final Notice Of Disciplinary Action Dated February 22, 2016

R-17 Not in Evidence

R-18 Not in Evidence

R-19 Not in Evidence

R-20 Not in Evidence

R-21 Not in Evidence

R-22 Notice of Meeting held on September 15, 2015 with Matthew Kurland, Cathy Tauriello and Carolyn Shefsky

R-23 Not in Evidence

2-8-17

STATE OF NEW JERSEY

In the Matter of Yin Matteo
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2016-4338
OAL DKT. NO. CSV 09073-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 09073-16
AGENCY DKT. NO. 2016-4338

IN THE MATTER OF YIN MATTEO,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Jeffrey M. Russo, Esq., for appellant, Yin Matteo (Russo Law Offices, LLC, attorneys)

Lauren Zarrillo, Deputy Attorney General, for respondent, Department of Human Services, Hunterdon Developmental Center (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: January 9, 2017 Decided: January 18, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on June 17, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 18, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/19/17

Date Mailed to Parties: 1/19/17

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on January 9, 2017

J-1 Record
OAL 1/9/17

OAL DKT. NO. CSV 09073-2016S
AGENCY DKT. NO. 2016-4338

IN THE MATTER OF
YIN MATTEO

AND

SETTLEMENT AGREEMENT

DEPARTMENT OF HUMAN SERVICES, HUNTERDON DEVELOPMENTAL CENTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 5/31/16 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C.4A:2-2.3(a)6	Removal	10/22/15
2. A.O. 4.08 C3.1	Removal	10/22/15
3. A.O. 4.08 C5.1	Removal	10/22/15
4. A.O. 4.08 C11.1	Removal	10/22/15
5. N.J.A.C.4A:2-2.3(a)12	Removal	10/22/15

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: Since 10/22/15.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: NONE.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Yin Matteo withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that: the following result will occur with regard to each charge:

Charge	Disposition
1. Appellant and Respondent resolve this matter by General Resignation pursuant to N.J.A.C. 4:2-6.3.	
2. Appellant agrees not to seek or accept employment with the Department of Human Services at any time in the future.	
3.	
4.	

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Yin Matteo's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

or admission of guilt or wrongdoing

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, ~~any workers compensation~~ or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

- Nothing contained herein shall impact or be construed as adversely affecting the Appellants workers compensation medical treatmen or claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/9/17
DATE

DATE

1/9/17
DATE

ON BEHALF OF Yin Ma M.D.

1/9/17
DATE

ON BEHALF OF H.D.C.

CERTIFICATION

I, Yin Matteo, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/9/17 _____ Yin Matteo _____

DATE

2-8-17

STATE OF NEW JERSEY

In the Matter of Christopher Morris
Essex County,
Department of Health and Rehabilitation

CSC DKT. NO. 2016-4180
OAL DKT. NO. CSV 08426-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08426-16
CSC DKT. NO. 2016-4180

IN THE MATTER OF CHRISTOPHER MORRIS, ESSEX COUNTY, DEPARTMENT OF HEALTH AND REHABILITATION.

Luretha M. Stribling, Esq., for appellant Christopher Morris

Courtney M. Gaccione, County Counsel, for respondent Essex County Department of Health and Rehabilitation (Joseph N. DiVincenzo, Jr., Essex County Executive)

Record Closed: January 4, 2017 Decided: January 4, 2017

BEFORE **MUMTAZ BARI-BROWN,** ALJ t/a:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on June 6, 2016, for determination as a contested case. The parties reached an amicable resolution of the matter, and submitted a Stipulation of Settlement and General Release indicating the terms thereof, which is attached and

fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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.

January 4, 2016
DATE

MUMTAZ BARI-BROWN, ALJ t/a

Date Received at Agency:

1-11-17

Date Mailed to Parties: JAN 11 2017

dlc

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
OFFICE OF THE COUNTY COUNSEL
HALL OF RECORDS-ROOM 535
NEWARK, NEW JERSEY 07102
(973) 621-2703
Attorney for County of Essex

	:OFFICE OF ADMINISTRATIVE LAW
IN THE MATTER OF THE DISCIPLINARY ACTION AGAINST CHRISTOPHER MORRIS	: :OAL DOCKET NO. CSV 08426-16 : STIPULATION OF SETTLEMENT : AND GENERAL RELEASE :

It is hereby stipulated and agreed by and between the parties hereto that the above-captioned matter be and same is hereby settled upon the following terms and conditions:

1. The employee hereby acknowledges the disciplinary charges as specified in the Preliminary Notice of Disciplinary Action dated May 4, 2015, the Supplemental Preliminary Notice of Disciplinary Action dated August 24, 2015 and the Final Notice of Disciplinary Action dated May 19, 2016, which were duly served upon employee in accordance with Civil Service Rules.

2. Employee agrees to submit a letter of resignation in good standing effective August 25, 2015. Employee's personnel records shall reflect that he resigned in good standing from the Essex County Hospital Center effective August 25, 2105.

3. Employee agrees to withdraw the within appeal pending before the Office of Administrative Law, as well as the pending Request for Interim Relief pending before the

New Jersey Civil Service Commission and the Tort Claim Notice served on the County of Essex dated October 29, 2015. Notice of the withdrawal of the actions set forth above shall be provided to counsel for the Employer within 30 days of the full execution of the within Settlement Agreement and General Release ("Agreement"). Moreover, the employee agrees that he will not seek future employment with the Essex County Hospital Center or with any County of Essex Department or Division.

4. It is understood and agreed that any payment under this Agreement is made conditional upon receipt by the Employer of a fully executed original of this Agreement. It is agreed that the total monetary payment to be made under this Agreement to the employee and employee's counsel equals $18,535.55 inclusive of all counsel fees ("the Settlement Amount"). Employee agrees that he has been compensated for any and all outstanding accrued time including, but not limited to, holidays, sick days and vacation days. Said payment shall be payable as per the terms of the Agreement and is intended by the mutual agreement of the Parties to be full compensation for all claims and potential claims, including, but not limited to, claims for counsel fees and expenses. The employer has not made, and does not make, any representations as to the tax consequences of any payment hereunder or the allocation of these monies between the employee and his counsel. It is specifically understood and agreed that the amount paid under this settlement agreement includes all counsel fees and costs to which employee and/or his attorneys may be entitled, and the amount is specifically intended to be inclusive of all counsel fees and costs. Employee and his counsel represent that they have agreed to this settlement and have acknowledged that the amount to be paid under this agreement is the full and final settlement payment inclusive of any claims for attorneys' fees that they have or may have. Employee agrees that he will be responsible for the payment of all applicable state, federal and local taxes with respect to the payments under this Agreement and will assume full liability with respect to same.

5. Employee further agrees that in the event the Internal Revenue Service or any other taxing authority deems any tax, interest, penalties, or other amounts to be due with respect to this settlement payment and/or the issuance of the Form 1099s or the Form W-2, he will fully indemnify and hold harmless the employer for any sums that may be owed.

6. The Employee and the County agree that the terms and conditions of this Stipulation of Settlement and General Release and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public, as permitted by law, unless compelled to do so by judicial process. However, the employee may make disclosures to the members of his immediate family, his attorney, his union representative and as may be required by his accountant in connection with the discharge of the latter's duties in preparation of tax returns or financial statements. Employee's failure to comply with the confidentiality provisions of this program may result in the dissolution of the within Stipulation of Settlement and General Release at the sole and exclusive option of the County.

7. In the event that an action is brought by the County for the employee's breach of the confidentiality conditions set forth in paragraph six (6) hereof, in addition to such other relief as is appropriate, the County shall be entitled to reasonable attorney's fees and costs.

8. This Stipulation of Settlement and General Release is not, and shall not in any way be construed, as an admission by the County of any violation of any federal or state

constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person. The parties have entered into this Stipulation of Settlement and General Release for the sole purpose of resolving employee's claims concerning his employment with the County, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

9. Employee agrees that this Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration for the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims she has now to any relief of any kind from the County, whether or not he now knows about those rights, arising out of his employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of

covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all possible claims against the County from the beginning of employee's employment with the County to the date this Stipulation of Settlement and General Release is executed by employee.

10. Employee represents and certifies that he has carefully read and fully understands all of the provision of and effects of this Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with his attorney. Further, the employee certifies that he is voluntarily entering into this Stipulation of Settlement and General Release and that the County has not made any representations concerning their terms of effects of this Stipulation of Settlement and General Release, other than those contained herein.

11. This Stipulation of Settlement shall neither set a precedent nor constitute a past practice.

12. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this

Stipulation of Settlement and General Release, shall, in all cases, be construed as a whole, according to its fair meaning and not strictly for or against any of the parties.

13. Should any provision of this Stipulation of Settlement and General Release be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

14. This Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by the County Administrator.

15. The foregoing constitutes a full and final disposition of this matter.

16. Employee shall not institute an appeal in this matter.

17. Employee shall not request relief with respect to this matter, in any forum, beyond that which is contained herein.

18. This Stipulation of Settlement may not be modified, altered, or changed, except upon the prior, express written consent of both parties.

19. This Stipulation of Settlement and General Release is the result of negotiations with employee and employee's counsel, with whom employee had an opportunity to consult prior to signing same.

DATED: 1/4/17

COURTNEY M. GACCIONE
COUNTY COUNSEL

DATED: 1/4/17

RALPH CALLELLA
COUNTY ADMINISTRATOR

DATED: 1/4/17

FRANK DELGAUDIO
DIRECTOR
ESSEX COUNTY HOSPITAL CENTER

DATED: 12/15/16

CHRISTOPHER MORRIS
EMPLOYEE

DATED: 12/15/16

LURETHA STRIBLING, ESQ.
ATTORNEY FOR EMPLOYEE

2-8-17

STATE OF NEW JERSEY

In the Matter of Sule Oladapo
New Lisbon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-1706
OAL DKT. NO. CSV 18267-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18267-16

AGENCY DKT. NO. 2017-1706

IN THE MATTER OF SULE OLADAPO,
DEPARTMENT OF HUMAN SERVICES,
NEW LISBON DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: October 25, 2016 Decided: January 25, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Sule Oladapo, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 5, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 25, 2017 _____
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 1/25/17

Date Mailed to Parties: 1/25/17

/nd

OAL DKT. NO. CSV 18267-2016
AGENCY DKT. NO. ~~20~~ = 2017-1706.

SETTLEMENT AGREEMENT

IN THE MATTER OF

Sule Oladapo

AND

New Lisbon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated November 17, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. B.2.1, B.3.1, C.8.1, D.7.1,	Removal	8/22/2016
2. E.1.1, Conduct unbecoming		
3. + Other sufficient charge		
4.		
5.		

B. The Appellant Sule Oladapo withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.		
2.	General Resignation agreed to pursuant NJAC 4A:2-6.3 (b)	
3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 8/22/2016 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

_____ resignation in good standing

__✓__ general resignation

which shall be effective 8/22/2016 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Service, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant agrees not to seek or accept employment with the Department of Human Services in the future.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

01-24-2017
DATE

Appellant

1-24-17
DATE

Respondent

1-24-17
DATE

ON BEHALF OF APPELLANT

1-24-17
DATE

ON BEHALF OF NJDC

CERTIFICATION

I, SULE OLADAPO, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

01 - 24 - 2017
DATE

SULE OLADAPO
NAME

2-8-17

STATE OF NEW JERSEY

In the Matter of Marcel Oliver
New Lisbon Developmental Center,
Department of Human Services

CSC DKT. NO. 2016-774
OAL DKT. NO. CSV 13696-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13696-15

AGENCY DKT. NO. 2016-774

IN THE MATTER OF MARCEL OLIVER,
DEPARTMENT OF HUMAN SERVICES,
NEW LISBON DEVELOPMENTAL CENTER.

Michael C. Mormando, Esq., for appellant, Marcel Oliver (Attorneys Hartman, Chartered, attorneys)

Robert M. Strang, Deputy Attorney General, for respondent, Department of Human Services, New Lisbon Developmental Center (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: January 10, 2017 Decided: January 18, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on September 3, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 18, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/19/17

Date Mailed to Parties: 1/19/17

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on January 10, 2017

J-1 Record OAL 1/10/17

OAL DKT. NO. CSV 13696-2015S
AGENCY DKT. NO. CSC Dkt. 2016-774

SETTLEMENT AGREEMENT

IN THE MATTER OF

MARCEL OLIVER, Appellant,

AND

DEPT. OF HUMAN SERVICES, NEW LISBON DEVELOPMENTAL CENTER, Respondent.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated July 22, 2015 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	B.2.1 Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which could result in danger to persons or property.	Removal	2/20/14
2.	C.5.2 Inappropriate physical contact, or mistreatment of a patient, client, resident, or employee.	Removal	2/20/14
3.	C.8.2 Falsification, Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.	Removal	2/20/14
4.	C.16.1 Notoriously disgraceful conduct.	Removal	2/20/14
5.	D.7.1 Violation of administrative procedures and/or regulations involving safety and security.	Removal	2/20/14
6.	N.J.A.C. 4A:2-2.3(a) 6, Conduct unbecoming a public employee.	Removal	2/20/14

7.	N.J.A.C. 4A:2-2.3(a) 7, Neglect of duty.	Removal	2/20/14
8.	N.J.A.C. 4A:2-2.3(a) 12, Other sufficient cause.	Removal	2/20/14

B. The Appellant Marcel Oliver withdraws his appeal and request for hearing, and the Respondent Appointing Authority Department of Human Services, New Lisbon Developmental Center agrees that the following result will occur with regard to each charge as a resolution to the disciplinary appeal:

Charge	Disposition
All Charges Listed in Section A above	General Resignation, per N.J.A.C. 4A:2-6.3(b).

C. The parties have agreed to the following:

The Appellant agrees to a General Resignation, pursuant to N.J.A.C. 4A:2-6.3(b) which shall be effective December 13, 2014. Appellant agrees not to seek or accept employment with the New Jersey Department of Human Services at any time in the future.

1. To date, appellant has been suspended without pay since February 20, 2014 based upon the above charges.

2. The total backpay to be paid by the appointing authority to the Appellant is as follows: for the period from February 20, 2014 to December 12, 2014, plus any accrued vacation time earned during this time period.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services, New Lisbon Developmental Center (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Respondent regarding Appellant will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any other award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages

and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/10/17
DATE

Appellant

1/10/17
DATE

Michael C. Mormando
ON BEHALF OF Appellant

1/10/17
DATE

Respondent

1/10/17
DATE

ON BEHALF OF Respondent

CERTIFICATION

I, Marcel Oliver, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/10/17
DATE

MARCEL OLIVER

2-8-17

STATE OF NEW JERSEY

In the Matter of Frederick Taylor
Department of Children and Families,
Mercer South

CSC DKT. NO. 2017-114
OAL DKT. NO. CSV 10622-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10622-16

AGENCY DKT. NO. 2017-114

IN THE MATTER OF FREDERICK TAYLOR, DEPARTMENT OF CHILDREN AND FAMILIES, MERCER SOUTH.

Frederick Taylor, appellant, pro se

Douglas Banks, Assistant Director, for respondent, Department of Children and Families, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 29, 2016 Decided: January 5, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on July 18, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 5, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 1/6/17

Date Mailed to Parties: 1/6/17

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on December 29, 2016

OAL DKT. NO. CSV 10622-16
AGENCY DKT. NO. 2017-114
SETTLEMENT AGREEMENT

IN THE MATTER OF
Frederick Taylor

AND
Department of Children and Families

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Release at the end of the WTP** dated 7/5/16 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.		
2.		
3.		
4.		
5.		

B. The Appellant Frederick Taylor withdraws his appeal and request for a hearing, and the Respondent Department of Children and Families agrees that the following result will occur: Appellant will receive a General Resignation with the condition the Appellant agrees not to apply for, accept, and or seek future employment with the Department of Children and Families or any of its contracted service providers.

OAL DKT. NO. CSV 10622-2016S

Charge	Disposition	New Penalty
1.		
2.		
3.		
4.		
5.		

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows:

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Children and Families (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Children and Families will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of

New Jersey, the Department of Children and Families, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 10622-2016S

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12-28-16
DATE

Appellant

12-28-16
DATE

Respondent

DATE

ON BEHALF OF

DATE

ON BEHALF OF

OAL DKT. NO. CSV 10622-2016S

CERTIFICATION

I, Frederick Taylor, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12-28-16
DATE

Frederick Taylor
NAME

2-8-17

STATE OF NEW JERSEY

In the Matter of Catina Wainwright
NJ Veterans Memorial Home,
Vineland

CSC DKT. NO. 2016-1377
OAL DKT. NO. CSV 18552-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 8, 2017 BW

The Civil Service Commission, at its meeting of February 8, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18552-16

AGENCY DKT. NO. 2016-1377

IN THE MATTER OF CATINA WAINWRIGHT,
NJ VETERANS MEMORIAL HOME, VINELAND.

Richard Robinson, Esq., for appellant

Susan C. Sautner, Esq., Employee Relations Administrator for New Jersey Veterans Memorial Home, Vineland, Department of Military and Veterans Affairs, respondent, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: January 19, 2017 Decided: January 24, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Catina Wainwright, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 9, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 24, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 1/25/17

Date Mailed to Parties: 1/25/17

/nd

OAL DKT. NO. CSV 18552-2016
AGENCY DKT. NO. 2016-1377

SETTLEMENT AGREEMENT

IN THE MATTER OF

CARINA WAINWRIGHT

AND

NJDMAVA - NJ Veterans Home @ Vineland

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 9/18/2015 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. AD 230.05(a) 4	Removal	9/18/2015
2. NJAC 4A:2-2.3(a) 4		
3.		
4.		
5.		

B. The Appellant Carina Wainwright withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority NJDMAVA agrees that the following result will occur with regard to each charge:

OAL DKT. NO. CSV 14852-2016

Charge	Disposition	New Penalty
1. NJAC 4A:2-2.3(a)4	30 day RECORD Suspension	
2. NJAC 4A:2-2.3(a)4	RETURN TO WORK	
3.	16 MONTHS BACK PAY due to APPELLANT	
4.		
5.		

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, appellant has served a total of 16 MONTHS _____ ~~days~~ without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 16 MONTHS. _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Leave of absence from work w/o pay for personal reasons.

4. (Strike if not applicable) The Appellant agrees to a

N/A _____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. NJDMAVA (Respondent Appointing Authority) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority NJDMAVA will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Cathina Wainwright's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, NJDMAVA, its employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act,

the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/19/2017
DATE

Catina Wagner
Appellant

1/19/2017
DATE

Respondent
NJDMAVA
NJ Veterans Home @ Vineland

1/19/2017
DATE

ON BEHALF OF ~~Appellant~~

DATE

ON BEHALF OF

OAL DKT. NO. CSV 18552-2016

CERTIFICATION

I, Catina Wainwright, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/19/2017
DATE

Catina Wainwright
NAME Catina Wainwright

2-8-17

STATE OF NEW JERSEY

In the Matter of Melissa Walker
City of Hoboken,
Department of Transportation and
Parking

CSC DKT. NO. 2016-4074
OAL DKT. NO. CSV 08262-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEB 10 2017 **BW**

The appeal of Melissa Walker, Parking Enforcement Officer, City of Hoboken, Department of Transportation and Parking, of her removal effective February 16, 2016, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on December 16, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on February 8, 2017, accepted the recommendation of the ALJ to uphold the removal but did not uphold the recommendation to reverse the immediate suspension and award back pay.

DISCUSSION

In the initial decision, the ALJ stated that based on the appointing authority's due process violations in implementing the appellant's immediate suspension, the appellant should receive back pay for the period of that suspension, namely from February 16, 2016 through May 9, 2016. The Commission does not agree. Initially, the Commission notes that challenges to procedural deficiencies at the departmental level are most appropriately dealt with via a petition for interim relief at the time of the alleged violations pursuant to *N.J.A.C.* 4A:2-1.2. The Commission has no record of any such petition by the appellant in this matter.

Moreover, it is well settled that procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the Office of Administrative Law. *See Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971). In this case, the procedural deficiencies cannot be considered significantly prejudicial as the appellant has had a full opportunity to appeal the discipline taken and challenge her inappropriate actions at her *de novo* hearing. Accordingly, the Commission does not adopt that portion of the ALJ's decision awarding back pay to the appellant for the period of the immediate suspension. However, the appointing authority is cautioned to meticulously follow the disciplinary procedures outlined in *N.J.A.C.* 4A:2, *et seq.* in the future.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Melissa Walker. Additionally, the Commission does not award the appellant any back pay for the period of her immediate suspension.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 8, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.CSV 08262-16
AGENCY REF. NO. 2016-4074

IN THE MATTER OF MELISSA WALKER, CITY OF HOBOKEN, DEPARTMENT OF TRANSPORTATION & PARKING.

Merick H. Limsky, Esq., for appellant Melissa Walker (Limsky Mitolo, attorneys)

Patricia C. Melia, Esq., for respondent City of Hoboken (Weiner Lesniak, attorneys)

Record Closed: November 18, 2016 Decided: December 16, 2016

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Melissa Walker (appellant) appeals from the disciplinary action taken by her employer the City of Hoboken Department of Transportation and Parking (City) to remove her from her position as a Parking Enforcement Officer (PEO) on charges of failure to perform her duties in violation of N.J.A.C. 4A:2-2.3(a)(1); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The charges relate directly or indirectly to the responsibility of a PEO to notify a supervisor if,

while on the job, twenty minutes passes without the PEO being able to issue a parking ticket (Twenty Minute Policy). Appellant denies the charges and claims that she did her job, that she was given a neighborhood in which it was difficult to find parking violators, and that when she called in consistent with policy, supervisors were not available.

Petitioner appealed her termination under cover of May 13, 2016. The matter was transmitted to the Office of Administrative Law (OAL), on June 1, 2016, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On June 16, 2016, I held a case management conference telephonically with the parties in which discovery and hearing dates were discussed.

The plenary hearings were held on October 6 and 18, 2016. Post-hearing briefs were permitted and the record closed on November 18, 2016, with receipt of the written closing statements as the final submissions.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Robert Orsini has been employed by the City for fourteen years, including his current position as a PEO Supervisor which he assumed after being a PEO. The City employs eighteen PEOs over whom he shares responsibility with Hector Mojito. Together, they assign the routes and check on the productivity of the PEOs. Orsini stated that he drives around the City approximately once per month in order to observe the PEOs and garner more information on productivity issues. He also observes construction and other impacts to the City's parking situation, which he generally described as over-crowded. In addition to meter violations, it is common in the City for cars to be parked in cross-walks, loading zones and in front of fire hydrants, as well as double-parked.

Orsini remarked that in the City, it was practically unheard of for a PEO to go twenty (20) minutes without finding a parking violation, with the possible exception of areas where construction was being undertaken. There was no quota system in place mandating the writing of parking tickets for PEOs but there was a policy that a PEO who goes more than twenty minutes without finding a parking violation is to contact their supervisor. From there, it is up to the supervisor to decide whether to relocate the PEO or provide other suggestions. This Twenty Minute Policy was acknowledged as only a verbal policy until May 23, 2014, after which it was reduced to writing and acknowledged by appellant and all other PEOs. Orsini also explained that PEOs each received a meal break as part of the bargaining agreement and the City Handbook but that otherwise PEOs were expected to call in a "10-7" or "taking a 15" for permission to take a short break.

On February 2, 2016, Orsini was riding in his truck on Washington Street in a section that had been assigned to appellant. He stated that he could not find her on either side of her assigned route. He said that he then entered the McDonald's on Washington and Third Streets where he found appellant sitting in the back. Walker advised him that she had texted Mojito about the lack of violations she found so far that morning, consistent with the Twenty Minute Policy, which Orsini acknowledged would be consistent with that policy. Nevertheless, she had not called in to request a break and there were sure to be plenty of those other types of parking violations on her route if she looked for them.

One of the responsibilities of the PEO supervisors is to review the parking ticket reports for each PEO. Any time a PEO writes up a violation, it is recorded from their ticket instrument electronically to the City. In reviewing the reports from the prior day, Orsini or Mojito would look for any large gaps between tickets. He explained how to read the automated Parking Authority Ticketing System that produces daily Detailed Statistics by Officer Reports. These itemized the large gaps of time when appellant wrote no tickets on her route. For example, on February 2, 2016, Orsini noted that the report indicated that appellant wrote zero (0) tickets between the start of her shift at 9:00 a.m. and 11:03 a.m. Yet, she wrote seven (7) tickets between 11:03 a.m. and 11:44 a.m. that day. Moreover, appellant issued ten (10) and fourteen (14) tickets on

February 5 and 6 between 9 and 11 respectively, consistent with Orsini's comment that the City has insufficient parking capacity and that it is hard not to find a parking violation and contrary to appellant's testimony that meters are unexpired first thing in the morning.

Additional large gaps between tickets issued by appellant were revealed on those Detailed Statistics reports. I am omitting any of the gaps that were minor violations of the Twenty Minute Policy or accepted as her lunch break. Included, but not limited to, the violations were –

February 2[1]	1:00 – 2:53	1 hour, 53 minutes
	3:20 – 4:55	1 hour, 25 minutes
February 3	10:13 – 12:09	1 hours, 56 minutes
	1:26 – 4:50	3 hour, 24 minutes
February 5	10:04 – 11:05	1 hour, 1 minute
	11:11 – 1:07	0 hour, 56 minutes (net lunch)
	1:16 – 2:40	1 hour, 24 minutes
	3:16 – 4:56	1 hour, 40 minutes
February 6	9:49 – 11:54	2 hours, 5 minutes
	1:25 – 4:34	3 hours, 9 minutes

Orsini confirmed even on cross-examination that a PEO can always reach a dispatcher or the customer service desk if s/he cannot reach a supervisor to report a lack of violations in the area. The Supervisors and PEOs can communicate through City-issued hand-held, two-way radios, by calling dispatch or the office, or by calling or texting the supervisor's cell phones, which numbers the PEOs are given. He clarified that the review of the electronic violation reports was one of his regular duties as the morning supervisor.

[1] There is a gap of 76 minutes noted between 11:44 a.m. and 1:00 p.m. but I am assuming that was appellant's lunch time. Similarly, on February 6, appellant had an 82 minute gap that included her lunch hour. It was also ambiguous as to how respondent allowed for a PEO walking back to office to punch in and out for lunch. Therefore I will not find that these two gaps were not violations of the Twenty Minute Policy.

On cross-examination, however, Orsini also seemed confused about whether PEOs were entitled to a fifteen-minute break or whether they had to ask permission for such. He agreed that there was no requirement for a PEO to ask a supervisor for permission to stop in a store for a bottle of water or other quick break. Orsini also admitted that he had been told by appellant that she was subject to anxiety attacks but she had never asked for any accommodation as a result of that or any other condition. With respect to McDonald's, he stated that there had been a prior occasion when he was eating there and appellant later came in and sat down with him but that was not what happened on February 2.

Because the allegations herein all concern just one week, Orsini was asked on cross-examination as to appellant's job performance for the prior eight months after she returned from a suspension. He stated that her performance was fine. He acknowledged that he did not sit down with her or ask her why this particular week turned out to be problematic.

Hector Mojica also testified for the City. He is also a PEO Supervisor, having served in that capacity for the last five years after being a PEO for approximately twelve years. He also described the supervisory responsibilities as including roll call, uniforms, route assignments and productivity reports. In dividing those responsibilities, Mojica stated that Orsini currently is more on the outside overseeing the routes and also handles the productivity reports. Mojica addresses larger issues and projects such as temporary street closings and parking limitations for construction, paving, parades and other similar obstructions.

Mojica also explained the call-in process for a PEO who needs to report under the Twenty Minute Policy and the break protocols. To his knowledge, appellant had not been experiencing productivity issues and violations of the Twenty Minute Policy prior to this week in February.[2] On cross-examination, Mojica agreed that appellant's text to

[2] On the record, I sustained an objection to the introduction through Mojica by the City of additional Detailed Ticket Statistics on appellant's work performance between May 2015 and February 2016 on several grounds. It had not been produced prior to the first hearing date; it was not relevant to the specification of charges; it had not been provided to appellant's counsel; and it was intended to try to rehabilitate the City's own witness.

him on the morning of February 2 was a proper means of complying with the Policy. He did not follow up with appellant beyond his reply text of "OK," nor did he pass along the communication to Orsini. Mojica was of the opinion that appellant should have known to look for violations beyond expired meters without any reminders from one of the supervisors. Mojica reiterated that a "10-7" text or call was required before a PEO could take a short break pursuant to written and verbal protocols.

Appellant testified on her own behalf at this hearing. She has been a PEO with the City for five years. As established on the record, appellant was on a suspension previously for violations of the Twenty Minute Policy and returned to work in May 2015. Appellant did not contest the applicability of the Twenty Minute Policy but stated that she would always contact one of the supervisors when she could not locate violations but that she either did not get an answer or she would be advised to just "stay on your route." The supervisors would never come out to the route to suggest modifications.

With respect to the allegation that Orsini found her in the back of the McDonald's on February 2, appellant explained that she went in there to get a cup of water because she was feeling light-headed. She had completed her route initially after the start of her shift at 9:00 a.m. and had trouble finding any meters that were not paid up. Appellant described her route that day as the east side only of Washington Street between Observer and 8th streets. And yet, appellant said that she stopped when she got to 2nd Street.[3] She recalled that Orsini came in, ordered food and sat himself down. She then joined him. She denied being in the back of the McDonald's when he arrived.

Appellant testified that for the other gaps in productivity specified in these charges that she always contacted or attempted to contact a supervisor but that they are either unavailable or unhelpful. She also disagreed that the break practice is to always call in a "10-7." Appellant asserted that all PEOs will just jump off their routes for a bathroom or to buy water without calling it in each time.

[3] I will take judicial notice of the fact that, as I placed on the oral record at the hearing, the McDonald's is on the corner of Washington and 3rd Street.

On February 16, 2016, appellant reported for and completed her normal shift. As she was punching out, Orsini told her that she was not to return to work and that Director Morgan wanted her suspended. She thinks she got a paper copy of the original Preliminary Notice of Disciplinary Action (PNDA) that day. She could not recall how she received the Amended PNDA.

On cross examination, appellant explained that the police officers often ticketed double-parked cars before the PEOs could get to them. She took photos of their tickets but no longer has the same cell phone with which she took them. Sometimes, she would also be competing with another PEO on the same routes. Appellant said that it was possible that she had been assigned both sides of Washington Street that day. It was hard to recall as it was many months ago and her route often changed. Once again, she denied sitting in McDonald's eating any food. She was not feeling well and the agency has proof on file that she is on some anti-anxiety medications.

I gave appellant every opportunity through my own questioning to explain whether she had personal circumstances that particular week in February 2016 that would mitigate her lack of job productivity. Appellant insisted that she did not take time out of her shift to go home or to her mother's house in order to check in on her children or to take a nap. I **FIND** that appellant was not a credible witness. She did not produce any corroborating witnesses or documentary records such as cell phone messages or call history to buttress her statements that she constantly reported gaps in her productivity along her route or that all the meters were paid up. Clearly, her own productivity statistics indicates that she finds plenty of violations when she is attending to her route.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div.

1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954).

Based upon the facts set forth above, I **FIND** that the respondent's witnesses were more credible and their testimony was entitled to more weight than the denials of appellant, at least with respect to her job duties, her understanding of those duties, and the productivity of her assignment. Appellant's protestations that her assignment route and blocks made it difficult for her to find parking violations were not credible. Setting aside the very generic statement of respondent's witnesses that one could easily find parking violations in Hoboken, what is more objectively telling is that appellant had no difficulty finding lots of parking violations on most days, or even during the portions of the days that are at issue herein. Appellant was writing up violations just minutes apart when she was in fact writing up violations. If her route was the problem because of handicapped exceptions or police officers beating her to cars double-parked, it would have been expected that her days would more consistently fall short. Instead, it was just particular, discrete periods of days that were charged based upon the objective time logs. Moreover, as demonstrated above, the gaps were very large indeed.

I **CONCLUDE** that appellant was not credible with her excuses for the large gaps of time when she claimed she tried to call her supervisor but would otherwise just keep walking around. The preponderance of the credible evidence demonstrates that it was more likely than not that appellant went off her route during the various large gaps. I cannot determine on the basis of the present record where she went but I also need not so determine.

Having concluded that substantial violations of the Twenty Minute Policy occurred, I must determine the proper penalty or discipline to be assessed. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the

philosophy that an appointing authority has a responsibility to encourage the development of an employee's potential.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

In this case, I **CONCLUDE** that the City has supported its case for removal because of appellant's prior violation of the Twenty Minute Policy. In my own prior Initial Decision, appellant was advised:

> Subject to final agency action and any appeals, appellant should be entitled to return to and be retrained for her employment as a PEO for the City of Hoboken. Thereafter, appellant is fully forewarned that she must comply with all work policies on meals, breaks, leave time, and the Twenty Minute Policy if she wants to keep her public employment.

Nevertheless, I advised counsel to brief the issue of her suspension without pay prior to her departmental hearing and formal removal because it appeared to violate generally accepted regulatory and constitutional provisions. The United States Supreme Court in Gilbert v. Homar, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997), clarified that the process due an employee faced with termination is distinguishable from the process due an employee faced with suspension without pay. Gilbert clarified that when an employee is suspended without pay, due process requirements differ because there are times when a "State must act quickly, or where it would be impractical to provide predeprivation process." 520 U.S. at 930. 117 S. Ct. at 1812, 138 L. Ed. 2d at 127. The Court in Gilbert directed that the Mathews-Eldridge balancing test be applied when determining if a pre-suspension hearing is or was necessary by looking first to "the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the

procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.'" 520 U.S. at 931-32, 117 S. Ct. at 1812, 138 L. Ed. 2d at 128 (quoting Mathews v. Eldridge, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)). Considered in that balancing test are facts such as how long the employee will go without pay before being heard; if the position the employee holds coupled with the reason for suspension requires immediate action; or whether reasonable grounds exist to support the suspension, such as, as in Gilbert, supra, a felony indictment of a police officer. Gilbert, supra, 520 U.S. at 932-36, 117 S. Ct. at 1813-15, 138 L. Ed. 2d at 128-31.

In Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985), the U.S. Supreme Court concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing. Stressing that the pre-termination hearing "should be an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," id., at 545-546, the Court held that pre-termination process need only include oral or written notice of the charges, an explanation of the employer's evidence, and an opportunity for the employee to tell his side of the story, id., at 546. In the course of its assessment of the governmental interest in immediate termination of a tenured employee, the Court stated that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." Id., at 544-545 (emphasis added; footnote omitted). Thus, Loudermill spoke specifically to the necessity of providing the employee with some opportunity for a hearing prior to the employee's suspension without pay.

These principles are reflected in N.J.A.C. 4A:2-2.5(b) where an employer is expected to determine that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that the immediate suspension is necessary to maintain safety, health, order or effective direction of public services, prior to suspending the employee without pay. Furthermore, the regulations and the case law stand for the proposition that the requirements of N.J.A.C. 4A:2-2.5(b), such as informal

notice and an opportunity to respond, must be met before an employee is suspended without pay.

Here, respondent did not even try to comply with these due process provisions. It merely issued an Amended Preliminary Notice of Disciplinary Action and stuck in there the words it thought would be talismanic for taking away of petitioner's rights and pay until the departmental hearing could be undertaken. The balancing test set forth above does not support this after-thought. Petitioner is a Parking Enforcement Officer; she had no quota of parking tickets she must issue; she had many weeks and months of compliance with her job duties; she has no impact on the safety or health of the City's residents; and she is not employed in a highly skilled or law enforcement position, or one with access to sensitive information. Petitioner issues tickets for parking and other non-moving street violations that provided revenues to the respondent.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the City of Hoboken, Department of Transportation and Parking against appellant Melissa Walker for her termination is hereby **AFFIRMED**. It is further **ORDERED** that the immediate suspension imposed by the City of Hoboken, Department of Transportation and Parking against appellant Melissa Walker on February 18, 2016, retroactive to February 16, 2016, is hereby **REVERSED** and she shall be paid back pay for the period February 16, 2016, through May 9, 2016.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

December 16, 2016

DATE

Gail M Cookson

GAIL M. COOKSON, ALJ

Date Received at Agency: December 16, 2016

Laura Sanders

Date Mailed to Parties: December 19, 2016

~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Melissa Walker

For Respondent:

Robert Orsini

Hector Mojica

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

None.

For Respondent:

R-1 City of Hoboken Employee Handbook Acknowledgement

R-2 Memo from Director John Morgan to Melissa Walker Re: 20 minute policy, dated May 23, 2014

R-3 Collective Bargaining Agreement

R-4 Break Policy

R-5 Initial Decision, dated April 13, 2015

R-6 Amended Preliminary Notice of Disciplinary Action, dated February 18, 2016, with attachment

R-6a Preliminary Notice of Disciplinary Action, dated February 16, 2016, with attachment

R-7 Text Message, dated February 2, 2016

R-8 Written Statement Robert Orsini, dated February 2, 2016

R-9 Email from Orsini to Dedio, dated February 2, 2016

R-10 Detailed Ticket Statistics

R-11 Final Notice of Disciplinary Action, dated May 9, 2016

R-12 [not in evidence]

2-22-17

STATE OF NEW JERSEY

In the Matter of Raymond Acevedo
Newark Public School District

CSC DKT. NO. 2016-2349
OAL DKT. NO. CSV 01877-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 27 2017 BW

The appeal of Raymond Acevedo, Security Guard, Newark School District, removal effective October 15, 2015, on charges, was heard by Administrative Law Judge Margaret M. Monaco, who rendered her initial decision on January 26, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. However, given the serious ramifications of the types of misconduct demonstrated in this matter, the Commission recommends that the appointing authority provide clear guidance and/or in-service training on proper techniques to handle such situations.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Raymond Acevedo.

Re: Raymond Acevedo

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01877-16
AGENCY DKT. NO. 2016-2349

IN THE MATTER OF RAYMOND ACEVEDO,
NEWARK PUBLIC SCHOOL DISTRICT.

Arnold Shep Cohen, Esq., for appellant Raymond Acevedo (Law Offices of Oxfeld Cohen, attorneys)

Bernard Mercado, Associate Counsel, for respondent Newark Public School District (Charlotte Hitchcock, General Counsel, attorney)

Record Closed: October 27, 2016 Decided: January 26, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Appellant Raymond Acevedo appeals his removal from employment as a security guard with respondent, the Newark Public School District (the District). The District took this action based upon charges of conduct unbecoming a public employee and other sufficient cause stemming from an incident that occurred on October 2, 2015, involving appellant and a seventh-grade student.

PROCEDURAL HISTORY

The District issued a Preliminary Notice of Disciplinary Action dated October 14, 2015, informing appellant of the charges of conduct unbecoming a public employee and other sufficient cause issued against him. Following a departmental hearing on October 21, 2015, the District issued a Final Notice of Disciplinary Action dated December 14, 2015, sustaining the charges and providing for appellant's removal from employment effective October 15, 2015. Appellant filed an appeal, and the Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on August 8, 2016. After the conclusion of the testimony, the record remained open for the receipt of post-hearing submissions. The parties filed briefs in support of their respective positions, and the record closed upon receipt of the last submission.

FACTUAL DISCUSSION AND FINDINGS

At the hearing, the District presented three witnesses: Eric Ingold, B.T., and Ginamarie Mignone. Appellant testified on his own behalf and offered testimony by Aquilla Williams. Certain facts surrounding this matter are largely undisputed. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following preliminary **FACTS**.

Appellant has been employed by the District as a ten-month security guard since March 1997. Appellant is approximately 5' 8" tall and weighs over 200 pounds.

At the time of the incident the student involved, B.T., was twelve years of age and in the seventh grade. B.T. is approximately five feet tall and weighs approximately 100 pounds.

Eric Ingold is employed by the District as the executive director of the Office of Safety. He has been employed by the District for two and one-half years and previously worked for the Newark Police Department for approximately twenty years. His duties as

executive director include overseeing the day-to-day operations of the Office of Safety, including security guards.

Ginamarie Mignone is the principal at the school in issue. Part of her duties entails supervising security staff at the school.

This matter involves an incident that occurred on October 2, 2015, between appellant and B.T. shortly before the end of the school day. Appellant and another security guard, Sean Jacobs, were working at the school on that date.

A video from a surveillance camera at the school was introduced at the hearing. (R-1.) The video, which has no audio, shows the second-floor hallway of the school on October 2, 2015. Lockers and doorways are situated on the left side of the hallway, and closer to the view of the camera is a water fountain. On the right side of hallway, from the view closest to the camera, are two doors that lead to a stairwell. The next doorway area leads into the boys' bathroom, but the bathroom door cannot be seen in the video. Other doorways are situated farther down on the left side of the hallway. Under the surveillance camera, a portion of two steps can be seen. Throughout the video students can be seen at lockers, moving about the hallway and in and out of the doors that presumably lead to classrooms.

Appellant can first be seen at approximately 2:46:36 p.m. He enters the hallway from the area under the surveillance camera. Appellant is seen interacting with a student at a locker and then walking down the hallway away from the camera. Another security guard can also be seen walking down the hallway toward the camera, interacting with students and then walking down the hallway in the other direction. The other security guard enters a doorway on the left (at approximately 2:49:24 p.m.) and appellant enters the same doorway less than five seconds later (at approximately 2:49:28 p.m.). Appellant exits the room a few minutes later (at approximately 2:51:20 p.m.) and walks down the hallway away from the camera. The other security guard exits the room less than a minute after appellant (at approximately 2:51:51 p.m.) and can be seen holding the door open. B.T. exits the room and runs down the hallway toward the camera for approximately three seconds (from approximately 2:52:02 p.m. to

approximately 2:52:05 p.m.). The other security guard runs down the hallway after B.T. and approaches B.T. by the wall near the bathroom entrance. B.T.'s back is against the wall and the security guard stands in front of B.T. and blocks his path without touching B.T. with his hands. The guard appears to be talking to B.T. Appellant can be seen walking in the direction of the security guard and B.T. The security guard calmly walks with B.T. down the hallway to the area where appellant is situated. At approximately 2:52:18 p.m., appellant can be seen with his right arm around the front of B.T.'s neck and throat area. Appellant's right hand is holding onto B.T.'s shoulder. Because other students are in the area, appellant cannot be clearly seen putting B.T. in this position. Appellant walks B.T. down the hallway in this position until they reach the entrance to the bathroom. During this period, B.T. is not touching appellant's arm or body. B.T. can be seen flailing his right arm in the air while his left arm is holding a white piece of paper. At the area just outside the bathroom entrance, appellant can be seen turning around and pushing B.T. face first into the bathroom entrance while continuing to hold B.T. around the neck. Another student enters the bathroom before appellant and B.T. (at approximately 2:52:27 p.m.). B.T. and appellant enter the bathroom entrance approximately two seconds after that student (at approximately 2:52:29 p.m.), and the student exits out of the bathroom less than five seconds later (at approximately 2:52:32 p.m.). When appellant and B.T. are in the bathroom, the other security guard, who is holding a backpack and clothing, enters the entrance to the bathroom (at approximately 2:52:47 p.m.); the guard exits the bathroom less than a minute later (at approximately 2:53:07 p.m.); and the guard then stands in the doorway area of the bathroom, essentially blocking any entrance, for less than one minute (to approximately 2:53:48 p.m.). The guard then reenters the bathroom, and appellant exits the bathroom approximately one minute later (at approximately 2:54:33 p.m.), followed by the other security guard and then B.T. B.T. is no longer being held, and they all leave the area together through the doors to the stairwell.

Incidents that occur at the school between a security guard and a student must be documented by security staff in an Incident Report. Appellant authored an Incident Report (R-3) in which he described the events that occurred as follows:

> On Friday time 2:50 p.m. I . . . and Security Jacobs was call[ed] to go to Room 311 & 310. When I arrived I saw [B.T.] pushing against Jacobs and yelling out loud and was out of control so I tried to calm him down so he ran out of the class. Jacobs ran after him and caught up with him in the hallway near the boys['] bathroom. [B.T.] started to run again. I grab[bed] [B.T.] and walk[ed] him to the nearest room which was the bathroom for his own safety. Also Jacob[s] walk[ed] in the bathroom. We tried to calm him down again. [B.T.] told Jacob[s] to go get his book bag so Jacobs went to get his book bag. [B.T.] pushed me and tried[ ] to run out. I push[ed] him back and told him to calm down. At that time Security Jacobs return[ed] to the bathroom with his book bag and his sweater[;] [he] return[ed] back in one minute. We got a radio call so Jacobs step[ped] out to receive the radio call and return[ed] in the bathroom in a minute. At that time [B.T.] had calm[ed] down and we all left out of the bathroom to the main office.

After being apprised of the incident, Mignone spoke to B.T., appellant, Jacobs, and another student on Monday, October 5, 2015, and documented her interviews in a Report of Incident. (R-5.) Mignone also reviewed the videotape and contacted the Office of Institutional Abuse. The record is bereft of evidence that B.T. sustained injury as a result of the incident. Ingold testified that he saw no documentation that B.T. had been injured and Mignone observed no visible injury to B.T. when she interviewed him on October 5, 2015.

Apart from the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

The Testimony

B.T.

B.T. testified that appellant came to his classroom when it was time to leave school; appellant indicated that B.T. had been called through the main office; and appellant "dragged" B.T. out of the classroom. He described that, while in the hallway, appellant placed him in a headlock and pulled him down the hallway to the bathroom. B.T. stated that he did not like being held in that position, which was uncomfortable, and

B.T. could not breathe. He denied that he made any threats to appellant when appellant was taking him to the bathroom. According to B.T., after appellant took him into the boys' bathroom, appellant placed B.T. against the bathroom wall and punched B.T. three times in the chest. He described appellant's action as a "medium" hit that "hurt." B.T. admitted that, after appellant hit him, B.T. hit or punched appellant back to defend himself. B.T. described that he ran after appellant when appellant was leaving the bathroom and hit appellant in the back for approximately five seconds. The other security guard entered the bathroom and told B.T. to calm down and stop hitting appellant. B.T. informed the other security guard that appellant had hit him.

Eric Ingold

Ingold testified that the use of physical force against a student is only permitted in limited circumstances and, in such cases, only the minimum amount of force needed may be used. He described the importance of security guards acting appropriately for the school environment. Ingold explained that a security guard's actions reflect the actions of all security guards and, if the image or perception of security guards is compromised, this makes the job of security personnel more difficult when having to handle situations in the future. He added that, when a security guard acts inappropriately, it has a negative effect on the school environment and the perception of security personnel.

Ingold's knowledge of the incident is based on his review of the video and reports submitted. He characterized the contact that appellant made with B.T. as an inappropriate "choke-hold." Ingold testified that a security guard is not permitted to grab a student around his/her neck or throat area, which is not safe. He further described that the video did not depict B.T. making any threats, brandishing a weapon, causing a disturbance or taking physical action that would necessitate the use of force. Ingold testified that it was also inappropriate for appellant to walk with B.T. down the hallway while keeping B.T. in the choke-hold around his neck and to take this action in the view of other students who were in the hallway at that time. He stated that under the circumstances it was inappropriate for appellant to take B.T. into the bathroom, which was out of the camera's view. Ingold testified that a security guard is not allowed to

take a student into a bathroom alone, and it is not standard procedure for security to bring a student into the bathroom. He noted that there were other open areas in the hallway, such as the area under the surveillance camera, which would have been a suitable location for dialogue with the student and where the student could have been controlled. Ingold further described that it was not appropriate for appellant to push the bathroom door open with B.T. in front of the door since it exposed the student to injury if someone were walking out of the bathroom at the same time as B.T. was entering with appellant's arm around his neck. With regard to the entire series of events (e.g., the choke-hold, traveling in the hallway, bringing the student in the bathroom), Ingold testified that appellant failed to act appropriately in processing the student, and his actions violated safety procedures and protocols.

Ingold testified that appellant's Incident Report also did not match what Ingold observed on the video. The video did not depict that the student ran again as stated in appellant's report. Appellant's report further did not mention that any physical force had been used. Ingold did not consider the bathroom to be a safe place to put B.T. as stated in appellant's report. He explained that placing a student in a bathroom could be warranted in certain limited circumstances, such as an active-shooter situation.

In his opinion as the executive director of the Office of Safety, the District was justified in taking disciplinary action against appellant. He recommended discipline up to and including termination.

Ginamarie Mignone

Mignone testified that security guards are not permitted to hold a student around the neck or to strike a student. She described the importance for security guards to act in an appropriate manner for the school environment. Mignone explained that staff must model behavior that the school wants the children to portray. Staff must model respect in order to gain the students' respect and, as the school does not want students to use physical force when trying to resolve problems, it expects staff to do the same. Mignone described that when a security guard acts inappropriately, it affects the culture of the school and the way the school is perceived.

Mignone testified that it was inappropriate for appellant to hold B.T. with his arm around B.T.'s neck. She articulated the policy in the building that staff should not put a hand on a student unless the child is endangering himself/herself or others. Based on her review of the videotape, B.T. did not appear to be endangering himself or others. She testified that it also was not appropriate for appellant to walk down the hallway holding B.T. in that manner and to take B.T. into the bathroom alone. Mignone noted that there were available areas other than the bathroom that could have been used, such as the area in the hallway under the surveillance camera. Mignone testified that she wrote in her Report of Incident exactly what appellant told her, during his interview, had occurred. Appellant's version of the incident as recorded in Mignone's report was as follows:

> At approximately 2:45 Acevedo was called to go upstairs to room 310 to get [B.T.] . . . . When Acevedo arrived at the room Mr. Jacobs (security guard) was there trying to talk [B.T.] into leaving the classroom. [B.T.] is yelling and pushing Jacobs. [B.T.] ran into the hallway. Jacobs catches up with him and tries to calm him down. [B.T.] started pushing Acevedo and [B.T.] went into the bathroom. Jacobs and Acevedo follow him. In the bathroom [B.T.] is yelling and Acevedo is trying to calm him down. [B.T.] leaves the bathroom.
>
> [R-5.]

Mignone noted that appellant's version to her differed from what can be seen on the video. Appellant did not mention in his account the need to restrain B.T. or put B.T. in a headlock or put his arm around B.T.'s neck. Appellant also did not mention that he put B.T. in the bathroom and, instead, reported that B.T. ran into the bathroom. During her interview with B.T., he relayed that appellant punched him three times when they were in the bathroom.

Mignone testified that the manner in which appellant processed B.T. violated school policy. She further described that appellant's actions caused disruption to the

operations of the school, and his actions affect the culture and environment of the building, such as the trust that students and/or the community has in school staff.

Raymond Acevedo

Appellant testified that on October 2, 2015, he was initially assigned to the front desk and later assigned to walk the upstairs hallways. He described that a call came over the radio from the office indicating that security was needed to bring B.T. downstairs. Appellant responded to the call, and Jacobs was in the classroom when appellant arrived. According to appellant, B.T. was disruptive, B.T. was yelling and punching Jacobs, and B.T. then ran out of the classroom. Appellant and Jacobs ran after B.T.; Jacobs ran faster than appellant and approached B.T. next to the bathroom; and B.T. and Jacobs then walked down the hallway toward appellant.

Appellant testified that, as B.T. and Jacobs were approaching, appellant noticed that B.T. was getting ready to run again. At that point appellant extended his right arm straight out to stop B.T. He described that B.T. grabbed appellant's arm "real tight" and held it. B.T. was walking backwards, and B.T. turned appellant around, wrapped appellant's arm around B.T.'s upper chest and held appellant's arm around his body. According to appellant, he tried to take his arm away from B.T.'s chest, but B.T. had him off balance, B.T. forcibly held and had control of appellant's arm, and B.T. overpowered him. Appellant did not deny that, at that time, B.T. was not destroying school property, he did not have a weapon, and he was not a physical threat to other students or staff members. As to whether there was any reason to physically restrain a student under these circumstances, appellant responded that if a child is trying to run and could be injured by falling, he is going to stop him, and he stopped B.T. before he had taken off. Appellant denied that he put or had B.T. in a choke-hold, denied that he grasped B.T.'s upper left shoulder while walking down the hallway, and denied that his arm was around B.T.'s neck, stating that it was around B.T.'s chest.

Appellant testified that he went into the bathroom with B.T., believing that it was the safest and nearest area to calm B.T. down and try to talk to him. He reasoned that someone could get hurt if they went down the stairs, so he walked into the bathroom

with B.T. when the bathroom door opened as another student was coming out. Appellant denied that he pushed B.T. against the door to open it. When asked whether other students could have been in the bathroom, so it was not a safe area, appellant responded that it was time to go home. He described that soon afterwards, Jacobs came into the bathroom; B.T. asked Jacobs to get his belongings; and Jacobs left to get them. According to appellant, when he was alone with B.T., B.T. was pushing and punching appellant. Appellant denied that he struck B.T. but admitted that he pushed B.T. back. Subsequently, Jacobs returned with B.T.'s belongings, B.T. calmed down, and they all walked out of the bathroom.

Appellant testified that he had received no physical training from the District since he was hired in 1997, and he was never taught tactics regarding how to handle or respond to unruly children. Appellant admitted his awareness that it was inappropriate to hold a student around the neck, to place a choke-hold on a student, and to punch a student. Appellant testified that he would never place a choke-hold on a student or hurt a child, and denied that he placed or held B.T. in a headlock or punched B.T. Appellant admitted that his job duties include reporting any incidents, and his report did not contain the fact that appellant made physical contact with B.T. As to the statement in his report that B.T. ran again, appellant testified that B.T. was walking fast and getting ready to run. Appellant denied that he told the principal that he and Jacobs followed B.T. into the bathroom. Appellant agreed that, as a security guard, he is responsible for the health, safety and welfare of students under his care, and a security guard must follow the District's rules and regulations and make common-sense and reasonable decisions. Appellant articulated his belief that the actions he took regarding the entire incident were appropriate. He further described that he would have no problem acting in the same manner if the circumstances happened again, for the safety of the student.

Aquilla Williams

Aquilla Williams is employed by the District as a part-time per-diem security guard and was assigned to the school after the incident. According to Williams, she had an incident with B.T.; B.T. said to Williams that he would have her job the same way that he had appellant's job; and Williams was told by other staff not to "mess" with B.T.

because he can do whatever he wants. Williams testified that around November 2015 she also overheard B.T. bragging and laughing with another student that he got appellant fired. She articulated her view that appellant was a good security guard. Williams admitted that she was not working at the school at the time of the October 2, 2015, incident and had no direct knowledge regarding the interaction between appellant and B.T. on that date. She agreed that a security guard is not permitted to punch a student and expressed her view that it would be inappropriate for a security guard to take a student into a bathroom, due to the lack of cameras in the bathrooms. Although Williams expressed that a security guard can grab a child around the neck if necessary to restrain the student, she agreed that there is no need to restrain a student who is not displaying threatening behavior, possessing a weapon, or destroying property.

Analysis of the Testimony

In this matter, the District bears the burden of proving the disciplinary charge against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In undertaking this evaluation, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not

only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence and evaluating the credibility of the witnesses, I found Ingold and Mignone to be forthright and credible witnesses. They presented persuasive testimony vis-à-vis the actions they took and the school's procedures and protocols, coupled with the adverse impact to the school when a security guard acts inappropriately. No evidence suggests that either witness harbored a motive or bias to fabricate their version of the relevant facts. Plainly, on balance, appellant has the greater stake in the outcome of this proceeding since it involves the propriety of his removal from employment.

For her part, Williams had no direct knowledge regarding appellant's encounter with B.T. I further afford limited weight to her testimony recounting what B.T. allegedly said on later occasions, which is plainly hearsay. Indeed, even if B.T. made the alleged statement about getting appellant fired, this does not undermine B.T.'s credibility or

appellant's termination if appellant had taken inappropriate action in connection with dealings with B.T.

Succinctly stated, I found appellant's testimony regarding the events that transpired on October 2, 2015, to be riddled with inconsistencies, lacking internal consistency, inherently improbable, and not "hanging together" with, and discredited and overborne in significant respects by, other evidence in the record. A canvas of the totality of the evidence casts substantial doubt on the accuracy, reliability and believability of appellant's version of the events. I found appellant to be non-responsive to various questions during cross-examination and his rendition could not be reconciled with earlier statements appellant made. For example, at the hearing appellant offered a vastly different account than that portrayed in his Incident Report. In contrast to appellant's testimony and what can be seen on the surveillance video, the report that he authored shortly after the incident stated that B.T. "started to run again" after Jacobs caught up with him near the boys' bathroom. Appellant's Incident Report further omitted any reference to appellant making physical contact with B.T. in the manner captured on the video. And, appellant did not claim in that report that B.T. had punched him in the bathroom or that B.T. had wrapped appellant's arm around B.T. Rather, appellant then reported that he "grab[bed] [B.T.] and walk[ed] him to the nearest room which was the bathroom for his own safety." Appellant's account at the hearing is also irreconcilable with the scenario provided to the principal a few days after the incident. I reject appellant's testimony attempting to sidestep the statements he made during his interview, which was overborne by the testimony of Mignone, whom I found to be forthright and credible. In contrast to appellant's testimony and the surveillance video, during that interview appellant claimed that B.T. "started pushing [him] and [B.T.] went into the bathroom [and] Jacobs and [appellant] follow[ed] him." Further, appellant did not at that time disclose that he used any physical force against B.T. and appellant did not claim that B.T. had pushed or punched him when they were in the bathroom. Although the charges against appellant do not concern the appropriateness of his Incident Report, the inaccuracies and omissions in that report, which mischaracterized the incident as captured on the surveillance video, significantly impair appellant's credibility and raise substantial doubt as to the accuracy, reliability, and believability of

appellant's testimony, including the actions he took when he was not in view of the surveillance camera and alone in the bathroom with B.T.

I further found improbable appellant's assertion that, despite appellant being approximately twice the size of B.T., B.T. overpowered him and forced appellant to wrap his arm around B.T.'s chest, and B.T. continued to overpower appellant and forcibly held appellant's arm around B.T.'s body when they travelled down the hallway and into the bathroom. Apart from this, appellant's version is discredited by the surveillance video. Although appellant claims that B.T. forcibly held appellant's arm around B.T.'s upper chest area, the video shows appellant's arm around B.T.'s neck area and that B.T. is not holding or touching appellant's arm while being held in this position. Appellant is also seen with his hand clamped down on B.T.'s left shoulder while B.T. is flailing his right arm in the air, with his left arm extended outward holding a white piece of paper.

Additionally, appellant's explanation as to why he took B.T. into the bathroom did not make sense. He could not answer how he knew that the boys' bathroom was clear of students and, thus, would be a safe area to process B.T. He did not address why another student exited the bathroom immediately after appellant entered the bathroom with B.T. Further, even if appellant believed the bathroom was empty at the end of the day, his action in taking B.T. into the bathroom, where he reasonably knew that he would be out of the surveillance camera's view, is highly suspect given the other available options that appellant could have used in the hallway, such as the open area near the surveillance camera. Simply put, on balance, I afford more weight to B.T.'s testimony addressing what occurred in the bathroom than the account offered by appellant.

Finally, I afford no weight to appellant's asserted claim regarding the lack of training that he received. In short, it is common sense that it is inappropriate and dangerous to grab and hold a student around the neck or throat area and to punch a student, and appellant acknowledged knowing the inappropriateness of taking these actions.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

When B.T. and Jacobs walked toward the area where appellant was situated, appellant grabbed B.T. from behind his body and had his right arm around B.T.'s neck and under his throat and appellant clamped down and secured his right hand on B.T.'s left shoulder in what Ingold characterized as a choke-hold. At the time appellant took this action, B.T. was not posing a danger to others, did not have a weapon, and was not otherwise destroying property. While holding B.T. in that position, appellant walked with B.T. down the hallway in the view of other students. While continuing to hold B.T. in that position, appellant forced B.T. to enter the boys' bathroom face first through the bathroom door. Appellant intentionally brought B.T. alone into the bathroom, which was not subject to view by the surveillance camera. There were other available areas in the hallway that appellant could have utilized in order to control or calm down B.T., to the extent that such action was necessary. When they were alone in the bathroom, appellant punched B.T. three times.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether appellant is guilty of the charge brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appointing authority may discipline an employee for conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(6) and (12). Although the term "conduct unbecoming a public employee" is not defined in the New Jersey Administrative Code, it has been described as an "elastic" phrase that includes

"'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct need not be predicated upon a violation of the employer's rules or policies and may be based merely upon a violation of the implicit standard of good behavior. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). It has been recognized that a school security guard "holds an important position in the school community" and, "[s]imilar to law enforcement officers, security guards inherit a pedestal posture and are held to a higher standard of conduct than others who do not in their profession have a direct responsibility to uphold the law." Alton v. Newark Bd. of Educ., 92 N.J.A.R.2d (CSV) 478, 480. "The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official," In re Phillips, 117 N.J. 567, 576 (1990), who "must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).

Against this backdrop, and in addition to appellant's claim that B.T. "put himself in a position that looked like a choke hold," which I reject, appellant contends in his brief that he "did not act inappropriately on October 2, 2015, but took appropriate action to quell a disturbance caused by B.T." The crux of appellant's argument is that B.T. was causing a disturbance in the classroom before he is observed on the video; appellant "was trying to quell the disturbance, which began in the classroom"; and appellant "used reasonable force in dealing with a disruptive, unruly student." Simply put, I do not embrace appellant's contentions.

Appellant's reliance on the alleged events in the classroom is misplaced. Apart from the fact that whatever occurred in the classroom hinges solely on appellant's testimony and was not corroborated by any witness or other competent evidence, the basis for appellant's discipline is not predicated on his actions in the classroom but his later alleged misconduct in the hallway. More importantly, any disruption that B.T. may have been causing in the classroom does not serve to justify appellant's actions in the

hallway. At the point appellant employed the tactics he did, no extraordinary circumstances existed, and there was no imminent threat that warranted physical intervention, especially the restraining maneuver around B.T.'s neck. The video shows that immediately before appellant took the actions he did, B.T. was not creating any disturbance in the hallway that would have required appellant to restrain or use any physical force against B.T. He was not posing a danger or threat to any person, destroying any school property, or brandishing a weapon. The only disruptive action that can be seen on the video is when B.T. ran down the hallway for approximately three seconds. However, at the time appellant physically restrained B.T. around his neck, the other security guard had already brought B.T. under control. Further, even if B.T. had been causing a disturbance by trying to run down the hall again as claimed by appellant, any intervention should have been accomplished without the use of physical force. Plainly, appellant could have brought B.T. under control in a manner similar to that previously used by the other security guard, who merely stopped in front of B.T. and blocked his path without touching B.T. with his hands. Instead of employing a similar approach, appellant made unwarranted, unreasonable, and aggressive physical contact with B.T.

In sum, there was no need or justification for appellant to restrain and use physical force against B.T., and it was particularly inappropriate for appellant to grab and hold B.T. around the neck and throat area. Appellant's contact and conduct was an improper, unnecessary, and unreasonable use of force and contravened District policy and protocols. The inappropriateness of appellant's conduct is compounded by the fact that he took the action he did in the presence of several young students. And, no emergency or disturbance existed that required appellant to remove B.T. from the area and place him alone in the bathroom with appellant. Indeed, the video shows that after appellant places his arm around B.T.'s neck, appellant then calmly walks B.T. down the hall without any degree of urgency, and other areas existed in the hallway that could have been used.

I **CONCLUDE** that the District has shouldered its burden of proving, by a preponderance of the credible, competent evidence, that appellant's conduct in connection with his dealings with B.T. was unprofessional and unbecoming a public

employee. Appellant's actions fall significantly short of the type of conduct that the public has the right to expect from a public employee charged with protecting the health and safety of elementary-school students. Appellant should be cognizant of the standard of conduct expected of his position given his lengthy career with the District. Clearly, appellant knew, or reasonably should have known, that it is unacceptable and unbecoming conduct to engage in aggressive physical contact with a student. Appellant's conduct was unwarranted, unjustified, and unreasonable. By engaging in the conduct he did, appellant failed to exercise good judgment and to act in a responsible manner with due regard to the safety of others. He failed to exercise tact and restraint during his encounter with B.T., and appellant conducted himself in a manner that failed to maintain the dignity and integrity of his position. Appellant engaged in conduct in violation of his responsibilities as a school security guard, and such conduct has a tendency to destroy the public's respect for public employees and confidence in the operation of the school. Appellant's behavior also has the likelihood of eroding the students' perception, respect, confidence, and trust in security guards who are there to protect and safeguard their well-being, and adversely impacting the educational environment and the proper operation of the school. Significantly, appellant's actions placed B.T. at risk of harm and could have resulted in injurious consequences.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, supra, 38 N.J. at 522. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. See Henry, supra, 81 N.J. at 580. The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, supra, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable

for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, supra, 192 N.J. at 33. In this regard, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property." Ibid.; see, e.g., Henry, supra, 81 N.J. at 580; Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The courts have also upheld the dismissal of employees for engaging in conduct unbecoming to their position without regard to whether or not the employee had a substantial past disciplinary record. Herrmann, supra, 192 N.J. at 34; see Div. of State Police v. Jiras, 305 N.J. Super. 476 (App. Div. 1997) (upholding dismissal of police officer where the infraction, an assault on a prisoner, was "so serious as to go to the heart of his capacity to function appropriately"). Public-safety concerns may also bear upon the propriety of an employee's removal from employment. See Carter, supra, 191 N.J. at 485.

The evidence reveals that appellant has no prior disciplinary record. However, the seriousness of appellant's infractions is a critical consideration in this case. While the incident involved a short duration of time, this does not mitigate the gravity of appellant's derelictions. Appellant's actions, regardless of how brief, were highly inappropriate and inexcusable, and violated the standards of the proper conduct expected of an elementary-school security guard. Appellant's irresponsible conduct could have resulted in injurious consequences to B.T. and cannot be countenanced. His unauthorized actions were antithetical to the proper functioning of the school, and his failure to safeguard those individuals whom he was charged to protect violated his basic obligations as a school security guard and demonstrates his unfitness to perform those duties. Appellant's failure to recognize or appreciate the inappropriateness and severity of his misconduct serves as further support for the conclusion that appellant is unsuitable for continuation in his position.

Based upon the totality of the circumstances, I **CONCLUDE** that appellant's unbecoming conduct is of a sufficiently egregious nature to warrant his termination notwithstanding the absence of any disciplinary history. I **CONCLUDE** that the District acted appropriately by removing appellant from his position.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee and other sufficient cause be and hereby are **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charges, appellant be and hereby is removed from his employment as a security guard with the District effective October 15, 2015.

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.

January 26 2017
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: January 27, 2017

Date Mailed to Parties: January 27, 2017

jb

APPENDIX

List of Witnesses

For Appellant:

Aquilla Williams

Raymond Acevedo

For Respondent:

Eric Ingold

B.T.

Ginamarie Mignone

List of Exhibits in Evidence

For Appellant:

None

For Respondent:

R-1 Surveillance video

R-2 Surveillance images

R-3 Office of Security Services, Incident Report, by Raymond Acevedo

R-4 Violence, Vandalism and Substance Abuse (VV-SA) Incident Report Form

R-5 Report of Incident dated October 5, 2015

R-6 Preliminary Notice of Disciplinary Action dated October 14, 2015

R-7 Final Notice of Disciplinary Action dated December 14, 2015

R-8 Newark Public Schools Policy, Conduct and Dress Code

2-22-17

STATE OF NEW JERSEY

In the Matter of Richard Alvarez
Town of West New York,
Department of Public Works

CSC DKT. NO. 2017-246
OAL DKT. NO. CSV 11615-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11615-16
AGENCY DKT. No. 2017-246

RICHARD ALVAREZ,
Appellant,
v.

TOWN OF WEST NEW YORK, DEPARTMENT OF PUBLIC WORKS,
Respondent.

Jason Jones, Esq., for appellant (Weissman & Mintz, LLC, attorneys)

Sean Dias, Esq. for respondent (Scarinci Hollenbeck, attorneys)

Record Closed: January 27, 2017 Decided: January 30, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) and filed on August 1, 2016, for determination as a contested case. At the hearing on January 27, 2017, the parties reached an amicable resolution of the matter and executed a Settlement Agreement and Release in the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 30, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

FEB 3 2017

Date Mailed to Parties:

db

2-3-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 27th day of January, 2017 between the Town of West New York (hereinafter referred to as the "Town") and Richard Alvarez (hereinafter referred to as "Alvarez" or the "Employee").

WHEREAS, the Employee is employed with the Department of Public Works; and

WHEREAS, the Town instituted a disciplinary action against Alvarez in the Preliminary Notice of Disciplinary Action dated June 17, 2016 (hereinafter referred to as the "Disciplinary Action"); and

WHEREAS, the Employee requested a departmental hearing on the Disciplinary Action which took place on June 29, 2016; and

WHEREAS, the charges were sustained by the Hearing Officer at the conclusion of the departmental hearing; and

WHEREAS, the Hearing Officer set forth a penalty of one hundred and twenty (120) day suspension on Alvarez; and

WHEREAS, a Final Notice of Disciplinary Action dated July 21, 2016 was issued to the Employee following the outcome of the departmental hearing; and

WHEREAS, Alvarez filed an appeal of the Hearing Officer's determination to the Office of Administrative Law, Docket No.: CSV11615-16; and

WHEREAS, Alvarez and the Town desire to resolve all outstanding issues with respect to the Disciplinary Action.

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the Town and Alvarez agree as follows:

1. TERMS

a. Alvarez and the Town agree that only the charge of Conduct Unbecoming a Public Employee set forth in the Preliminary Notice of Disciplinary Action dated June 17, 2016 and the Final Notice of Disciplinary Action is hereby sustained. As a result, Alvarez and the Town agree that his civil service record will reflect a disciplinary penalty of a ninety (90) working day suspension without pay.

b. Alvarez and the Town will treat the one hundred and twenty (120) day disciplinary suspension to have been served and treated as follows:

i. sixty (60) days shall be treated as time served as a suspension without pay;

ii. twenty-nine (29) days shall be treated as an unpaid leave of absence; and

iii. thirty-one (31) days shall be considered as days for which Alvarez shall be eligible to receive back pay, and said back pay shall be paid within thirty (30) days of the date of the Civil Service Commission's final decision.

c. Except as set forth above in Paragraph 1.b., Alvarez agrees to waive any and all claims to back pay, benefits, and any and all other monetary claims including, but not limited to, attorney's fees with respect to the Disciplinary Action.

2. COMPLETE RELEASE

In further consideration of the settlement hereinabove, the Employee, his heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement,

and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the Town, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character of description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any claim, cause of action, demand or complaint arising out of or under Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA) which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning the public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2.a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the Town or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by Town and/or the Releasees, including reasonable attorney's fees.

3. NON ADMISSION

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the Town, by whom any such obligation or liability is expressly denied.

4. NO DISPARAGING STATEMENTS

The Employee agrees that he will not make any statement that has, have or can be expected to have the effect of disparaging the Town.

5. CONSULTATION WITH ATTORNEY

The Employee has consulted with his Union Representative and the Union's attorney with respect to this Agreement and reviewed with the Union Representative and the Union's attorney all the terms and conditions of this Agreement prior to executing this Agreement.

6. COMPLETE AGREEMENT

This Agreement contains the entire agreement between the Employee and the Town, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Town to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. MODIFICATION

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. SEVERABILITY

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

9. ALVAREZ ATTESTS

The Employee represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Alvarez represents and warrants that he enters into this Agreement

voluntarily, of his own free will, without any pressure or coercion from any person or entity including, but not limited to, the Town and the Releasees.

10. REASONABLE PERIOD OF TIME

The Employee agrees that he has been advised of an opportunity to take a reasonable period of time of at least 21 days to review and consider this Agreement prior to executing this Agreement, but Alvarez may waive this 21 day period by signing the space provided at the end of this Agreement.

11. REVOCATION

The Employee may revoke this Agreement within seven (7) days after the date this Agreement is signed by Alvarez. This revocation must take the form of written notice by Alvarez that Alvarez intends to revoke this Agreement. This revocation must be provided directly to the Town Business Administrator, James Cryan. This seven (7) day revocation period may not be waived by Alvarez.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Richard Alvarez, executed the foregoing Agreement this 27th day of January, 2017.

RICHARD ALVAREZ

Sworn and Subscribed to before me
This 27th day of January, 2017.

Notary Public
State of New Jersey
Jason L. Jones, Esq.

Dated: 1/27/17

UNION REPRESENTATIVE

BY: 1/27/17
Jerelle Blackmon

TOWN OF WEST NEW YORK

BY:
Jose Diaz

Dated: 1/27/17

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 day period referred to in the 10th recital on page 7 of this Agreement.

Date: 1/27/2017

Richard Alvarez
RICHARD ALVAREZ

2-22-17

STATE OF NEW JERSEY

In the Matter of Lakiesha Atkins,
Central Reception and Assignment Facility, Department of Corrections

CSC DKT. NO. 2015-3204
OAL DKT. NO. CSV 9606-15

CSC DKT. NO. 2017-1589
OAL DKT. NO. CSR 18069-16
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. CSV 9606-15
AGENCY DKT. NO. 2015-3204
OAL DKT. NO. CSR 18069-16
(CONSOLIDATED)

IN THE MATTER OF LAKIESHA ATKINS, CENTRAL RECEPTION AND ASSIGNMENT FACILITY, DEPARTMENT OF CORRECTIONS.

Michael Gallagher, PBA Local 105, for appellant Lakiesha Atkins, pursuant to N.J.A.C. 1:1-5.(a)6

Tamara Rudow, Legal Specialist, for Central Reception and Assignment Facility, pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: January 26, 2017 Decided: January 31, 2017

BEFORE **JOSEPH LAVERY**, ALJ t/a:

Lakiesha Atkins, a senior corrections officer with Central Reception and Assignment Facility, appeals her fifteen-working-day suspension (OAL Dkt. No. CSV 9606-15) and her termination effective October 19, 2016 (OAL Dkt. No. CSR 18069-16).

The parties appeared before the undersigned on January 9, 2017, wherein the matter was resolved and the record was held open awaiting receipt of an executed agreement. On January 26, 2017, an executed settlement agreement was received which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 31, 2017
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 1/31/17

Date Mailed to Parties: 2/1/17

mph

SETTLEMENT AGREEMENT

IN THE MATTER OF
LAKIESHA ATKINS,
APPELLANT
AND
CENTRAL RECEPTION AND ASSIGNMENT FACILITY, DEPARTMENT OF CORRECTIONS,
RESPONDENT

OAL DOCKET NO. CSV 9606-2015
CSR 18069-2016 (CONSOLIDATED)
AGENCY DOCKET NO. 2015-3204

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Notice of Final Disciplinary Action, OER No. 2015-01 dated June 11, 2015, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	15 Working Day Suspension	same
2.	HRB 84-17, as amended A1 Absent from work as scheduled without permission and/or without giving proper notice of intended absence		

B. The Notice of Final Disciplinary Action, OER No. 2016-171, dated October 19, 2016 (Date of Incident – August 7, 2016), contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	Removal	TBD

2. HRB 84-17, as amended
A1 Absent from work
as scheduled without
permission and/or
without giving proper
notice of intended absence

C. The Notice of Final Disciplinary Action, OER No. 2016-160, dated October 19, 2016 (Date of Incident – August 13, 2016), contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	Removal	TBD
2.	HRB 84-17, as amended A1 Absent from work as scheduled without permission and/or without giving proper notice of intended absence		

D. The Final Notices of Disciplinary Action were consolidated for disposition. The Appellant withdraws both her appeals and request for hearings, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

	Charge	Disposition
1.	N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	Withdrawn
2.	HRB 84-17, as amended A1 Absent from work as scheduled without permission and/or without giving proper notice of intended absence	Withdrawn
3.	N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	General Resignation

4.	HRB 84-17, as amended A1 Absent from work as scheduled without permission and/or without giving proper notice of intended absence	General Resignation
5.	N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	Withdrawn
6.	HRB 84-17, as amended A1 Absent from work as scheduled without permission and/or without giving proper notice of intended absence	Withdrawn

E. The parties have agreed to the following:

1. To date, Appellant has served 15 days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Approved leave without pay.
4. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
5. As set forth in paragraph E(1), the Appellant shall not serve any working days suspension. The Appellant shall not receive back pay, no counsel fees or any other monetary relief.
6. Appellant agrees not to seek or accept employment with the Department of Corrections at any time.

F. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant

or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

G. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph E(2).

H. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

I. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

J. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 1-13-17

LAKIESHA ATKINS, Appellant

DATE: 1-9-17

MICHAEL GALLAGHER
On Behalf of Appellant

DATE: 1/23/17

TAMARA L. RUDOW,
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, Lakiesha Atkins, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 1-13-17

Lakiesha Atkins

2-22-17

STATE OF NEW JERSEY

In the Matter of Vincenzo Billero Adult Diagnostic and Treatment Center, Department of Corrections	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2015-2612 & 2015-2613	
OAL DKT. NO. CSV 04238-15 & 04235-15 **(Consolidated)**	
	ISSUED: FEB 27 2017 **BW**

The appeals of Vincenzo Billero, Senior Correction Officer, Adult Diagnostic and Treatment Center, Department of Corrections, 10 working day suspension and 30 working day suspension, on charges, were heard by Administrative Law Judge Michael Antoniewicz, who rendered his initial decision on January 17, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified in both matters. The Commission therefore affirms these actions and dismisses the appeals of Vincenzo Billero.

Re: Vincenzo Billero

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)
OAL DKT. NOS. CSV 04235-15
and CSV 04238-15
AGENCY DKT. NOS. 2015-2612
and 2015-2613

IN THE MATTER OF VINCENZO BILLERO, ADULT DIAGNOSTIC AND TREATMENT CENTER, DEPARTMENT OF CORRECTIONS.

Raymond Heck, Union Representative, PBA Local 105, for appellant Vincenzo Billero pursuant to N.J.A.C. 1:1-5.4(a)6

Karen Campbell, Legal Specialist, for respondent Department of Corrections pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: December 2, 2016 Decided: January 17, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Adult Diagnostic and Treatment Center (ADTC), Department of Correction (DOC) suspended appellant for a period of thirty days for conduct unbecoming a public

employee and ten days for insubordination for violating the DOC's Rules and Regulations. Appellant requested a hearing and the Civil Service Commission transmitted the matters to the Office of Administrative Law, where they were filed on March 26, 2015, as a contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. On May 28, 2015, the undersigned issued an Order of Consolidation. The matter was heard on October 11, 2016, and the record closed after submission of post-hearing briefs and any responses on or before December 2, 2016.

TESTIMONY

Senior Correction Officer Angel Santiago

Angel Santiago (Santiago) worked for the DOC for sixteen years. Santiago worked for ADTC since 2001. Santiago was working on November 28, 2014, and worked the shower detail with Peeples. Santiago received a call from the gate and saw Billero at the gate. Billero wanted to be let out. Billero left the area and had a log book with him and it was inside Billero's coat. Santiago found out that Choe's log book was missing.

Correction Officer Daniel Choe

Daniel Choe (Choe) worked for DOC and the ADTC for twelve years. Choe was in charge of the log book. There are eight log books in total. Billero asked Choe for the log book and Choe provided same to him. Choe did not ask Billero why he needed the log book. Choe was aware that he was not permitted to hand out the log book. A corrections officer needed permission from a supervisor in order to obtain log books. Choe was later charged for giving Billero the log book without proper authorization and received a five-day suspension. I **FIND** that Choe was a credible witness. His testimony withstood cross examination, and was basically unchallenged.

Senior Correction Officer Anthony Peeples

Anthony Peeples (Peeples) worked for the DOC for over thirteen years. Peeples worked for ADTC since 2009. Peeples testified that Billero placed the log book in his jacket, which he considered to be an unusual event. In response to seeing this event, Peeples advised Supervisor Schonyers and was told to prepare a report.

Accordingly, Peeples wrote and signed the report. (R-4.) Peeples was also interviewed by Lieutenant Sullivan regarding the incident. I **FIND** that Peeples's testimony was believable.

Sergeant Toren Schonyers

Toren Schonyers (Schonyers) worked as a guard for the DOC for over twenty-five years. Schonyers worked for ADTC as a sergeant. On November 28, 2014, Schonyers was working in the Closed Custody Unit (CCU). Schonyers was contacted by Peeples and was told by Peeples that Billero took a log book in a "suspicious manner." Schonyers then wrote a report regarding the incident. (R-3.)

On cross-examination, Schonyers recalled that November 28, 2014, was the day after Thanksgiving. Schonyers was then off on the November 29, 2014, of that month and he returned to work on the November 30, 2014. Schonyers stated that a log book is located at all units and the supervisor's areas. He stated that the supervisor's office is located on the first floor. The rank and file has access to the supervisor's office.

Retired Lieutenant Edward Sullivan

Edward Sullivan (Sullivan) worked thirty-two years for the DOC. In April 2001, Sullivan worked for ADTC. Sullivan retired May 2016 from service. Sullivan recalled that there was an investigation regarding the removal of the log book. The log book was taken from the CCU and Sullivan interviewed the following individuals as part of the investigation: Peeples, Choe, Santiago, and Billero. It was Sullivan's conclusion that

Billero obtained the log book without proper authorization. Sullivan was aware that he was named by Billero in an Equal Employment Division (EED) dispute.

Sullivan stated that each housing unit had a log book. The daily activities must follow the Internal Managerial Procedures (IMP). Sullivan interviewed Billero, with a union representative present, regarding the removal of the log book. Billero refused to participate in this investigation. As a result, Sullivan contacted Major White and advised White that Billero would not cooperate in the investigation. Thereafter, Billero was ordered by White to cooperate in the investigation, as non-cooperation could result in discipline. Afterward, Sullivan reviewed surveillance DVDs and then again interviewed Billero. Once again, Billero refused to cooperate.

Subsequently, Sullivan wrote a report. The report concluded that Billero removed the log book from its location and Billero was not cooperative in the investigation at the first interview. Billero was only cooperative on December 18, 2014.

On cross-examination, Sullivan said that IMP #143 applies to the log book. The policy states that the log book must be at each housing unit.

Major William Gamba

William Gamba (Gamba) is a Major (as of 2014) in the DOC and worked one year at the ADTC. Gamba was working on November 28, 2014. Gamba was aware that there was a current IMP #143, which dealt with log book management and handling. Gamba wrote a report regarding the missing log book. (R-9.) Sullivan conducted an interview with Billero and other relevant individuals. It was Gamba's understanding that Billero was uncomfortable with Sullivan conducting the interview. However, Major White ordered Billero to cooperate with the investigation. It was Gamba's opinion that there was no good reason for Billero to not comply with the order given by Major White. It was Gamba's position that Billero was told two or three times to cooperate with the interview and that by failing to cooperate with the reasonable order, Billero was insubordinate.

On cross-examination, Gamba stated that Billero was uncomfortable with Sullivan conducting the interview because he had filed an EED complaint against Sullivan. Gamba believed that Sullivan was fully qualified to do the investigation. There was no reason to remove Sullivan from this position. Gamba spoke with Administrator Yates about this issue and this was his position as well. If the EED stated not to use Sullivan, he would have complied, but they did not.

Major Michael White

Major Michael White (White) worked for DOC for nineteen years. In 2013, White was assigned to ADTC. On December 4, 2014, White instructed Sullivan to do an investigation regarding the removed log book. White confirmed Billero's position that he was uncomfortable with Sullivan conducting the investigation regarding the log book because of the EED complaint. It was White's position that the EED complaint did not support Sullivan being barred from the investigation. White spoke with Administrator Yates, who stated that it was fine for Sullivan to do the investigation.

White recalled that Billero requested and received a new union representative. White then ordered Billero to participate in the investigation. Billero continued to not cooperate because he said he felt uncomfortable. White gave Billero a "direct order" to cooperate. White confirmed that Yates found that there was nothing to prevent Sullivan from doing the interview. They had forty-five days to complete the investigation. R-10 was the report prepared by White. It was White's position that Sullivan was the right person to conduct the investigation because he was in charge of the CCU and had knowledge of the events.

Major Colin Foley

Major Colin Foley (Foley) began working in the ADTC in 2000 and was transferred to other venues and came back to ADTC in 2014. Foley was a major at that time. R-14 was the IMP for CCU. Foley stated that the rules and procedures stated

that a log book must be present at each unit and is a legal document. The IMP #143 speaks about the log book. Taking the log book without proper permission is a violation of policy. Full log books must be in a secured location because it is evidence.

On cross-examination, Foley stated that an officer can write in a log book and would write his name next to the entry. It was clear to Foley, however, that someone cannot take a log book without permission. Permission must be obtained from the major to take a log book. Foley further stated that he could not state for sure as to whether the log book IMP was in the unit because he did not work in that unit at the time in question.

Senior Correction Officer Vincenzo Billero

Appellant Vincenzo Billero (Billero) worked with the ADTC for just over sixteen years. Billero testified that he took the log book after seeing same in the CCU on November 28, 2014. Billero stated that he took the log book about 100 feet away and then looked at the book in order to determine when he was working on a certain day. Thereafter, Billero returned the book to its assigned area. Billero did place the book inside his jacket. Billero also stated that he did not believe that his taking the log book was a breach of safety and/or security.

Billero was advised that the individual who was conducting the interview was Sullivan. Billero advised the supervisors that he had concerns about Sullivan conducting the investigation because he had filed an EED complaint in 2011 against Sullivan. Billero testified that he did not refuse to comply with the investigation. Billero advised White and Gamba about his concerns. Billero stated that he did answer the questions on December 18, 2014.

On cross-examination, Billero stated that he took the log books for Lieutenant Gonzalez and Lieutenant Philips. Although Billero stated that he took the log book, he further stated that he never gave the log book to any other officer. Billero also testified that he never had any problems with any other employees. Billero admitted that he

received an order from Major White to cooperate with the investigation. Billero further admitted that he never obtained any permission from any supervisor to review the log book.

I had an opportunity to observe appellant as he testified. He appeared unbelievable in many ways on both direct and cross-examination. Billero refused to accept responsibility and maintained his position that he was unaware that taking the log book was a violation of IMP. As a result of the foregoing, I **FIND** that Billero's testimony was unreliable.

FINDINGS OF FACT

1. Billero is a Senior Correction Officer at the ADTC.

2. On November 28, 2014, Billero appeared at the CCU and removed a log book by placing it inside his jacket and taking it away from the CCU. Billero then reviewed the contents of the log book and returned it to the CCU after reviewing same.

3. Billero made alteration of addition to the log book.

4. At no time prior to taking the log book did Billero ask for or obtain any authorization to take the log book.

5. Billero gave the log book to SCO Santiago, who then gave the log book to SCO Choe, who was in charge of the log book for that unit.

6. SCO Peeples also witnessed Billero take the log book, who found Billero's actions to be very strange.

7. SCO Peeples reported Billero's actions to Schonyers, who was told by Assistant Superintendent Davis to write a report of these events.

8. Based on the events, Major White instructed Lieutenant Sullivan to conduct an investigation into the removal of the log book from the CCU.

9. Sullivan interviewed Choe, Santiago, and Peeples and reviewed the reports of Schonyers and Peeples.

10. Both Choe and Santiago were disciplined for their actions regarding the removal of the log book.

11. Sullivan ordered Billero to report to the office for an interview as part of the investigation on December 5, 2014.

12. Billero appeared as directed, with his union representative, and was administered his Weingarten Rights.

13. Sullivan began to question Billero regarding the removal of the log book.

14. Billero stated that he was not comfortable with answering any questions asked by Sullivan because Sullivan was named in an EED complaint by Billero.

15. Sullivan informed Billero that the investigation was ordered by Major White and had nothing to do with the EED complaint.

16. Billero continued to refuse to answer any questions.

17. In response to Billero's refusal to answer questions, Sullivan contacted Major White and advised White that Billero was refusing to participate in the investigation.

18. Thereafter, Majors White and Gamba appeared at the office of the investigation and White gave a direct order to Billero to cooperate in the investigation.

19. After receiving White's direct order and being advised that his continued refusal could subject him to disciplinary action, Billero further refused to cooperate in the investigation.

20. On December 18, 2014, Billero was ordered to report to the major's office with his union representative.

21. In the second interview, Billero admitted to removing the log book from the CCU without prior authorization.

22. Billero looked at the log book because he wanted to check as to whether he worked on a certain date.

LEGAL DISCUSSION

Respondent, as the appointing authority, bears the burden of proof of facts upon which its disciplinary charges are based and must prove facts essential to its charges by a reasonable probability, i.e., by the preponderance (greater weight) of the competent and credible evidence. 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. See Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

The appointing authority must prove its case by a preponderance of credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). An appeal requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Social Serv., 197 N.J. Super. 307 (App. Div. 1984).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Appellant's

testimony about his not knowing that taking a log book as being a violation of the IMP, is of no consequence. Billero testified that he took the log book and placed it inside his jacket. Such testimony makes his position that he was unaware that by taking the log book was a violation of the appointing authority's rules and regulations, as not believable.

A Preliminary Notice of Disciplinary Action (PNDA) was issued on January 7, 2015. Appellant was also provided with a Final Notice of Disciplinary Action (FNDA) which indicated that he violated N.J.A.C. 4A:2-2.3 as follows:

1.) Violation of Administrative Procedures involving Safety and Security;
2.) Insubordination;
6.) Conduct Unbecoming a Public Employee; and
12.) Other Sufficient Cause.

Billero is a law enforcement officer and, as such, is held to a high standard of fidelity, honesty, integrity and good faith. Reinhard v. East Jersey State Prison, CSV 1605-96, aff'd, 97 N.J.A.R.2d (CST) 166 (1993). It is well settled that law enforcement officers are held to a higher standard of conduct. Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965).

Even if the undersigned accept some of Billero's explanations, i.e., that he was unaware of the regulation regarding the log book and that he was only looking at the log book for purposes of seeing when he worked on certain days, that does not excuse the clear violation of the rules and regulations regarding log books being removed from the assigned unit without prior authorization. The applicable IMP #143 clearly establishes the guidelines for the use, control and inventory of log books. (R-13.)

Based upon the testimony provided by the respondent's witnesses, I find that the respondent has satisfied its burden that it is more likely than not that appellant Billero, without dispute, removed a log book from the CCU without prior authorization.

I further **FIND AS FACT** that Billero was given a direct order to cooperate in the investigation and that he failed to comply with that direct order. The testimony and documentary evidence presented in this case, confirms that Billero refused a direct order (which I find was reasonable) to participate in the investigation regarding his actions surrounding the log book removal. Billero was given several chances to comply with those orders and Major White provided Billero with a direct and clear order to participate in the interview/investigation. Billero continued to refuse to cooperate, despite this direct order. Billero's explanation, regarding the EED complaint (and the fact that he felt uncomfortable) is not an acceptable basis for disobeying the order.

I find that the appellant offered no competent evidence or testimony which would tend to refute or diminish the testimony provided by the respondent's witnesses, particularly since I find that appellant's own testimony was simply unreliable.

PENALTY

Ordinary progressive discipline applies to civil service disciplinary actions. West New York v. Bock, 38 N.J. 500, 522 (1962). However, the seriousness of Billero's actions, warrant a thirty-day suspension for removing the log book and a ten-day suspension for insubordination. When an employee's actions are of such an egregious nature, the imposition of a penalty, up to and including removal is appropriate, without regard to the employee's previous disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980).

I **CONCLUDE** that a forty-day (thirty days plus ten days) suspension in this matter comports with the principles of Bock, supra, and is, therefore, appropriate. As a result, the determination of the respondent must be affirmed.

ORDER

I **ORDER** that the decision of the respondent Adult Diagnostic and Treatment Center, Department of Corrections suspending the appellant for ten days (as to CSV

04235-15) and thirty days (as to CSV 04238-15), be **AFFIRMED** and the appellant's action be **DISMISSED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

January 17, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: January 18, 2017

JAN 20 2017

Date Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

WITNESSES

For Appellant:

Vincenzo Billero

For Respondent:

Michael White
Edward Sullivan
Daniel Choe
Anthony Peeples
Angel L. Santiago
Torren Schonyers
William Gamba
Colin Foley

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Preliminary and Final Notices of Disciplinary Action

R-2 Investigative Report by Lt. Edward Sullivan dated December 26, 2014

R-3 Special Custody Report by Sgt. Toren Schonyers

R-4 Special Custody Reports, by SCO Anthony Peeples dated December 1, 2014, and December 4, 2014

R-5 Weingarten Administrative Rights form and Special Custody Report by SCO Angel Santiago dated December 4, 2014

R-6 Weingarten Administrative Rights form and Special Custody Report by SCO Daniel Choe dated December 4, 2014

R-7 Weingarten Administrative Rights form and Special Custody Report by SCO Vincenzo Billero dated December 4, 2014

R-8 Special Custody Report by Lieutenant Sullivan dated December 6, 2014

R-9 Special Custody Report by Major Gamba dated December 5, 2014

R-10 E-mail d by Major Michael White dated December 5, 2014

R-11 Weingarten Administrative Right form and Accused Statement by SCO Billero, dated December 18, 2014

R-12 Not admitted

R-13 Internal Management Procedure #143 "Custody Logbooks"

R-14 internal Management Procedure #48 "Close Custody unit"

2-22-17

STATE OF NEW JERSEY

In the Matter of Reinaldo Bosque,
City of Newark, Police Department

CSC DKT. NO. 2015-3210
OAL DKT. NO. CSV 9467-15

In the Matter of George Pepeira,
City of Newark, Police Department

CSC DKT. NO. 2015-3211
OAL DKT. NO. CSV 9469-15
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
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Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 9467-15
AGENCY DKT. NO. 2015-3210

IN THE MATTER OF
REINALDO BOSQUE,
CITY OF NEWARK, POLICE DEPARTMENT.

IN THE MATTER OF
GEORGE PEPEIRA,
CITY OF NEWARK, POLICE DEPARTMENT.

OAL DKT. NO. CSV 9469-15
AGENCY DKT. NO. 2015-3211
(CONSOLIDATED)

Anthony J. Fusco, Jr., Esq., for appellants Bosque and Pepeira (Fusco & Macaluso, attorneys)

Corrine Rivers, Assistant Corporation Counsel, for respondent (Willie L. Parker, Corporation Counsel)

Record Closed: January 27, 2017 Decided: January 27, 2017

BEFORE **DANIELLE PASQUALE,** ALJ:

These matters concern the appeals of Reinaldo Bosque and Jorge Pereira from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on June 26,2015 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 27, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: FEB 1 2017

Date Mailed to Parties: 2-1-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr
Enc.

2017 JAN 27 P 2:19

REINALDO BOSQUE, Appellant, -v- CITY OF NEWARK Respondent,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 9467-15** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**
JORGE PEREIRA, Appellant, -v- CITY OF NEWARK Respondent,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 9469-15** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Police Officer Reinaldo Bosque ("Bosque" or "Appellant"), Officer Jorge Pereira ("Pereira" or "Appellant"), The Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (Bosque, Pereira, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Bosque and Pereira by the City's Preliminary Notice of Disciplinary Action dated April 7, 2015 (PNDA) and Final Notice of Disciplinary Action dated June 2, 2015 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about March 30, 2015, at approximately 11:02 a.m., at 150 Bergen Street, Newark, New Jersey, University Hospital Emergency Department, Police Officers Reinaldo Bosque and Jorge Pereira, being responsible for maintaining the safekeeping and custody of a male prisoner, to wit: Elijah Shabazz, who was in their personal charge, did fail to maintain the safekeeping of said prisoner when the prisoner managed to escape from custody.

2. As a result of the conduct outlined in paragraph one (1) herein, the PNDA was issued and Bosque and Pereira were brought up on disciplinary charges for violating the following Newark Police Department ("NPD") Rules and Regulations: (1) safekeeping of prisoners, and (2) official inefficiency or incompetency.

3. At the departmental hearing, Bosque and Pereira plead not guilty and waived the hearing to the Office of Administrative Law. They were both suspended for thirty (30) days beginning June 15, 2015 and ending July 24, 2015.

4. Bosque and Pereira appealed the decision on the FNDA to the Office of Administrative Law.

5. The parties have agreed to resolve all issues herein and herein referenced as follows:

    1. The City agrees to reduce Bosque's suspension from thirty (30) days to fifteen (15) days. Bosque will receive fifteen (15) days back.

    2. The City agrees to reduce Pereira's suspension from thirty (30) days to fifteen (15) days. Pereira will receive fifteen (15) days back.

3. The City further agrees to amend the FNDAs for Bosque and Pereira to merge charge two (2), official inefficiency or incompetency with charge one (1), safekeeping of prisoners.

4. Bosque and Pereira further waive any and all rights and/or claims which they have and/or may have to: 1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; 2) To challenge the PNDA, FNDA and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake in any and all litigation against the City in State, Federal and/or Administrative Courts.

5. Bosque, Pereira and the Union each further agree that there is no consideration due Bosque and Pereira, their counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

6. Bosque, Pereira and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

7. Bosque, Pereira and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court

or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

8. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Bosque's and Pereira's estate, and purchasers and/or assignees of Bosque's, Pereira's, the City's and/or the Unions interests shall also be bound.

9. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

10. Bosque, Pereira and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

11. Bosque, Pereira and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

12. This Agreement contains the sole and entire agreement between Bosque, Pereira, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Bosque and Pereira

specifically represent and acknowledge in executing this Agreement that they have not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

13. Bosque and Pereira agree and acknowledge that they have been fully and fairly represented by their Attorney and the Union in this matter, and both Bosque and Pereira are satisfied with that representation and with the terms and conditions of this Agreement.

14. Bosque and Pereira agree and acknowledge that they have had a full opportunity to review this Agreement with their Attorney and/or Union representative and they enter into this Agreement knowingly and voluntarily.

15. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

16. By signing this Settlement Agreement, Bosque and Pereira state that:

    a. They have read it;

    b. They understand it and know that they are giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII

of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c. They agree with everything contained in this Agreement;
d. Their Attorney and Union representative negotiated this Agreement in their presence and with their knowledge and consent;
e. They consulted with their Attorney prior to executing this Agreement;
f. They have signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

1/18/17
Date

BY: _____
Anthony Ambrose, Director
Department of Public Safety

1/20/2017
Date

BY: Reinaldo Bosque
Reinaldo Bosque

1/20/2017
Date

BY: _____
Jorge Pereira

1/24/17
Date

_____
Anthony J. Russo, Jr., Esq.
Attorney for Reinaldo Bosque and Jorge Pereira

Approved as to Form and Legality:

1/17/17
Date

Corinne E. Rivers
Corinne E. Rivers, Esq.
Law Department, City of Newark

CERTIFICATION

I, Reinaldo Bosque, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

January 20, 2017
DATE

Reinaldo Bosque
Reinaldo Bosque

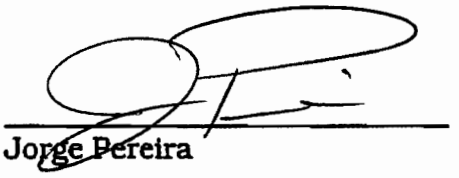
CERTIFICATION

I, Jorge Pereira, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my

understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/20/2017
DATE



Jorge Pereira

2-22-17

STATE OF NEW JERSEY

In the Matter of Reinaldo Bosque,
City of Newark, Police Department

CSC DKT. NO. 2015-3210
OAL DKT. NO. CSV 9467-15

In the Matter of Jorge Pereira,
City of Newark, Police Department

CSC DKT. NO. 2015-3211
OAL DKT. NO. CSV 9469-15
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

CORRECTED

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 9467-15
AGENCY DKT. NO. 2015-3210

IN THE MATTER OF
REINALDO BOSQUE,
CITY OF NEWARK, POLICE DEPARTMENT,

OAL DKT. NO. CSV 9469-15
AGENCY DKT. NO. 2015-3211

IN THE MATTER OF
JORGE PEREIRA,
CITY OF NEWARK, POLICE DEPARTMENT (CONSOLIDATED)

Anthony J. Fusco, Jr., Esq., for appellant (Fusco & Macaluso, attorneys)

Corrine Rivers, Esq., appearing for respondent (City of Newark, attorney)

Record Closed: January 27, 2017 Decided: January 27, 2017

BEFORE **DANIELLE PASQUALE,** ALJ:

These matters concern the appeals of Reinaldo Bosque and Jorge Pereira from the action of the respondent/appointing authority. Upon receipt of the

appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on June 26,2015 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

OAL DKT. NO. CSV 9767-16, CSV 9469-16

January 27, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency:

Date Mailed to Parties:

/rr
Enc.

2-22-17

STATE OF NEW JERSEY

In the Matter of Michael Cirasella
City of Newark, Police Department

CSC DKT. NO. 2015-2488
OAL DKT. NO. CSV 03347-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03347-15

AGENCY DKT. NO. 2015-2488

IN THE MATTER OF MICHAEL CIRASELLA,
CITY OF NEARK POLICE DEPARTMENT,

Anthony J. Fusco, Jr., Esq. for appellant (Fusco & Macaluso, LLC)

Corrine Rivers, Esq., for respondent (Willie, L. Parker, Corporation Counsel)

Record Closed: January 26, 2017 Decided: January 27, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on May 10, 2015, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. This matter was initially assigned to ALJ Irene Jones but reassigned to the undersigned on or about July 6, 2016. A hearing was scheduled for January 12, 2017. Prior to the hearing date, respondent's counsel advised that the parties reached a settlement agreement and there is no need for an appearance. On January 26, 2017 the appellant's counsel submitted the fully executed settlement agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 27 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

FEB 1 2017

Date Mailed to Parties:

ljb

2-1-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

TP

MICHAEL CIRASELLA, Appellant, -v- CITY OF NEWARK Respondent,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 03347-2015** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Police Michael Cirasella ("Cirasella" or "Appellant"), The Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (Cirasella, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Cirasella by the City's Preliminary Notice of Disciplinary Action dated January 2, 2015 (PNDA) and Final Notice of Disciplinary Action dated February 17, 2015 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about November 19, 2014, at 470 Orange Street, Special Operations Division, at approximately 11:30 a.m., Police Officer Michael Cirasella, did commit an act of insubordination to Lieutenant Camilo Mos, a superior officer, to wit: after being issued a one (1) day suspension, at a Command Conference, which Lieutenant Mos was the charging investigator. Police Officer Michael Cirasella made the following remarks directed at Lieutenant Mos in a loud and condescending manner in an attempt to humiliate and disrespect Lieutenant Mos when he stated, "what you charge me for today, is the same thing I gave your brother a break before?" "What goes around

comes back around" and repeated "what goes around comes back around."

2. On November 19, 2014, at 470 Orange Street, Special Operations Division, at approximately 11:30 a.m., Police Officer Michael Cirasella, did receive a lawful verbal order from Captain Mario Martin, a superior officer, directing Police Officer Cirasella to desist with his condescending remarks to Lieutenant Camilo Mos, he did disobey this order when he failed to comply as directed. Instead Officer Cirasella stated again "what goes around comes back around."

3. As a result of the conduct outlined in paragraphs one (1) and two (2) herein, the PNDA was issued and Cirasella was brought up on disciplinary charges for violating the following Newark Police Department ("NPD") Rules and Regulations: (1) Acts of Insubordination, (2) Misconduct Generally, and (3) Obedience to Orders.

4. At the departmental hearing, Cirasella plead not guilty and waived the hearing to the Office of Administrative Law. He was suspended for fifteen (15) days beginning March 9, 2015 and ending March 27, 2015 and the FNDA was issued.

5. Cirasella appealed the decision on the FNDA to the Office of Administrative Law.

6. The parties have agreed to resolve all issues herein and herein referenced as follows:

    1. The City agrees to reduce Cirasella's suspension from fifteen (15) days to five (5) days. Cirasella will receive ten (10) days back.

2. Cirasella further waives any and all rights and/or claims which he has and/or may have to: 1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; 2) To challenge the PNDA, FNDA and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake in any and all litigation against the City in State, Federal and/or Administrative Courts.

3. Cirasella and the Union each further agree that there is no consideration due Cirasella, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

4. Cirasella and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

5. Cirasella and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting

arbitration, that is in any manner grounded, based upon, or related to the FNDA.

6. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Cirasella's estate, and purchasers and/or assignees of Cirasella's, the City's and/or the Union's interests shall also be bound.

7. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

8. Cirasella and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

9. Cirasella and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

10. This Agreement contains the sole and entire agreement between Cirasella, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Cirasella specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other

promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

11. Cirasella agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

12. Cirasella agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

13. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

14. By signing this Settlement Agreement, Cirasella states that:
    a. He has read it;
    b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of

the United States, the State of New Jersey, or any other State;

c. He agrees with everything contained in this Agreement;

d. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;

e. He consulted with his Attorney prior to executing this Agreement;

f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

1/18/17
Date

BY: _____
Anthony Ambrose, Director
Newark Police Department

1/20/17
Date

BY: _____
Michael Cirasella

1/24/17
Date

_____
Anthony J. Fusco, Jr., Esq.
Attorney for Michael Cirasella

Approved as to Form and Legality:

1/18/17
Date

_____
Corinne E. Rivers, Esq.
Law Department, City of Newark

I, Michael Cirasella, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1-20-17
DATE

Michael Cirasella
Michael Cirasella

2-22-17

STATE OF NEW JERSEY

In the Matter of Donna Cisco
City of East Orange,
Police Department

CSC DKT. NO. 2017-433
OAL DKT. NO. CSV 12601-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 12601-16
AGENCY DKT. NO. 2017-433

IN THE MATTER OF DONNA CISCO,
CITY OF EAST ORANGE POLICE
DEPARTMENT.

Donna Cisco, appellant, pro se

Marlin Townes, III, Assistant Corporation Counsel, for respondent City of East Orange (Khalifah L. Shabazz, Corporation Counsel)

Record Closed: January 26, 2017 Decided: January 30, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Donna Cisco filed an appeal from a Final Notice of Disciplinary Action dated June 23, 2016, issued by respondent City of East Orange Police Department. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed for determination as a contested case. Prior to the scheduled hearing, the parties engaged in discussions toward an amicable resolution of the matter. Under letter dated January 24, 2017, counsel for respondent forwarded the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 30, 2017
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 2-3-17

Date Mailed to Parties: FEB 3 2017

jb

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT

DONNA CISCO, Petitioner, v. CITY OF EAST ORANGE, POLICE DEPARTMENT, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **OAL Dkt. No.: CSV 12601-16** **Agency Ref. No.: 2017-433**

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into this _____ day of January 2017 by and between the City of East Orange (the "City") and Police Aide Donna Cisco ("Employee"); and

WHEREAS, on November 6, 2015, Employee was served with a Preliminary Notice of Disciplinary Action dated October 23, 2015. Therein, Employee was charged with violating N.J.S.A. 4A:2-2.3 (a) (7), Neglect of Duty, and N.J.S.A. 4A:2-2.3 (a) (12), Other Sufficient Cause. After a departmental hearing, Employee was served with a Final Notice of Disciplinary Action dated June 23, 2016 which sustained the charges and the City suspended Employee for six (6) days for said alleged violations; and

WHEREAS, Employee timely filed an appeal with the New Jersey Civil Service Commission; and

WHEREAS, prior to a hearing being conducted at the Office of Administrative Law, the parties agreed to settle their dispute in the interests of avoiding the costs and uncertainty associated with litigation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the City and the Employee agree to the following terms as full and final settlement of the above-captioned matter:

1. Employee agrees to accept a five (5) day suspension for violation of N.J.S.A. 4A:2-2.3 (a) (7), Neglect of Duty, and N.J.S.A. 4A:2-2.3 (a) (12), Other Sufficient Cause. Both parties agree that Employee has already served her suspension.

2. The City agrees to pay Employee one (1) day in back pay.

3. Employee voluntarily enters into this Settlement Agreement.

4. Employee shall not request any other relief with respect to this matter, other than that provided for by this Settlement Agreement. Employee voluntarily and in consideration for the above, hereby releases the City, its employees, officials, agents and assigns from

all claims that he may have now against the City, its employees, officials, agents and assigns from the date of his initial employment with the City until the date of this agreement, including but not limited to all claims, liabilities, costs, and attorney fees under the New Jersey Civil Service Act (N.J.S.A. 11A:1-1 et seq.), Civil Rights Act of 1964, as amended (42 U.S.C. § 621 et seq.), the New Jersey Civil Rights Act or any other state or federal statute or the common law.

5. Employee acknowledges that she has been afforded the opportunity to consider the terms of this Settlement Agreement with the advice of counsel and/or the representative of her choice and had the opportunity to be fully and fairly represented in this matter.

6. Each party shall be responsible for their respective counsel fees.

7. The terms of this Agreement shall be non-precedential for all purposes arising under the City's collective bargaining agreement with the Communications Workers of America, AFL-CIO and shall not be referred to in any other grievance, arbitration, unfair practice charge proceeding or any other litigation.

8. By signing this Settlement Agreement, the Employee acknowledges that she understands all of the provisions set forth above and that he freely and willingly enters into this Settlement Agreement.

This Agreement is hereby executed by the duly authorized representatives of the parties.

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO

By: BENNIE BRANTLEY
PRESIDENT

1/24/17
Date

CITY OF EAST ORANGE

By: WILLIAM SENANDE
CITY ADMINISTRATOR

1/19/17
Date

CITY OF EAST ORANGE

By: DONNA CISCO

1/11/17
Date

By: SHEILAH COLEY
PUBLIC SAFETY DIRECTOR

1/19/17
Date

CITY OF EAST ORANGE
POLICE DEPARTMENT

Phyllis L Bindi

By: PHYLLIS L. BINDI
ACTING CHIEF OF POLICE

1/18/17
Date

2-22-17

STATE OF NEW JERSEY

In the Matter of Ivonne Collazo,
Garden State Youth Correctional
Facility

CSC DKT. NO. 2017-1240
OAL DKT. NO. CSR 16412-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 16412-16

IN THE MATTER OF IVONNE COLLAZO, GARDEN STATE YOUTH CORRECTIONAL FACILITY.

Robert R. Cannan, Esq., for appellant Ivonne Collazo (Markman and Cannan, attorneys)

Emily Bisnauth, Deputy Attorney General, for respondent Garden State Youth Correctional Facility (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: January 25, 2017 Decided: January 31, 2017

BEFORE **JOSEPH LAVERY**, ALJ t/a:

Ivonne Collazo, a senior corrections officer with Garden State Youth Correctional Facility, appeals her termination effective October 7, 2016.

The parties appeared before the undersigned on December 15, 2016, for a prehearing conference and on January 18, 2017, for oral argument. A hearing date was also scheduled for January 26, 2017, but prior to the hearing date, an executed settlement agreement was received which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 31, 2017
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 1/31/17

Date Mailed to Parties: 2/1/17

mph

OAL DKT. NO. CSR 16631-2016 S

AGENCY DKT.

SETTLEMENT AGREEMENT

IN THE MATTER OF

IVONNE COLLAZO

AND

GARDEN STATE YOUTH

CORRECTIONAL FACILITY,

DEPARTMENT OF CORRECTIONS

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. A **Final** Notice of Disciplinary Action dated September 30, 2016 (Removal) contained the following charges:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee;
2. N.J.A.C. 4A:2-2.3(a)11 Other sufficient cause;
3. HRB 84-17, as amended, C-3 Personal Conduct: Physical or mental abuse of an inmate, patient, client, resident, or employee;
4. HRB 87-17, amended, C-8 Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding;
5. HRB 84-17, as amended C-11: Conduct unbecoming of an employee;
6. HRB 84-17 as amended E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision;

The parties have agreed to the following Withdrawal of Charges:

A. N.J.A.C. 4A:2-2.3(a)11 Other sufficient cause;

B. HRB 84-17, as amended, C-3 Personal Conduct: Physical or mental abuse of an inmate, patient, client, resident, or employee;

C. HRB 87-17, amended, C-8 Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding

The parties have agreed that the following charges are Sustained:

A. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee;

B. HRB 84-17, as amended C-11: Conduct unbecoming of an employee; General Resignation in lieu of Removal effective December 31, 2016

C. HRB 84-17 as amended E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision; General Resignation in lieu of Removal effective December 31, 2016;

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None

3. Any other days from the time of last date of pay status, April 23, 2016 until resignation date of December 31, 2016 shall be treated as follows: approved voluntary leave without pay.

4. Respondent Department of Corrections will accept a General Resignation from Appellant Ivonne Collazo, pursuant to N.J.A.C. 4A:2-6.3, effective December 31, 2016. Appellant Ivonne Collazo agrees not to seek or accept employment with the Department of Corrections, or any of its subsidiaries, at any time in the future.

C. The Appellant Ivonne Collazo withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Corrections agrees that the

following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Corrections (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ivonne Collazo's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Ivonne Collazo agrees to appear as a witness and to testify truthfully in any future hearings, including that of SCO Steven Hotz and SCO Brian Attardi, arising from the underlying incident that occurred on or about 11/06/2015.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or

prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

1/24/2017
DATE

Ivonne Collazo
Ivonne Collazo, Appellant

1/24/2017
DATE

ON BEHALF OF Appellant
Robert R. Cannan, Esq
Counsel for Appellant

1/25/17
DATE

ON BEHALF OF Respondent
Emily M. Bisnauth
Deputy Attorney General
on behalf of Department
of Corrections

CERTIFICATION

I, Ivonne Collazo, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/24/2017
DATE

Ivonne Collazo
Ivonne Collazo

2-22-17

STATE OF NEW JERSEY

In the Matter of Sully Delgado
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2017-1276
OAL DKT. NO. CSV 16634-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 16634-16
AGENCY DKT. NO. 2017-1276

IN THE MATTER SULLY DELGADO,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert Little, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)6 for appellant Sully Delgado

Anita Pinkas, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)2 for respondent Department of Human Services, Ancora Psychiatric Hospital

Record Closed: January 30, 2017 Decided: February 1, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on October 28, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Sully Delgado from the action of the respondent, Department of Human Services, Ancora Psychiatric Hospital. On January 30, 2017, the parties filed a fully executed Settlement Agreement and General Release. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 1, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 2/3/17

Date Mailed to Parties: 2/3/17

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement and General Release

OAL DKT. NO. CSV 16634-2016

AGENCY DKT. NO. 20 – 2017-1276

SETTLEMENT AGREEMENT

IN THE MATTER OF

Sully Delgado

AND

Ancora Psychiatric Hospital
Department of Human Services

RECEIVED
2017 JAN 30 P 12:12
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated 10/20/2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. AD:408 A.2.5; A.4.5; E.1.3	Removal	10/22/16
2. NJAC 4A:2-2.3(a) 4, 6, 12		
3.		
4.		
5.		

B. The Appellant Sully Delgado withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.		
2.	General Resignation pursuant to NJAC 4A:2-6.3	
3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of since 10/22/16 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

_____ resignation in good standing

X general resignation

which shall be effective 10/22/16 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2 18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant agrees not to seek or accept reemployment with the Department of Human Services at any time in the future.

OAL DKT. NO. CSV 16634-2016

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

X 1/19/17
DATE

X
Appellant

1/24/2017
DATE

Respondent

1-24-2017
DATE

ON BEHALF OF APPELLANT

1-26-17
DATE

ON BEHALF OF APH

OAL DKT. NO. CSV 16634-2016.

CERTIFICATION

I, x Sully Pelgado, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

x 1/9/17
DATE

x Sully Pelgado
NAME

2-22-17

STATE OF NEW JERSEY

In the Matter of Jessica Garcia
Union City, Department of Public Safety

CSC DKT. NO. 2015-401
OAL DKT. NO. CSR 10485-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 27 2017 BW

The appeal of Jessica Garcia, Police Officer, Union City, Department of Public Safety, removal effective July 1, 2014, on charges, was heard by Administrative Law Judge Caridad F. Rigo, who rendered her initial decision on January 19, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on February 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Jessica Garcia.

Re: Jessica Garcia

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT NO. CSR 10485-14

IN THE MATTER OF JESSICA GARCIA,
UNION CITY POLICE DEPARTMENT.

Wolodmryr Tyshchenko, Esq., for Appellant Jessica Garcia (Caruso, Smith, Edell, Picini, attorneys)

Kenneth B. Goodman, Esq., for Respondent Union City Police Department (O'Toole, Fernandez, Weiner, Van Lieu, attorneys)

Record closed: June 20, 2016 Decided: January 19, 2017

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Jessica Garcia (Garcia) appeals from a Final Notice of Disciplinary Action issued by the respondent, Union City Police Department (City), providing for appellant's removal from her position as a police officer. The charges against appellant arise out of events occurring on or about June 11, 2014. They are:

Administrative:

1. Failure to perform duties
2. Insubordination
3. Conduct unbecoming a public employee

4. Neglect of duty
5. Other Sufficient Cause

Departmental:

1. General responsibilities
2. Neglect of duty
3. Performance of duty
4. Insubordination
5. Care of firearm offduty, outside home
6. Repeated violations of department rules and regulations
7. Refusal to obey proper orders from a superior
8. Consequences to refusal to submit to drug test

PROCEDURAL HISTORY

Petitioner is charged with failure to perform duty, insubordination, care of firearms off duty outside home, refusal to obey proper orders from a superior.

Garcia was removed from her position effective July 1, 2014, via a Final Notice of Disciplinary Action (FNDA) dated August 4, 2014. The primary basis for her removal was her failure to report for an ordered drug test and violation of the Attorney General's Law Enforcement Drug Testing Policy, as well as leaving a loaded weapon unsecured in a public location and failure to report unlawful activity by a fellow Union City police officer in violation of the Union City Police Department and Civil Service rules and regulations.

This matter was transferred as a contested case to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to 13.

I heard this matter on May 13, 2016, and May 20, 2016. The record was kept open pending submissions of post-hearing transcripts and closing arguments. Closing arguments were received on June 20, 2016.

An extension was requested and received for the issuing of an Initial Decision because of a voluminous caseload of the undersigned.

Issue

Whether respondent has met its burden of proof by proving the charges against petitioner by a preponderance of the credible evidence?

Summary of Testimony for respondent

Jamey DiGrazio

Jamey DiGrazio (DiGrazio) is a police officer in Monroe Township. On the evening of June 11, 2014, he was dispatched to a home within the boundaries of the township to responded to a first aid call of an unconscious, unresponsive male with CPR in progress. Upon his arrival, first aid responders were already administering assistance to the male, Corey Corbo (Corbo), in the bedroom. At some point, he located Garcia in the household. During a conversation in which DiGrazio was attempting to ascertain relevant information, Garcia stated that Corbo had "done a bump of cocaine about five days ago." Garcia also informed DiGrazio that both she and Corbo were police officers. Garcia also stated "[d]on't tell anyone." DeGrazio informed the paramedics of Corbo's alleged ingestion of cocaine, and noted it in his incident report.

Under cross-examination, DeGrazio admitted that he did not inquire about how Garcia gained the information regarding Corbo's alleged drug use, nor did he find any illegal drugs or drug paraphernalia in the residence.

Keith Saloom

Detective Sergeant Keith Saloom (Saloom) is employed by the Monroe Township Police Department. He requested that "complete reports" of the incident that were

completed by DeGrazio be forwarded to the Internal Affairs Bureau of the Union City Police Department in response to requests from officers investigating the incident.

Richard Molinari

Richard Molinari (Molinari) is Union City's Chief of Police. Molinari testified that in June 2014, he was informed that Corbo had been involved in an emergency call at his residence, and Garcia was the reporting party; he further testified that Garcia made a statement to the Township Police during their investigation of the first aid call that Corbo had done a "bump" of cocaine. He also was presented with a copy of the police report on or around June 13. Molinari further testified that he was informed on or around June 12th that Corbo had been hospitalized in a seriously ill condition.

After reviewing the report, Molinari stated that he felt "as though [he] had a situation where [he] needed to determine or not whether Garcia was using illicit drugs," and contacted an Assistant Prosecutor (AP) in the Hudson County Prosecutor's Office in order to determine whether reasonable suspicion existed to order a drug test. He provided the AP with the report, and told him that he believed that reasonable suspicion existed, a determination with which the AP concurred. Molinari ordered Lieutenant Ramon Vazquez to contact Garcia and order her to report to the Union City Police Department. The Chief testified he ordered Vasquez to give Garcia the order at approximately 3 p.m. The order was given, but Garcia never responded. "She was ordered to come into the police department. It's a lawful order. I gave it. The lieutenant issued it. She understood. She stated she understood." Despite assurances that she was on her way in, she never did; therefore, the department undertook actions to locate her.

Molinari further testified that Captain Nichelle Luster "reached out to Garcia, and it was conveyed . . . that she ordered Garcia to report for a drug test." Later, Luster informed Molinari that Garcia had voluntarily entered a substance abuse rehabilitation center.

Under the Attorney General's testing guidelines, an officer who is ordered to report in for a drug test is required to appear for the drug test or face termination, and the City Police Department has promulgated rules and regulations that "completely mirror" the Attorney General's guidelines. Notably, under the Guidelines, "there is no other recourse . . . other than removal" of an officer who refuses to respond to a reasonable suspicion drug test. Also, a police officer has an ongoing obligation to report a criminal offense, if such officer has first-hand knowledge.

Molinari further testified that Captain Luster informed him that Corbo's ex-wife reported to her that she found an unsecured firearm in a bag in Corbo's hospital room that she believed belonged to Garcia. Molinari ordered Luster to investigate, and if a firearm were located, that she take possession of it. Captain Luster later reported that she found the weapon. The weapon was made safe and secure. The weapon was later determined to belong to Garcia. Police department policy generally imposes a responsibility upon its officers to always keep their weapons secure.

Under cross-examination, Molinari testified that he never examined the firearm, but Captain Luster reported that she had determined that it was Garcia's by completing a check of the serial number. He further testified that his decision to call Garcia in for a drug test was based on DiGrazio's report. However, Molinari admitted that he did not know whether Garcia had first-hand knowledge of Corbo's alleged drug use. Molinari also testified that Lieutenant Vasquez did not tell her when he called that she was to report in for a drug test, but she was later informed by Captain Luster. However, under examination by the Court, Molinari stated that under normal circumstances, there would be a verbal communication via phone call to report to the station, and then once the officer reported, there would be a second communication to undergo a drug test. Also, it is undisputed that an officer "must know that they are being ordered for a drug test and refuse in order to be guilty of refusing to submit to a drug test.

Nichelle Luster

Nichelle Luster (Luster) is a Captain in the Union City Police Department. Luster testified that Garcia informed her on June 12 that Corbo had a medical emergency and

was being treated at Raritan Bay Medical Center, in serious condition. She texted Molinari the information and proceeded to the hospital. At the hospital, Garcia informed her that at around 6 p.m. on June 11th, Corbo appeared to be in breathing distress, so Garcia started to perform CPR.

Subsequently, on June 13th, Luster reported to Molinari's office. She testified that she was informed about the Monroe Township police report, and she learned that Molinari, after discussions with the Assistant Prosecutor, ordered Lieutenant Vasquez to order Garcia in to the department. When Garcia arrived at the police station at that time, she would be ordered to undergo a drug test.

After waiting until 7 p.m., Luster left the Chief's office and ran into another officer who informed her that Garcia had checked into rehab. She instructed the officer to contact Garcia to inform her to contact the department. Subsequently, Luster received a phone call from Garcia; Garcia was crying. Luster testified that she informed Garcia "three different ways three different times" to report in for a drug test; this was done "with the chief's approval to specifically direct her and order her in for a drug test." Luster testified that the crying intensified, and Garcia hung up. The department undertook steps to locate Garcia to no avail.

Subsequently, on June 14th, Luster received a call from Corbo's ex-wife, stating that while she was searching for Corbo's wallet or paperwork in a duffel bag, she found a loaded gun. Luster informed Molinari, who ordered her to retrieve the weapon. Luster found the handgun in a duffel bag on the floor in Carbo's hospital room, she secured the gun. The serial number on the weapon was registered to Garcia.

Under cross-examination, Luster stated that Garcia did not acknowledge what she was saying "other than the intensifying of crying," which may have been because of other factors. Luster also testified that she did not know whether Garcia brought the duffel bag to the hospital or whether Garcia put the contents in the bag. However, she testified that Officer Porres stated during an interview by Internal Affairs that he had a conversation with Garcia about "checking in the bag for something or securing the bag or something." Under examination by the Court, Luster stated that Corbo's ex-wife

informed her that she saw Garcia and Officer Porres texting on June 13, and she saw Porres remove an item from Garcia's purse, which was in the duffel bag. Luster further testified that Porres informed Internal Affairs that he never removed an item from the duffel bag.

Francesco DePinto, Jr.

Francesco DePinto, Jr. (DePinto) is a police officer with the City. DePinto testified that he visited Corbo in the hospital, and later that day he received a phone call from a "crying" Garcia. They exchanged phone calls after that. Notably, during one of the phone calls, Garcia asked DePinto "do you know how long cocaine stay[s] in the system?" He forwarded her information via text.

Subsequently, on Friday evening, Garcia telephoned him and asked that he retrieve certain items for her since she checked herself into rehab. After that, he informed Captain Luster. The following morning, he retrieved the items and asked Officer Porres to transport the bag to the facility.

Under cross-examination, he stated that he knew Corbo to be a "very sarcastic individual." He also stated that he knew that Garcia had been in a very serious accident in June 2014 that required her to take prescription medication and undergo therapy.

Ramon Vasquez

Lieutenant Ramon Vasquez (Vasquez) is a member of the City's Police Department in its Internal Affairs Bureau. Vasquez testified that on June 13, Internal Affairs received a call from Saloom regarding an emergency call involving Corbo and Garcia. After that, Saloom faxed a copy of DiGrazio's police report. Vasquez immediately notified Molinari, who convened a conference call with the Assistant Prosecutor's office. Thereafter, Vasquez contacted Garcia and ordered her to report to Molinari's office by 5 p.m., an order which Garcia acknowledged. Garcia never reported, and at approximately 6:45 p.m., Vasquez and Detective Maitlin began searching for her, with no results.

Under cross-examination, Vasquez stated that he had no direct knowledge of the events of June 11 and that he did not speak to DiGrazio. Vasquez further testified that the phone call placed to Garcia was recorded via a handheld recorder operated by Detective Maitlin.

Anthony Facchini

Lieutenant Anthony Facchini (Facchini) is a member of the City's Police Department. On June 16, Facchini was briefed on the matter and became involved in the investigation. Facchini stated that there was no report that Garcia's weapon found in the duffel bag was lost or stolen. The investigation included an interview of Officer Porres, under grant of immunity, to determine whether he had removed anything from the duffel bag, as reported by Corbo's ex-wife. Facchini stated that Porres provided no useful information. Facchini interviewed DiGrazio, whose information was consistent with that contained in his report. He also interviewed DePinto, who informed him about Garcia's question about the time cocaine stays in the system. Facchini testified that he was able to contact Garcia at the rehabilitation facility, where he served her papers related to the charges against her.

Under cross-examination, Facchini testified that he interviewed several other officers who stated that they had no reason to believe that Garcia used illicit substances. Facchini also testified that it was his understanding that based on Vasquez's phone call and prior to contact with Luster, Garcia had no reason to believe she was being ordered to report for a drug test. Facchini further testified that no other officers were granted immunity except Porres because there was an allegation that he tampered with evidence.

Jessica Garcia

Garcia was a patrol officer in the City for approximately four years until her termination. She was in a relationship with Corbo at the time of the incident. She

testified that when she awakened on June 11th, she noticed that Corbo was blue in the face and was not breathing, so she began performing CPR and called 911.

She stated that she told DiGrazio that Corbo "may have" done a "bump" of cocaine five days before. According to Garcia, Corbo was in the habit of making "distasteful jokes" and stating that he may have to use cocaine to ease the pain associated with a recent motorcycle accident. She stated that she did not know if Corbo actually ingested cocaine, nor was she aware that a toxicology test performed at the hospital was positive for cocaine.

Garcia testified that DiGrazio's testimony was not completely accurate because her statement to "not tell anyone" was based on her lack of knowledge, not an attempt to hide illicit activity, and that the information should be relayed to the EMS personnel only. She further testified that when she went to the hospital with the duffel bag, she did not place the handgun into the duffel bag, nor did she have a weapon on her person. The weapon was stored in a nightstand at Corbo's residence.

Garcia further testified that she spoke with Luster on June 12th regarding Corbo's condition. Garcia further testified that she did not recall any calls from Luster on June 13, but she did recall speaking to another officer to state that she was checking herself into rehab. Garcia received a call from Vasquez on June 13th, ordering her to report in, on the direct order of the Chief of Police, at a certain time. After receiving the order, Garcia left the hospital and drove "in a state of panic and anguish." Garcia stated that she did not expect to be subjected to a drug test, but she admitted that she did not intend to report to Union City. She further admitted that she called DePinto to ask how long cocaine would stay in a person's system. Subsequently, she told DePinto not to call her anymore because she did not wish to speak to anyone. However, she contacted him to ask that he bring her certain items at the rehabilitation facility.

At the time, Garcia believed she was abusing prescription medications, though she stated that she did not take any of the medications while on duty.

Under examination by the Court, Garcia stated that she placed the duffel bag on the floor of Corbo's room on or around June 12 but did not come into contact with it after that. Under direct examination, she stated that she had no knowledge of how her handgun came to be found in the hospital room, and she believed that her weapon was in the nightstand in Corbo's residence. She stated that she has no knowledge as to how her weapon came to be in the duffel bag, and she did not place it in the duffel bag.

Garcia admitted that she disobeyed Vasquez's direct order.

Under cross-examination, she stated that Corbo joked around a lot, and "it's not always in good taste." Therefore, when Corbo spoke about ingesting cocaine, she assumed it was a joke, and she stated that she never witnessed him ingest cocaine. She informed DiGrazio about the possible cocaine use "out of an abundance of caution." She described her state of mind throughout this period as "hysterical [and] panicked." Thus, when Vasquez gave her the order to report, "[she] was really worried about [Corbo] and . . . didn't want to leave." Further, at this point, she "wasn't thinking clearly" that she had disobeyed a direct order.

Under re-direct, Garcia again admitted that she told DiGrazio that Corbo may have ingested a "bump" of cocaine. She stated that she had no reason to believe that she was the target of an investigation and acknowledged that, regardless, she violated a direct order from the Chief via Vasquez.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Civil Service Act and its associated regulations govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Among the causes for major discipline is conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(3).

Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct. W. New York v. Bock, 38 N.J. 500, 522-24 (1962). Conduct unbecoming a public employee is any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him/her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Bock, supra, 38 N.J. 500.

This case is particularly sensitive because it involves law enforcement officials.

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . .
>
> [Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).]

Even more troubling is the fact that illicit drugs may be involved. "Every police officer understands that an officer who uses or sells drugs is a threat to the public." Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 189 (1993).

In this matter, the City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). Thus, I must engage in a fact-specific analysis to determine which party on whose side the weight of the evidence preponderates, and according to a reasonable probability of

truth. Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

Petitioner challenges whether the City has reasonable suspicion to order her to undergo a drug test.

> Reasonable suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. In fact, reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Moreover, the concept of reasonable suspicion, like probable cause, is not readily, or even usefully, reduced to a neat set of legal rules. Rather, it requires an evaluation of the totality of the circumstances—the whole picture.
>
> [Tamburelli v. Hudson County Police Department, 326 N.J. Super. 551, 555-56 (App. Div. 1999) (internal citations and punctuation omitted).]

First, I note that contrary to petitioner's assertion in summation, reasonable suspicion does not require testimony that "she was acting strangely, or not performing her job properly, or that she had exhibited any signs of using drugs." Further, though it is obvious that I owe no deference to the determination of an Assistant Prosecutor regarding reasonable suspicion, I would be remiss not to afford his determination some weight, given that under the Attorney General's guidelines, a county prosecutor could in certain circumstances order a law enforcement officer to undergo a drug test based on reasonable suspicion. See Passaic County PBA Local 187 v. Office of the Passaic County Prosecutor, 385 N.J. Super. 11 (App. Div. 2006). I disagree with petitioner's characterization that the drug test was ordered based on "guilt by association"; Molinari testified that he ordered the drug test based on several factors, including the police report, thus based upon an evaluation of the totality of the circumstances. I

CONCLUDE that respondent had a sufficient basis to order petitioner to submit to the drug screening.

The next question is whether Garcia refused to submit to a drug test. Contrary to petitioner's assertion, I **FIND** Luster's testimony credible. Though there may be inconsistencies in her testimony, there is nothing to lead me to conclude that she should be disbelieved. Further, I **FIND** Garcia's testimony that she was in an emotional state throughout this ordeal credible. However, petitioner has not presented any evidence to support her contention that she did not hear Luster's order. Even if assuming, *arguendo*, that she did not hear Luster's order, it does not excuse her insubordination in failing to respond to Vasquez's lawful order, which she readily admits she heard. Therefore, I **CONCLUDE** that respondent has shown by a preponderance of the evidence that petitioner refused to submit to a drug screening. I further **CONCLUDE** that respondent has shown by a preponderance of the evidence that petitioner was insubordinate by failing to follow a lawful order of a superior officer. I further note that petitioner admitted that she disobeyed Vasquez's order.

Therefore the charges of insubordination, neglect of duty, conduct unbecoming a public employee and refusal to obey a proper order from a superior are sustained.

As for the handgun, it is unclear how it ended up in the duffel bag in Corbo's hospital room. I **FIND** Garcia's testimony that she did not place it in the duffel bag and that she had no knowledge of how it ended up in the duffel bag credible. However, this does not sufficiently answer the question of how it ended up in the hospital room. In this case, the facts show that Garcia's off-duty weapon was found unsecured and loaded in Corbo's hospital room. Garcia had an obligation to keep the weapon secured, and if it were lost or stolen, to report it. It would require a "leap of faith," bordering on implausibility to imply that the handgun was placed in the duffel bag by a person or persons unknown with malicious intent. Therefore, I **CONCLUDE** that respondent has shown by a preponderance of the evidence that petitioner failed to properly secure her weapon. The charges of failure to perform duties, neglect of duty and failure to care of firearm off duty outside the home are sustained.

ORDER

The Union City Police Department's termination of Garcia is **AFFIRMED**.

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. 40A:14-204.

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, P.O. 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.

January 19, 2017
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: January 19, 2017

Date Mailed to Parties: JAN 20 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

List of Witnesses

For Petitioner:

None

For Respondent:

Jamey DiGrazio
Keith Saloom
Richard Molinari
Nichelle Denise Luster
Francesco DePinto, Jr.
Ramon Vasquez
Anthony Facchini
Jessica Garcia

List of Exhibits in Evidence

For Petitioner:

P-1 Transcript of Call: Vasquez/Garcia
P-2 Diagram drawing of Police Desk
P-3 Transcript of Interview of Officer Caridad Diaz

For Respondent:

R-1 Jamey DiGrazio Incident Report
R-2 Attorney General's Law Enforcement Drug Testing Policy
R-3 Union City Police Department Manual, Chapter 10
R-4 Union City Police Department Manual, Chapter 3
R-5 Union City Police Department Manual, Chapter 3
R-6 Report of Captain Nichelle Luster
R-7 Report of Lieutenant Ramon Vasquez, dated June 13, 2014
R-8 Report of Lieutenant Anthony Facchini, dated August 28, 2014

2-22-17

STATE OF NEW JERSEY

In the Matter of Michael L. Jenkins,
City of Plainfield, Police Department

CSC DKT. NO. 2016-4193
OAL DKT. NO. CSR 08353-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 08353-16

IN THE MATTER OF MICHAEL L. JENKINS,
CITY OF PLAINFIELD (POLICE DIVISION),

Gina Mendola Longarzo, Esq., for appellant

Marc S. Ruderman, Esq., for respondent (Ruderman, Horn, Esmerado, P.C., attorneys)

Record Closed: January 19, 2017 Decided: January 23, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

This matter concerns the appeal of Michael L. Jenkins from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on June 1, 2016 pursuant to N.J.S.A. 40A:14-202(d).

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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. 40A:14-204.

January 23, 2017
DATE

JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 1-26-17

Date Mailed to Parties: JAN 26 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RUDERMAN, HORN & ESMERADO, P.C.
675 Morris Avenue, Suite 100
Springfield, NJ 07081
(973) 467-5111
Attorneys for the City of Plainfield

IN THE MATTER OF:

MICHAEL L. JENKINS, II, POLICE OFFICER

SETTLEMENT & RELEASE AGREEMENT

OAL Docket No. CSR 08353-2016N

THIS SETTLEMENT AGREEMENT ("Agreement"), made and executed this 1st day of ~~August 2016~~ November 2016, by and between the City of Plainfield, (hereafter "Plainfield" or "City") and Michael L. Jenkins, II, Police Officer ("Officer Jenkins") and together are referred to as "the parties";

WHEREAS, the City of Plainfield sought to discipline Officer Jenkins pursuant to the City of Plainfield's Preliminary Notice of Disciplinary Action (31-A), dated October 19, 2015, served on October 20, 2016, (hereafter "the Disciplinary Charges"), for various violations of police departmental rules and regulations, with a disciplinary penalty of removal;

WHEREAS, Officer Jenkins was suspended with pay on October 20, 2015 and, following a hearing, then was placed on an unpaid suspension effective November 2, 2015;

WHEREAS, on April 28, 2016, Officer Jenkins waived his right to a departmental hearing on the Disciplinary Charges, and proceeded to an appeal to the Office of Administrative Law;

WHEREAS, a Final Notice of Disciplinary Action ("Final Charges") was issued by the City on May 12, 2016;

WHEREAS, the parties are desirous of resolving the pending administrative appeal of the Final Charges;

NOW THEREFORE, in consideration of the premises and mutual covenants herein contained, and for other good and valuable consideration, the parties agree and accept the following:

1. Officer Jenkins agrees that he is hereby submitting his resignation from his position with the Plainfield Police Department, effective May 2, 2016.
2. Officer Jenkins shall dismiss with prejudice his pending appeal with the Office of Administrative Law under OAL Docket No. CSR 08353-2016N.
3. The City shall rescind its May 12, 2016 Final Notice of Disciplinary Action and file any required documentation with the Civil Service Commission to reflect Officer Jenkin's resignation.
4. The City shall dismiss with prejudice the pending Disciplinary Charges against Officer Jenkins.
5. As required by the Attorney General Guidelines, the City will report Officer Jenkins' name to the Central Drug Registry.
6. Release. As inducement for the City to enter into this Agreement, Officer Jenkins hereby withdraws his pending appeal with the Office of Administrative Law under OAL Docket No. CSR 08353-2016N and waives any his right to appeal this matter to any forum, agency or court, and does remise, release and forever discharge the City and its members of the governing body, including all of its divisions, departments, employees and agents from any and all debts, obligations, suits, actions, causes of action, claims or

demands, in law or in equity, which Officer Jenkins now has, or hereafter can, shall or may have, with respect to the subject matter of this disciplinary action, save any claim of breach under this Agreement.

7. Release As inducement for Officer Jenkins to enter into this Agreement, the City hereby withdraws the Disciplinary Charges dated October 19, 2015 brought against him and does remise, release and forever discharge Officer Jenkins from any and all debts, obligations, civil suits, civil actions, civil causes of action, claims or demands, in law or in equity, which the City has, or hereafter can, shall or may have, with respect to the subject matter of this disciplinary action, save for any claim of breach under this Agreement.

8. Knowing and Voluntary Waiver Officer Jenkins acknowledges that in the execution of this Agreement he is effecting a knowing and voluntary waiver of any claims, liabilities or causes of action against the City of Plainfield and any of its members of the governing body, employees, agents, successors and assigns of the City by reason of the subject matter of this disciplinary action or issue. Officer Jenkins further acknowledges that he has discussed the terms of this Agreement with his attorney, Gina Mendola Longarzo, Esq. and Ms. Longarzo has answered any questions he may have regarding this matter to his full satisfaction. Officer Jenkins also hereby agrees and acknowledges that he has been fully, fairly and adequately represented by Ms. Longarzo in this matter.

9. Modification This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

10. Entire Agreement This Agreement supersedes all prior agreements and understandings between the parties; it contains the full understanding of the parties with respect to this

subject matter; and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

11. Controlling Law This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

12. Non-Admission Officer Jenkins acknowledges that this Agreement does not constitute and shall not be construed as an admission, violation of any law, rule or regulation, breach of any contract or commitment of any wrongdoing whatsoever on the part of the Borough.

13. Severability With the exception of Paragraphs 1 through 7, should any of the provisions of this Agreement be declared or determined by a court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first above written.

WITNESS

MICHAEL L. JENKINS II

ATTEST

ON BEHALF OF THE
CITY OF PLAINFIELD

ROSE MARIE CATHCART
Commission # 2183091
Notary Public, State of New Jersey
My Commission Expires
October 19, 2020

2-22-17

STATE OF NEW JERSEY

In the Matter of Elvis Lopez
City of Newark, Police Department

CSC DKT. NO. 2016-1514
OAL DKT. NO. CSV 20973-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 20973-15

AGENCY DKT. NO. 2016-1514

IN THE MATTER OF ELVIS LOPEZ, CITY OF NEWARK POLICE DEPARTMENT.

Samuel Wenocur, Jr., Esq. for appellant (Oxfeld Cohen PC)

Corrine Rivers, Esq., for respondent (Willie, L. Parker, Corporation Counsel)

Record Closed: January 30, 2017 Decided: January 30, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on December 22, 2015, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. On January 21, 2016 a telephone prehearing was conducted wherein the parties engaged in settlement discussions. Hearing dates were scheduled and adjourned due to the settlement negotiations. The last hearing was rescheduled for September 15, 2016 on which date the parties reached a tentative settlement. On January 30, 2017 the OAL received the Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 30, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

2-3-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Received at Agency:

Date Mailed to Parties: FEB 3 2017
ljb

ELVIS LOPEZ Appellant, -v- CITY OF NEWARK Respondent,	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 20973-2015N** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Civil Communications Clerk, Elvis Lopez, ("Lopez" or "Appellant",) represented by attorney, Samuel Wenocur, Esq. of Oxfeld Cohen, P.C., 60 Park Place. 6th Floor, Newark, New Jersey 07102, ("Counsel",) having waived is right to be represented by a Union represented in this matter, and the City of Newark ("City" or "Respondent".) (Lopez and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from and related to the Domestic Violence incident in which Lopez was involved on April 23, 2015 and the disciplinary action taken against Lopez by the City's Preliminary Notice of Disciplinary Action dated July 27, 2015 ("PNDA") and Final Notice of Disciplinary Action dated November 15, 2015 ("FNDA".)

In consideration of the promises contained herein, it is agreed as follows:

1. The City agrees to amend the FNDA to provide that Lopez is to be issued a 20 day suspension from October 12, 2015 to and including November 6 2015 for the conduct and actions he exhibited as set forth in within the PNDA and FNDA and supporting documentation, and as set forth herein in Paragraph "3" herein.
2. All charges in the FNDA are sustained.

3. In exchange for the terms in this Agreement, Lopez admits that on April 23, 2015, he was involved in a physical altercation with his then live in girlfriend and mother of his child, Stephanie Irizarry, resulting in his arrest by the Newark Police Department and the filing of charges against him for Domestic Violence- Simple Assault, which constitutes a violation of Newark Police Department Rules and Regulations, Chapter 18:24 -- Criminal Law -- Department members shall not violate any criminal law, any provision of the Disorderly Persons Act or of the City Ordinances, and Chapter 18:5 -- Unfavorable Conduct -- Department members shall not conduct themselves in a manner which reflects unfavorably on the courage and resourcefulness of the Department, and Violation of Civil Service Rule 4A:2-2.3(a)6, An employee may be subject to discipline for conduct unbecoming a public employee.
4. The Parties acknowledge and each agree that Lopez's absence from work for the period from November 9 JAS SW EL, 2015 through and including November 20, 2015 is to be an unpaid leave of absence and they each agree that Lopez will not receive and is not entitled to any wages or other compensation and/or he and his attorney hereby waive any and all back pay or time, seniority and/or pension credit for the aforementioned period.
5. Lopez agrees that he will select a counselor that specializes in Anger Management and/or enroll in an Anger Management Program and complete 12 sessions within a 6 month period. Lopez further agrees to proof of his program and/or counseling enrollment and completion to the Newark Police Department and a record of same will be maintained in his employment file.
6. Lopez further waives any and all rights and/or claims which he has and/or may have to: 1) A hearing on the merits of the disciplinary

7. action taken under the PNDA, FDNA and/or this Agreement; 2) To challenge the PNDA, FNDA and/or this Agreement; 3) Initiate and/or partake in Grievance procedures concerning any and all matters that have occurred and/or arisen up until and including the execution date of this Agreement; and/or 4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts concerning any and all matters that have occurred and/or arisen up until and including the execution date of this Agreement.
8. Lopez agrees not to appeal and/or permit or partake in the Union appealing on his behalf the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
9. Lopez agrees that there is no consideration due him, his counsel and/or any other person and/or organization, including but not limited to any claim for back pay and/or counsel fees, arising from his employment, the disciplinary matter and/or the execution of this Agreement, except as otherwise provided herein.
10. Lopez acknowledges that this Agreement further precludes him and/or the Union on his behalf from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

11. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Lopez's estate, and purchasers and/or assignees of Lopez's and/or the City's interests shall also be bound.

12. In consideration for the terms in this Agreement, the City agrees to issue to Lopez an amended PNDA and FNDA concerning the disciplinary matter related to Lopez's actions on April 23, 2015 as provided herein, and Scott and the Union agree to accept same, as timely prepared and issued.

13. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

14. Lopez further acknowledges and agrees that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

15. Lopez agrees this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

16. This Agreement contains the sole and entire agreement between Lopez and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Lopez specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other

promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

17. Lopez agrees and acknowledges that he has been fully and fairly represented by his Counsel and hat he waived representation by his

18. Labor Union in this matter, and he is satisfied with the representation of his Counsel and with the terms and conditions of this Agreement.

19. Lopez agrees and acknowledges that he has had a full opportunity to review this Agreement with his Counsel and/or Union representative and he enters into same knowingly and voluntarily.

20. Lopez acknowledges that the City does not admit, accept and/or in any way concede any form or quantum of liability or fault whatsoever on the part of the City by entering the Agreement or engaging in any other conduct relating to the Agreement and/or the subject matter hereof.

21. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement and General Release shall be fully enforceable.

22. By signing this Settlement Agreement, Lopez states that:

a. He has read it;

b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional,

d. His Counsel negotiated this Agreement in his presence and with his knowledge and consent;
e. He consulted with his Counsel prior to executing this Agreement, has had the opportunity to ask any and all questions relating to this Agreement and that his Counsel has answered all such questions to his satisfaction;
f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

1-18-17
Date

BY:

Anthony Ambrose, Director
Newark Public Safety

Date

Elvis Lopez

Date

Samuel Wenocur, Esq.
Attorney for Elvis Lopez

Approved as to Form and Legality:

1/18/2017
Date

Zilka A. Saunders, Esq.
Law Department, City of Newark

statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c. He agrees with everything contained in this Agreement;

d. His Counsel negotiated this Agreement in his presence and with his knowledge and consent;

e. He consulted with his Counsel prior to executing this Agreement, has had the opportunity to ask any and all questions relating to this Agreement and that his Counsel has answered all such questions to his satisfaction;

f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

_____ BY: _____

Date

Anthony Ambrose, Director
Newark Public Safety

9/15/16
Date

Elvis Lopez

9/15/16
Date

Samuel Wenocur, Esq.
Attorney for Elvis Lopez

Approved as to Form and Legality: Gale O. Saunders, Esq. O.C.C. 9/15/16

9/15/16
Date

Zilka A. Saunders, Esq.
Law Department, City of Newark

CERTIFICATION

I, Elvis Lopez, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/15/16
DATE

ELVIS LOPEZ

2-22-17

STATE OF NEW JERSEY

In the Matter of Ruben Lugo
Bayside State Prison,
Department of Corrections

CSC DKT. NO. 2015-646
OAL DKT. NO. CSV 11596-14

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11596-14

AGENCY DKT. NO. 2015-646

IN THE MATTER OF RUBEN LUGO,
BAYSIDE STATE PRISON
DEPARTMENT OF CORRECTIONS.

Frank M. Crivelli, Esq., for appellant, Ruben Lugo (Crivelli & Barbati, LLC, attorneys)

Tamara Rudow, Legal Specialist, Office of Employee Relations, for respondent, Bayside State Prison, Department of Corrections, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)

Record Closed: January 25, 2017 Decided: January 27, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on September 11, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

1-27-17
DATE

JEFFEREY WILSON, ALJ

Date Received at Agency: 1/31/17

Date Mailed to Parties: 2/1/17

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on January 25, 2017

State of New Jersey
DEPARTMENT OF CORRECTIONS
WHITTLESEY ROAD
PO BOX 863
TRENTON NJ 08625-0863

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

GARY M. LANIGAN
Commissioner

January 23, 2017

Honorable Jeffrey R. Wilson, ALJ
Office of Administrative Law
1601 Atlantic Avenue
Suite 601
Atlantic City, NJ 08401

Re: **Lugo, Ruben v. Bayside State Prison, Department of Corrections**
OAL Docket No. CSV 11596-2014 S (30-Day Suspension)
Agency Ref. No. 2015-646

Dear Judge Wilson:

Enclosed for your review and approval is an original fully executed Settlement Agreements in the above-referenced matter.

If deemed appropriate by your Honor, please process via an Initial Decision and forward to the Civil Service for their acknowledgement.

Thank you for your attention to this matter.

Respectfully submitted,

s/ Tamara L. Rudow
Tamara L. Rudow, Esq.
Legal Specialist
Office of Employee Relations

c: Frank Crivelli, Esq. (via email only)

Enc.

SETTLEMENT AGREEMENT

LUGO, RUBEN

APPELLANT

V.

STATE OF NEW JERSEY DEPARTMENT OF CORRECTIONS

OAL DOCKET NO. CSV 11596-2014S

AGENCY DOCKET NO. 2015-646

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated August 25, 2014 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	N.J.A.C. 4A:2-2.3 (a) (6) Conduct unbecoming an employee	Thirty (30) Working Day Suspension	8/25/2014
2.	N.J.A.C. 4A:2-2.3 (a) (12) Other Sufficient Cause	Same	Same
3.	HRB 84-17, as amended, B2.Neglect of duty, loafing, Idleness or willful failure to devote attention to tasks which could result in danger to persons and property	Same	Same
4.	HRB 84-17, as amended, C11. Conduct unbecoming an employee	Same	Same
5.	HRB 84-17, as amended, D7. Violation of administrative Procedures and/or regulations involving safety	Same	Same

and security

6. HRB 84-17, as amended Same — Same
   E1. Violation of a rule, regulation, policy, procedure or administrative order.

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3 (a) (6) Conduct unbecoming an employee	Three (3) Working Day Suspension
2. N.J.A.C. 4A:2-2.3 (a) (12) Other Sufficient Cause	Same
3. HRB 84-17, as amended, B2.Neglect of duty, loafing, Idleness or willful failure to devote attention to tasks which could result in danger to persons and property	Same
4. HRB 84-17, as amended, C11. Conduct unbecoming an employee	Three (3) Working Day Suspension
5. HRB 84-17, as amended, D7. Violation of administrative Procedures and/or regulations involving safety and security	Same
6. HRB 84-17, as amended E1. Violation of a rule, regulation, policy, procedure or administrative order.	Same

C. The parties have agreed to the following:

1. The Appellant has served a thirty (30) working days suspension.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will receive twenty-seven (27) days of back pay.
3. The personnel file for the Department of Corrections will indicate that the appellant received a three (3) working days suspension, for record keeping purposes only. Any other time off shall be reflected in appellant's record as authorized leave without pay. As set forth above, any claim for back pay or attorneys' fees is waived by the Appellant.
4. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
5. As set forth in paragraph C(2) and (3), the Appellant shall not receive counsel fees, return of vacation, sick days or any other monetary relief.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(2).

F. This matter may be expunged from the individual's work history and personnel file in accordance with the policy and procedures set forth in Internal Management Procedure No. PSM.002.Exp.01.

G. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or

prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 01/10/2017

RUBEN LUGO, Appellant

DATE: 1/11/2017

FRANK CRIVELLI, ESQ.
On Behalf of Appellant

DATE: 1/23/17

TAMARA L. RUDOW, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, RUBEN LUGO, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 01/10/2017

RUBEN LUGO

2-22-17

STATE OF NEW JERSEY

In the Matter of Carl Maglowski
Mercer County, Department of
Transportation and Infrastructure

CSC DKT. NO. 2017-655
OAL DKT. NO. CSV 13883-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 13883-16
AGENCY DKT. NO. 2017-655

IN THE MATTER CARL MAGLOWSKI, MERCER COUNTY, TRANSPORTATION AND INFRASTRUCTURE.

Sarai King, Esq., for Carol Maglowski, appellant (Weissman and Mintz, attorneys)

Kristina E. Chubenko, Esq., Assistant County Counsel, for Mercer County, Transportation and Infrastructure, respondent (Arthur R. Sypek, Jr., County Counsel, attorney)

Record Closed: January 26, 2017 Decided: January 26, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on September 13, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Carl Maglowski from the action of the respondent, Mercer County, Transportation and Infrastructure. On January 26, 2017, the parties filed a fully executed Settlement Agreement and General Release. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 26, 2017
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 1/31/17

Date Mailed to Parties: 2/1/17

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement and General Release

WEISSMAN & MINTZ LLC

ATTORNEYS AT LAW

ONE EXECUTIVE DRIVE
SUITE 200
SOMERSET, NEW JERSEY 08873
(732) 563-4565
FAX (732) 560-9779

www.weissmanmintz.com

65 BROADWAY
SUITE 827
NEW YORK, NEW YORK 10006
(212) 509-0918

JOEL N. WEISSMAN (1957-1998)
MARK ROSENBAUM (1955-2002)

STEVEN P. WEISSMAN
ANNMARIE PINARSKI
WILLIAM G. SCHIMMEL
IRA W. MINTZ
JASON L. JONES
SARAI K. KING
CHARLETTE MATTS-BROWN
PENELOPE A. SCUDDER‡

Of Counsel
ROSEMARIE CIPPARULO
ADAM M. GORDON

Counsel
DAVID A. MINTZ*

* ADMITTED TO PRACTICE ONLY IN NEW YORK
‡ ADMITTED TO PRACTICE ONLY IN PENNSYLVANIA

January 24, 2017

BY U.S. MAIL AND FAX: (609) 689-4070
Hon. Joseph Ascione
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: Carl Maglowski v. Mercer Co. Transportation and Infrastructure
OAL Docket No.: CSV 13883-2016 S
Agency Reference No.: CSC Dkt# 2017-655
W&M File No. WM-2010-003

Dear Judge Ascione:

Attached please find a copy of the signed settlement agreement in the above-referenced matter, which the parties propose OAL adopt as a recommended decision settlement.

Sincerely,

Sarai King, Esq.

E-mail copies to: Kristina E. Chubenko, Asst. County Counsel, Mercer County
Al Longstreet, AFSCME Local 2287
Carl Maglowski

ARTHUR R. SYPEK, JR., MERCER COUNTY COUNSEL
BY: KRISTINA E. CHUBENKO, ASSISTANT COUNTY COUNSEL
McDADE ADMINISTRATION BUILDING, ROOM 201
640 SOUTH BROAD STREET
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068
609-989-6511

IN THE MATTER OF
CARL MAGLOWSKI

SETTLEMENT AGREEMENT AND GENERAL RELEASE

Settled prior to Administrative Law Hearing

CSV 13883-2016S

This Settlement Agreement and General Release ("Agreement") is agreed to by the County of Mercer ("County") and Carl Maglowski ("Employee") (collectively "parties") upon the following terms and conditions:

WHEREAS, Employee is employed as a Maintenance Repairer in the County's Department of Transportation/Buildings and Grounds; and

WHEREAS, on or about July 18, 2016 Employee submitted to an Alcotest pursuant to the terms of a Last Chance Agreement dated September 14, 2015; and

WHEREAS, the Alcotest was positive; and

WHEREAS, a Preliminary Notice of Disciplinary Action dated July 21, 2016 was issued to Employee; and

WHEREAS, a Final Notice of Disciplinary Action dated August 8, 2016 was issued removing Employee from his employment; and

WHEREAS, Employee filed a timely appeal of the FNDA with the Civil Service Commission bearing agency reference number 2017-655; and

WHEREAS, the matter was transferred to the Office of Administrative Law bearing docket number CSV 13883-2016S for a de novo hearing; and

WHEREAS, the parties would like to resolve the matter amicably; and

WHEREAS, Employee has agreed to resign, upon and subject to the terms and conditions contained herein, which shall be considered a general resignation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. Employee understands and agrees that his employment with the County ended effective July 18, 2016 and will be recorded as a general resignation. Employee understands and agrees that the County is not obligated to employ him, and that he will not seek reemployment or reinstatement or accept reemployment with the County or any of its subdivisions, at any time in the future.

2. Employee agrees to withdraw with prejudice the appeal pending at the Civil Service Commission bearing agency reference number 2017-655 and Office of Administrative Law Docket Number CSV 13883-2016S.

3. Employee agrees that the County accepting his resignation in lieu of seeking removal constitutes consideration for his waiver of claims contained in this Agreement. Employee will be given the opportunity to obtain medical coverage through the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. § 1166(a)(4) ("COBRA") for a period of up to eighteen (18) months starting from the date of his employment end date at Employee's own expense.

4. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by

employee, but instead constitutes the good faith settlement of a disputed claim and the parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

5. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County amending the charges in this matter and agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of this agreement that he has now to any relief of any kind from the County, whether or not he now knows about those rights, arising out of his employment with County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-

Employee Relation Act; New Jersey Family Leave Act, Older Workers Benefit Protection Act of 1990, 29 U.S.C. §621 et seq., and any other claims for unlawful employment practices with regard to this matter. It is emphasized that Employee is waiving all possible claims against the County with regard to this disciplinary matter.

6. Employee represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that he is voluntarily entering into this Agreement and that the County has not made any representations concerning the terms of effects of this Agreement other than those contained herein.

7. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

8. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s)/term(s) or provision(s) shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

9. The foregoing constitutes a full and final disposition of this matter.

10. Employee shall not request relief with respect to this matter in any forum beyond that which is contained herein.

11. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

12. This Agreement is the result of negotiations with Employee and the attorney for AFSCME Council 73, Local 2287, Employee's union, with whom Employee had an opportunity to consult prior to signing same and is satisfied with the representation.

13. Employee specifically acknowledges that he understands that this Agreement is a legally binding document, and that by signing this Agreement he is prevented from filing, commencing or maintaining any action, complaint, charge, or other proceeding against the County, except as expressly permitted by the terms of this Agreement. Employee further agrees that any fact, evidence, event or transaction currently unknown to Employee but which hereafter may become known shall not affect in any way or manner the final and unconditional nature of this Agreement. Employee acknowledges that he understands that he has the right to consult with an attorney of his choice to review this Agreement and that he is encouraged by the County to do so. Employee further acknowledges that he understands that he has twenty-one (21) days to consider and accept this Agreement from the date it was first given to Employee, although he may accept it at any time within those twenty-one (21) days. Employee further acknowledges that he understands that he has seven (7) days after signing the Agreement to revoke it by delivering to Kristina Chubenko, Assistant County Counsel, County of Mercer, McDade Administration Building, 640 S. Broad Street, Trenton, New Jersey 08650, written notification of such revocation within the seven (7) day period. If Employee does not revoke the Agreement, the Agreement will become effective and irrevocable on the eighth (8^{th}) day after he signs it (the "Effective Date").

If Employee elects to exercise his right of revocation, this Agreement and the promises contained in it, will automatically be deemed null and void.

14. This settlement fully and finally disposes of all issues in controversy. It is reached by way of compromise.

15. This Agreement shall neither set a precedent nor constitute a past practice.

16. This Agreement shall not be considered binding and/or final until approved by and executed by the County Administrator and/or his designee, and the New Jersey Civil Service Commission.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I have hereunto set my hand. **WITH MY SIGNATURE HEREUNDER, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT AND UNDERSTAND ALL OF ITS TERMS INCLUDING THE FULL AND FINAL RELEASE OF CLAIMS SET FORTH ABOVE. I FURTHER ACKNOWLEDGE THAT I HAVE VOLUNTARILY ENTERED INTO THIS AGREEMENT, THAT I HAVE NOT RELIED UPON ANY REPRESENTATION OR STATEMENT, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO HAVE THIS AGREEMENT REVIEWED BY MY ATTORNEY.**

Dated: 1/20/17

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Dated: 1-20-17

CARL MAGLOWSKI, EMPLOYEE

Dated 1-20-17

ALAN L LONGSTREET (UNION)

2-22-17

STATE OF NEW JERSEY

In the Matter of Terrell McDonald
Hudson County,
Department of Family Services

CSC DKT. NO. 2017-266
OAL DKT. NO. CSV 11608-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11608-16
AGENCY DKT. NO. 2017-266

IN THE MATTER OF TERRELL MC DONALD,
HUDSON COUNTY,
DEPARTMENT OF FAMILY SERVICES.

Terrell McDonald, pro se, appellant

Angelo Auteri, Esq., for respondent (Scarinci and Hollenbeck, attorneys)

Record Closed: January 30, 2017 Decided: January 30, 2017

BEFORE **DANIELLE PASQUALE,** ALJ:

This matter concerns the appeal of Terrell McDonald from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on August 1 ,2016 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 30, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency:

2-3-17

Date Mailed to Parties:

FEB 3 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr
Enc.

ANGELO AUTERI | Associate
aauteri@scarincihollenbeck.com
P: 201-806-3410 | F: 201-896-8660

January 26, 2017

Hon. Danielle Pasquale
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: County of Hudson Disciplinary Action- Terrell McDonald
PNDA dated April 4, 2016- Appeal of 10 day suspension
Our File No.: 130.8450

Dear Judge Pasquale:

As you are aware, this matter is scheduled for a hearing for tomorrow January 27, 2017, before Your Honor. Please be advised that the parties have reached a settlement in the above referenced matter. Enclosed herewith is a copy of the fully executed Settlement Agreement. Based on the foregoing, this matter has been resolved.

Please feel free to contact the undersigned with any comments or questions.

Respectfully submitted,

ANGELO AUTERI
For the Firm

Enc.

cc: Terrell McDonald
Louis C. Rosen, Deputy County Counsel
Roger Quintana, Personnel Officer

4821-1498-0928, v. 1

SETTLEMENT AGREEMENT AND RELEASE

2017 JAN 27 P 2:20

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 27 day of January, 2017 between the County of Hudson (hereinafter referred to as the "County") and Terrell McDonald (hereina fter referred to as "McDonald" or the "Employee").

WHEREAS, the Employee is employed with the County as a Social Worker; and

WHEREAS, the County instituted a disciplinary action against McDonald in a Preliminary Notice of Disciplinary Action dated April 4, 2016, ("hereinafter referred to as the Disciplinary Action"), and charging the following violations: conduct unbecoming a public employee; neglect of duty; and other sufficient cause; and

WHEREAS, the Employee requested a departmental hearing on the Disciplinary Action which occurred on May 20, 2016; and

WHEREAS, the charges of conduct unbecoming a public employee; neglect of duty; and other sufficient cause were sustained by the Hearing Officer at the conclusion of the departmental hearing; and

WHEREAS, the Hearing Officer set forth a penalty of a ten (10) day suspension on McDonald; and

WHEREAS, a Final Notice of Disciplinary Action dated July 7, 2016 was issued to the Employee following the outcome of the departmental hearing; and

WHEREAS, McDonald filed an appeal of the Hearing Officer's determination to the Office of Administrative Law, Docket No. CSV 11608-2016 N; and

WHEREAS, the County and McDonald desire to resolve all outstanding issues with respect to the Disciplinary Action and the appeal filed in the Office of Administrative Law;

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the County and McDonald agree as follows:

1. **DISCIPLINARY ACTION**

   a. McDonald agrees that the charges set forth in the Preliminary Notice of Disciplinary Action, April 4, 2016, are sustained.

   b. The County agrees to reduce the disciplinary penalty from a ten (10) day suspension to a five (5) day suspension. McDonald agrees to accept a disciplinary penalty of a five (5) day suspension, without pay which shall be recorded as such with the New Jersey Civil Service Commission.

   c. As McDonald has already served a ten (10) day suspension, McDonald will receive five (5) days of back pay, which shall be subject to all applicable withholdings.

   d. Except as set forth above in Paragraph 1.c., McDonald agrees to waive any and all claims to back pay, benefits, and any and all other monetary claims including, but not limited to, attorney's fees with respect to the Disciplinary Action.

2. **COMPLETE RELEASE**

In further consideration of the settlement herein above, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily

enter into this Agreement, and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

   i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical

hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of or under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NON ADMISSION OF LIABILITY.**

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the County, by whom any such obligation or liability is expressly denied.

4. **CONSULTATION WITH ATTORNEY**.

Releasor has had an opportunity to consult with an attorney and/or Union Representative with respect to this Agreement and to review with her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

5. **REASONABLE PERIOD OF TIME.**

Releasor agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

6. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between the Employee and the County, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the County to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

9. **EMPLOYEE ATTESTS**

Releasor represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that she enters into this Agreement voluntarily, of her own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

10. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to Personnel Officer Roger Quintana, at the Hudson County Department of Family Services. This seven (7) day revocation period may not be waived by the Employee.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Terrell McDonald, executed the foregoing Agreement this ____ day of January 2017.

1/20/17

TERRELL MCDONALD

Sworn and Subscribed to before me
this ____ day of _____, 2017.

_____
Notary Public
State of New Jersey

EMPLOYEE

Dated: 1/25/17

BY: _____

COUNTY OF HUDSON

Dated: 1/25/17

BY: _____

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 day period referred to in the 5th recital on page 7 of this Agreement.

_____, 1/24/17

TERRELL MCDONALD

2-22-17

STATE OF NEW JERSEY

In the Matter of Tariq McLamb
Newark Public School District

CSC DKT. NO. 2016-2152
OAL DKT. NO. CSV 2383-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 2383-16
AGENCY DKT. NO. 2016-2152

IN THE MATTER OF TARIQ MC LAMB,
NEWARK PUBLIC SCHOOL DISTRICT.

Samuel Wenocur, Esq., for appellant (Oxfeld Cohen, attorneys)

Bernard Mercado, Esq., appearing for respondent (Newark Public Schools, attorney)

Record Closed: January 17, 2017 Decided: January 17, 2017

BEFORE **DANIELLE PASQUALE,** ALJ:

This matter concerns the appeal of Tariq McLamb from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on February 9, 2016 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 17, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 1-20-17

Date Mailed to Parties: JAN 20 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr
Enc.

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent State-operated
School District of the City of Newark

TARIQ MCLAMB, Appellant, vs. NEWARK PUBLIC SCHOOL DISTRICT, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV: 02383-2016N AGENCY REF. NO.: 2016-2152 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Tariq McLamb ("Appellant" or "McLamb") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, his appeal and request for a hearing filed under OAL Docket No. CSV 02383-2016N, Agency Ref. No.: 2016-2152 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other suits or claims that he may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all of Appellant's outstanding claims against the District related to his employment. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Appellant fail to submit a formal letter of withdrawal for each suit or claim.

3. In exchange, and for good consideration as hereby acknowledged by the the parties, the District will permit Appellant to resign his former position with the District in good standing so that Appellant's separation from employment effective September 16, 2015 will be converted to and deemed to be a voluntary and permanent "Resignation in Good Standing"

Appellant's personnel records will be amended to conform to the terms of the settlement.

4. Other than permitting Appellant to resign his former position, Appellant will not receive any monies or emoluments from the District as part of this Settlement Agreement.

5. Appellant agrees that he will not apply for reemployment with the District at any time. If Appellant does apply for reemployment with the District and is approved for employment, the terms of this Settlement Agreement will control and shall be grounds for immediate termination of Appellant's employment.

6. As of the date of his resignation, all of Appellant's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including all fees, back pay, front pay or any other monetary relief.

8. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that he may have against the District and the Released Parties relating to his employment with the District and/or separation from the District. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with and separation from the District, including but not limited to any and all rights or claims she may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as

any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with and separation from the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should enforcement of this agreement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving his rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 8, Appellant agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient and adequate time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

11. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

12. Appellant understands, agrees to and acknowledges that he is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit

of the Appellant and the District and all who succeed to their rights and responsibilities.

13. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

14. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

15. This Settlement Agreement constitutes the full agreement among the parties and shall be construed and enforced pursuant to New Jersey Law.

16. This Settlement Agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective on the District upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

17. This Settlement Agreement is subject to final approval by the Civil Service Commission and will only become final and binding on Appellant and Respondent upon the approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: 12-7-16
TARIQ MCLAMB
Appellant

Dated: 12/19/16
SAMUEL WENOCUR, ESQ.
Attorney for Appellant

Dated: 1/12/17
CHRISTOPHER CERF
State District Superintendent

Dated: 1/10/17
BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, TARIQ MCLAMB, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney/representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 12-7-16

Tariq McLamb
TARIQ MCLAMB

The Newark Public Schools
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091
Phone: 973-733-7139
Fax: 973-733-8771

January 13, 2017

VIA FACSIMIILE (973-648-6124) ONLY

Hon. Danielle Pasquale, A.L.J.
Office of Administrative Law
33 Washington Street, 7th Floor
Newark, NJ 07102

Re: McLamb v. Newark Public Schools
Dkt. No.: CSV 02383-2016N
Agency Ref. No.: 2016-2152

Your Honor:

As you may recall, this office represents respondent State-Operated School District of the City of Newark (the "District") in the above-referenced matter. Enclosed for filing, please find a settlement fully executed by both parties resolving the above-mentioned matter. As such, the hearing date scheduled for next week will not be necessary.

Should your Honor have any questions or need any further information, please do not hesitate to contact my office. I thank the Court for its courtesies regarding this matter.

Respectfully submitted,
The Newark Public Schools

By: _____
Bernard Mercado, Esq.

cc: Samuel Wenocur, Esq. (via facsimile (973-802-1055) only)

2-22-17

STATE OF NEW JERSEY

In the Matter of Dyeemah Porter
New Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2016-3214
OAL DKT. NO. CSV 04586-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04586-16

AGENCY DKT. NO. 2016-3214

IN THE MATTER OF DYEEMAH PORTER,
NEW JERSEY STATE PRISON,
DEPARTMENT OF CORRECTIONS.

Todd McConnell, Vice President #2, PBA Local 105, appearing for appellant, Dyeemah Porter, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Christopher J. Hamner, Deputy Attorney General, appearing for respondent, New Jersey State Prison, Department of Corrections (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 3, 2017 Decided: February 6, 2017

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 24, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 6, 2017
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 2/7/17

Date Mailed to Parties: 2/7/17

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 3, 2016

OAL DKT. NO. CSV 04586-2016 S

OAL DKT. NO. CSV 04586-2016 S
AGENCY DKT. NO. 2016-3214
SETTLEMENT AGREEMENT

IN THE MATTER OF
NJ STATE PRISON, NJ DEPARTMENT OF CORRECTIONS
AND
DYEEMAH PORTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. On February 25, 2016, Dyeemah Porter's working test period with the N.J. State Prison ended. The rating assigned to Dyeemah Porter's performance was UNSATISFACTORY, and her employment was terminated. Dyeemah Porter appealed this termination, and a hearing was scheduled in the Office of Administrative Law.

B. As a result of this Settlement Agreement, the Appellant Dyeemah Porter withdraws her appeal and request for a hearing, and the Respondent Appointing Authority New Jersey Department of Corrections agrees that the termination of Dyeemah Porter will be converted to a voluntary GENERAL RESIGNATION. Dyeemah Porter agrees not to seek or accept any employment with the New Jersey Department of Corrections at any time in the future.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

C. The New Jersey Department of Corrections (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal

records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding this matter will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

E. Except for the assessment of Dyeemah Porter's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant Dyeemah Porter waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver

H. The parties waive the right to file exceptions and cross exceptions.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/3/17
DATE

Dyeemah Porter
Dyeemah Porter

Feb. 3, 2017
DATE

ON BEHALF OF Appellant

2/3/17
DATE

ON BEHALF OF Respondent

OAL DKT. NO. CSV 04586-2016 S

CERTIFICATION

I, Dyeemah Porter, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/3/17
DATE

Dyeemah Porter
Dyeemah Porter

2-22-17

STATE OF NEW JERSEY

In the Matter of Eduardo Roces
City of Newark, Police Department

CSC DKT. NO. 2016-716
OAL DKT. NO. CSV 12724-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 12724-15
AGENCY REF. NO. 2016-716

IN THE MATTER OF EDUARDO ROCES, CITY OF NEWARK, POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., appearing for appellant Eduardo Roces (Fusco & Macaluso, attorneys)

Corinne E. Rivers, Esq., appearing for respondent City of Newark Police Department (Willie L. Parker, Corporation Counsel, attorneys)

Record Closed: January 24, 2017 Decided: January 26, 2017

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action effective January 2, 2014, the City of Newark Police Department (City) suspended Police Officer Eduardo Roces (appellant) for fifteen (15) days for neglect of duty, insubordination, and false statements relating to a domestic violence incident to which he was dispatched on March 9, 2015. Appellant filed a request for a hearing appealing his suspension which appeal was filed with the Office of Administrative Law by the Civil Service Commission for hearing as a contested

case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on August 18, 2015.

The matter was assigned to me on August 27, 2015. I scheduled a hearing date for February 11, 2016. On February 9, 2016, the City requested that the hearing date be adjourned due to the unavailability of witnesses. Thereafter, a new hearing date was scheduled for May 31, 2016. Prior thereto, and at the joint request of the parties, the hearing was cancelled because the parties were in productive settlement discussions.

After periodic inquiries from the undersigned as to the status of the settlement, under cover of January 24, 2017, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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.

January 26, 2017
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

JAN 31 2017

Mailed to Parties:

id

Lynn Gardner
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EDUARDO ROCES,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
	:	
-v-	:	**OAL DOCKET NO.: CSV 12724-2015**
	:	
CITY OF NEWARK	:	
	:	**SETTLEMENT AGREEMENT AND**
Respondent.	:	**GENERAL RELEASE**
	:	

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Police Officer Eduardo Roces ("Roces" or "Appellant"), The Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (Roces, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against him by the City's Preliminary Notice of Disciplinary Action dated April 19, 2015 (PNDA) and Final Notice of Disciplinary Action dated July 21, 2015 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about March 9, 2015, at Stratford Place, Police Officer Eduardo Roces did neglect his duty when he failed to diligently carry out all of the duties, responsibilities and functions of his position and/or employment, in that: he failed to exit his patrol unit to gain entry into the dwelling. Instead, the Officer notified dispatch that he was unable to gain access in to the building. It was later determined that the building is unsecured and the locks are inoperable. As a result of Officer Roces' neglect, the victim was assaulted a second time by the actor (the assault was overheard by call taker).

2. As a result of the conduct outlined in paragraph one (1) herein, the PNDA was issued and Roces was brought up on disciplinary charges for violating the following Newark Police Department ("NPD") Rules and Regulations: (1) neglect of duty, (2) obedience to orders, (3) false statements.

3. At the departmental hearing, Roces plead not guilty and waived the hearing to the Office of Administrative Law. He was suspended for fifteen (15) days beginning August 10, 2015 and ending August 28, 2015 and the FNDA was issued.

4. Roces appealed the decision on the FNDA to the Office of Administrative Law.

5. The parties have agreed to resolve all issues herein and herein referenced as follows:

    1. The City agrees to reduce Roces's suspension from fifteen (15) days to ten (10) days. Roces will receive five (5) days back.

    2. The City further agrees to amend the FNDA to merge charge two (2) obedience to orders, and charge three (3) false statements with charge one (1) neglect of duty.

    3. Roces further waives any and all rights and/or claims which he has and/or may have to: 1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; 2) To challenge the PNDA, FNDA and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake in any and all litigation against the City in State, Federal and/or Administrative Courts.

4. Roces and the Union each further agree that there is no consideration due Roces, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

5. Roces and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

6. Roces and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

7. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Roces's estate, and purchasers and/or assignees of Roces's, the City's and/or the Unions interests shall also be bound.

8. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

9. Roces and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

10. Roces and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

11. This Agreement contains the sole and entire agreement between Roces, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Roces specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

12. Roces agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

13. Roces agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

14. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

15. By signing this Settlement Agreement, Roces states that:
    a. He has read it;
    b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
    c. He agrees with everything contained in this Agreement;
    d. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;
    e. He consulted with his Attorney prior to executing this Agreement;

f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

1-18-17
Date

BY: _____
Anthony Ambrose, Director
Newark Police Department

1-20-17
Date

BY: _____
Eduardo Roces

1/24/17
Date

_____
Anthony J. Fusco, Jr., Esq.
Attorney for Eduardo Roces

Approved as to Form and Legality:

1/18/17
Date

_____
Corinne E. Rivers, Esq.
Law Department, City of Newark

CERTIFICATION

I, Eduardo Roces, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my

satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1-2017
DATE

Eduardo Roces

2-22-17

STATE OF NEW JERSEY

In the Matter of Johanna Shabazz
Mercer County Corrections Center

CSC DKT. NO. 2016-1509
OAL DKT. NO. CSV 19699-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 19699-15
AGENCY DKT. NO. 2016-1509

IN THE MATTER JOHANNA SHABAZZ,
MERCER COUNTY CORRECTION CENTER.

Merick H. Limsky, Esq., for appellant Johanna Shabazz

Kristina Chubenko, Esq., for respondent Mercer County Correction Center

Record Closed: February 2, 2017 Decided: February 6, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on December 2, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Sully Delgado from the action of the respondent, Mercer County Correction Center. On February 2, 2017, the parties filed a fully executed Settlement Agreement and General Release. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 6, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 2/7/17

Date Mailed to Parties: 2/7/17

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement and General Release

ARTHUR R. SYPEK, JR., MERCER COUNTY COUNSEL
BY: KRISTINA E. CHUBENKO, ASSISTANT COUNTY COUNSEL
McDADE ADMINISTRATION BUILDING, ROOM 201
640 SOUTH BROAD STREET
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068
609-989-6511
Attorney for the County of Mercer

IN THE MATTER OF JOHANNA SHABAZZ	: :	**SETTLEMENT AGREEMENT AND GENERAL RELEASE** CSV 19699 - 2015S
Settled Prior to Administrative Law Hearing	:	

THIS SETTLEMENT AGREEMENT dated ~~December~~ January 17, 2016 is entered into by and between Johanna Shabazz ("Employee") and the County of Mercer ("County") (collectively "the parties").

WHEREAS, Employee has been employed as a Correction Officer with the County at the Correction Center; and

WHEREAS, Employee was issued a Preliminary Notice of Disciplinary action dated May 28, 2015 (the "PNDA") seeking a 10 day suspension; and

WHEREAS, Employee timely requested a departmental hearing; and

WHEREAS, a departmental hearing was held before a hearing officer with regard to the charges contained in the PNDA; and

WHEREAS, the hearing officer recommended a penalty of a 10 day suspension; and

WHEREAS, Employee was issued a Final Notice of Disciplinary Action dated October 6, 2015 (the "FNDA") imposing a 10 day suspension which Employee forfeited 80 hours of compensatory time in lieu of serving the suspension; and

WHEREAS, Employee appealed the FNDA to the Civil Service Commission ("CSC"), Agency Reference number 2016-1509 and the CSC transferred the matters to the Office of

Administrative Law ("OAL"), docket number CSV 19699-2015S, for a de novo hearing; and

WHEREAS, the parties would like to amicably resolve these matters due to the uncertainties and expense of litigation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. The County agrees to amend the FNDA as follows: the 10 day suspension contained in the FNDA will be reduced to a 4 working day suspension and the Employee will plead guilty to the charge of N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause: Violation of administrative procedures and/or regulations those involving safety and security (D-6) SOP 004: Employee Handbook, Section 1.03.1. All other charges contained in the FNDA will be withdrawn. An Amended Final Notice of Disciplinary Action will be prepared to reflect the foregoing. Employee agrees to receive 48 hours of compensatory time in lieu of payment.

2. Employee agrees to withdraw with prejudice the appeal with pending at the Civil Service Commission bearing agency reference number 2016-1509 and OAL docket number CSV 19699-2015S.

3. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by employee, but instead constitutes the good faith settlement of a disputed claim and the parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be

the prevailing party in any threatened or pending litigation.

4. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County amending the charges in this matter and agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of this agreement that she has now to any relief of any kind from the County, whether or not she now knows about those rights, arising out of this disciplinary matter, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relation Act; New Jersey Family Leave Act and any other claims for unlawful employment practices with regard to this matter. It is emphasized that Employee is waiving all possible claims against the County with regard to this disciplinary matter.

7. Employee represents and certifies that she has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that she is voluntarily entering into this Agreement and that the County has not made any representations concerning the terms of effects of this Agreement other than those contained herein.

8. This Agreement is made and entered into in the State of New Jersey and shall in all

respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

9. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s)/term(s) or provision(s) shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

10. The foregoing constitutes a full and final disposition of this matter.

11. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

12. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

13. This Agreement is the result of negotiations with Employee and Employee's attorney with whom Employee had an opportunity to consult prior to signing same and is satisfied with the representation.

14. This settlement fully and finally disposes of all issues in controversy. It is reached by

way of compromise.

15. This Agreement shall neither set a precedent nor constitute a past practice.

16. This Agreement shall not be considered binding and/or final until approved by and executed by the County Administrator and/or his designee. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null and void and shall not interfere with the rights of either party to pursue this matter further.

********* SIGNATURES ON FOLLOWING PAGE **********

Dated: 1/17/17

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Dated: 1/11/17

JOHANNA SHABAZZ, EMPLOYEE

2-22-17

STATE OF NEW JERSEY

In the Matter of Jason Skillern Newark Public School District	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2015-2742 OAL DKT. NO. CSV 16181-16 (remand of CSV 08307-15)	:	

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
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attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 16181-16
AGENCY DKT. NO. 2015-2742
(Remand of CSV 08307-15)

IN THE MATTER OF JASON SKILLERN,
NEWARK PUBLIC SCHOOL DISTRICT.

Vipin Varghese, Esq., for appellant Kevin Washington (Pitta & Giblin, LLP, attorneys)

Sabrina Styza, Esq., for respondent Newark Public School District

Record Closed: January 19, 2017 Decided: January 23, 2017

BEFORE **CARIDAD F. RIGO**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on October 25, 2016, for determination as a contested case. The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

January 23, 2017
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 1-25-17

Date Mailed to Parties: JAN 25 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

attachment

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-8708
Attorney for Respondent

Jason Skillern, Appellant, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL Docket. No. CSV 08307-2015 N Agency Ref. No. 2016-1401 **SETTLEMENT AGREEMENT**

The parties to this appeal Appellant, Jason Skillern ("Appellant"), and Respondent, State-Operated School District of the City of Newark ("District"), hereinafter cumulatively referred to as the Parties, have voluntarily resolved all disputed matters and enter into the following settlement ("Settlement Agreement") that fully disposes of all issues in controversy between them:

1. Appellant hereby withdraws his appeal and waives his right to a hearing in connection with OAL Dkt. No. CSV-08307-2015 and Agency Reference No. 2015-2742.

2. The Parties agree that the charges for Neglect of Duty N.J.A.C. 4A:2-2.3(a) and Other Sufficient Cause N.J.A.C. 4A:2-2.3(A)11 set forth in the Final Notice of Disciplinary Action dated March 31, 2015 are sustained, except that Appellant's ten (10) day suspension will be converted to a ~~three~~ two (2) day suspension and the Appellant will be awarded four (4) days one (1)

back pay in the amount of Nine Hundred Twelve dollars and Eighty Four cents (912.84). The final notice of suspension will be amended accordingly. The additional ~~three~~ five (5) days of suspension Appellant has already served and accounted for in connection with this matter will be designated as and approved as unpaid administrative leave.

3. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

4. Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that he may have against the District and the Released Parties relating to his employment with the District up to the date of this Settlement Agreement. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with the District up to this point, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement

Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should same become necessary.

5. Notwithstanding Paragraph 4 of this Settlement Agreement, it is understood and agreed that the Parties are not prohibited from

communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against Respondent based upon any of the above-released claims in Paragraph 4, Appellant agrees not to seek or accept any resulting relief.

6. Notwithstanding the terms of Paragraph 4 of this Settlement Agreement, Appellant does not waive any right he may have to workers compensation claims.

7. By entering into this Settlement Agreement, the District does not admit to any prior discrimination against Appellant, but notwithstanding that, it agrees it will not discriminate against Appellant on account of race, gender, age, union affiliation or any other protected class as recognized under local, state or federal law, in regards to the enforcement of the District's attendance policies or any other aspect of Appellant's employment with the District.

8. The Settlement Agreement contains the sole and entire agreement between the Parties in connection with OAL Dkt. No. CSV-08307-2015 and Agency Reference No. 2015-2742, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Appellant specifically represents and acknowledges in executing the Settlement Agreement that he has not relied upon any representation or

statement by the District, or District's counsel or representative, with regard to the subject matter of this Settlement Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Settlement Agreement.

9. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given time within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Appellant understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

10. The Parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this

Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

11. Appellant agrees and acknowledges that he has been fully and fairly represented by his union and he is satisfied with that representation and with the terms and conditions of the Settlement Agreement.

12. This Settlement Agreement is subject to the review of the Superintendent of the State-operated School District of the City of Newark and will only become effective upon the approval of the Superintendent of the State-operated School District of the City of Newark or the Superintendent's designee. Any disapproval by the Superintendent or the Superintendent's designee shall not interfere with the rights of either party to pursue the matter further.

13. The Settlement Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

14. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder to the Settlement Agreement shall be fully enforceable.

Dated: 1/18/17

JASON SKILLERN
Appellant

Dated: 1/18/17

~~VIPIN VARGHESE, Esq.~~ Lesley Sotolongo, E
Attorney for Appellant

Dated: 1/18/17

CHIRSTOPHER D. CERF
State District Superintendent

Dated: 1/18/17

SABRINA STYZA, Esq.
Attorney for Respondent

CERTIFICATION

I, JASON SKILLERN, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my counsel questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 1/18/17

JASON SKILLERN

2-22-17

STATE OF NEW JERSEY

In the Matter of Ayesha Waite
Passaic County,
Preakness Healthcare Center

CSC DKT. NO. 2017-627
OAL DKT. NO. CSV 13884-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: FEBRUARY 22, 2017 BW

The Civil Service Commission, at its meeting of February 22, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
FEBRUARY 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 13884-16
AGENCY DKT. NO. CSC #2017-627

IN THE MATTER OF AYESHA WAITE,
PASSAIC COUNTY PREAKNESS HEALTHCARE CENTER.

Terry L. Woodrow, Staff Representative, AFSCME Local 3724, for appellant Mary Spivey pursuant to N.J.A.C. 1:1-5.4(a)6

Jose R. Santiago, Esq., Assistant County Counsel, for respondent (Passaic County Counsel)

Record Closed: January 24, 2017 Decided: January 25, 2017

BEFORE **LELAND S. McGEE**, ALJ:

On May September 13, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Hearings were scheduled for February 8 and 10, 2017 and before the hearing the parties agreed to settle the matter. A Settlement Agreement indicating the terms of settlement was signed by parties and forwarded to the undersigned on January 24, 2017. A copy of the Settlement Agreement and Board Resolution is attached hereto and made a part hereof.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

January 25, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: 1-27-17

Mailed to Parties: JAN 27 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

Attachment

WILLIAM J. PASCRELL, III,
PASSAIC COUNTY COUNSEL
401 GRAND STREET
PATERSON, NJ 07505(973) 881-4466
Attorney for Respondent Passaic County Preakness Healthcare Center

AYESHA WAITE,	:	STATE OF NEW JERSEY
	:	
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	AOL DOCKET NO: CSV 413884-2016 N
	:	
vs.	:	
	:	**SETTLEMENT AGREEMENT**
PASSAIC COUNTY PREAKNESS	:	
HEALTHCARE CENTER,	:	
	:	
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made by and between the Respondent, PASSAIC COUNTY PREAKNESS HEALTHCARE CENTER ("Preakness") and its employee, Appellant, AYESHA WAITE;

WHEREAS Preakness and Mrs. Waite (cumulatively the "Parties") are parties to a matter currently before the Office of Administrative Law (OAL Docket No. CSV 413884-2016N, Agency Dkt. No. 2017-627) regarding Preakness' imposition of a disciplinary action against Mrs. Waite with an effective date of July 28, 2016 (See Exhibit A & B) and

WHEREAS, because of the cost and expense of prosecuting the charge and the uncertainty of its outcome, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with a hearing; and

WHEREAS the proposed settlement is in the best interests of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW THEREFORE, intending to be legally bound hereby, Preakness and Mrs. Waite have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them:

A. Preakness agrees to amend its Personnel records to show a resignation in good standing.

B. Mrs. Waite agrees not to seek future employment with Preakness Healthcare for five years after the date of the signing the stipulation of settlement.

C. In consideration of paragraphs A and B, and the terms and conditions as set forth herein, Mrs. Waite agrees to withdraw her appeal and request for a hearing.

D. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which Mrs. Waite was not paid by Preakness.

E. Preakness shall amend Mrs. Waite's personnel records to conform to the terms of the Agreement. All of Preakness' internal records will be kept intact. Nothing herein shall preclude Preakness from releasing information on this matter to anyone who has a release executed by Mrs. Waite or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement system pursuant to N.J.S.A. 43:1-2.2 as amended effective April 14, 2007.

F. Mrs. Waite waives all other claims against Preakness with regard to this matter, including any award of back pay, counsel fees or other monetary relief.

G. Mrs. Waite waives all claims, suits or action, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against Passaic County, Passaic County Board of Chosen Freeholders, Preakness, Preakness' employees' agents or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this

Agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits law, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waive includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The Parties shall each bear their own costs, expert fees, attorneys' fees and other fees incurred in connection with this Agreement.

I. This Agreement is executed voluntarily and without any duress or undue influence on the part or behalf of the Parties hereto, with the full intent of releasing all claims. The Parties acknowledge that:

    1. They have carefully read this Agreement and it has been explained to them in full;

    2. They have been represented in the preparation, negotiation and execution of this Agreement by legal counsel of their own choice or that they have voluntarily declined to seek such counsel;

3. They fully understand the terms and consequences of this Agreement and of the releases it contains;
4. They are fully aware of the legal and final binding effect of this Agreement;
5. They freely and voluntarily enter into this Agreement without duress or coercion;
6. The Parties are completely satisfied that this Agreement is fair, reasonable, and acceptable; and
7. The parties are satisfied with their respective counsel if any and believe their counsel has effectively represented their independent interests.

J. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them, under the terms and conditions of this Agreement. Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of, or against, any of the claims or causes of action released herein.

K. Each Party represents that it has had the opportunity to consult with an attorney, and has carefully read and understands the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representation or statement made by the other Party hereto, which are not specifically set forth in this Agreement.

L. The Parties agree that in the event that any portion of this Agreement is deemed illegal, unenforceable or void, the remainder of this Agreement shall continue in full force and effect without said provision or portion of such provision.

M. This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto, respecting the subject matter hereof, and supersedes and cancels all previous negotiations, agreements, commitments and writings in connection herewith.

The introductory clauses are incorporated herein and read together are contractual in nature and not mere recitals.

N. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise except by an instrument in writing of concurrent or subsequent date, signed by a duly authorized officer or representative of each of the parties hereto. The Parties agree that they waive the rule of construction against the drafter of this Agreement.

O. The laws of the State of new Jersey shall govern this Agreement.

P. The Agreement is effective after it has been signed by all of the Parties.

Q. This Agreement may be executed in counterparts, and each counterpart shall have the same force and effect as an original and constitute an effective, binding agreement on the part of each of the undersigned.

R. This Agreement represents the complete and full understanding between the Parties, thereof and is signed as their own free act.

The undersigned state that they have carefully read the foregoing AGREEMENT, know the contents thereof, have had the opportunity to discuss those contents with counsel or other a personal advisor of their choosing, freely and voluntarily consent to all terms and conditions thereof and sign the same as their own free act.

BY SIGNING BELOW, THE UNDERSIGNED FURTHER INDICATE AND ACKNOWLEDGE THAT THIS IS A LEGALLY BINDING DOCUMENT AND that THEY ARE FREELY AND VOLUNTARILY GIVING UP CERTAIN RIGHTS TO FILE LEGAL CLAIMS AND TO RELEASE PRIVATE AND CONFIDENTIAL INFORMATION AND INTEND TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT WITHOUT EXCEPTION.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the respective dates set forth below.

1/18/17
Date

Ayesha P. Waite
Petitioner, Ayesha Waite

1/19/17
Date

Terry Woodrow Staff Rep 8:52.
Terry Woodrow, Union Representative

1/19/17
Date

Lucinda Corrado
Lucinda Corrado, Director
Preakness HealthCare Center

1/19/17
Date

Attorney for Preakness

CERTIFICATION

I, Ayesha Waite, being the moving party in this matter, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Agreement voluntarily.

I also understanding that if this Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

1/18/17
DATE

Ayesha Waite
Ayesha Waite

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

March 29, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Susan C. Sweeney, Esq.
Department of Military & Veterans Affairs
P.O. Box 340
101 Eggerts Crossing Road
Trenton, New Jersey 08625-0340

Re: *Wayman Smith v. Department of Military and Veterans Affairs* (CSC Docket No. 2017-1858; OAL Docket No. CSV 19011-16) - **SETTLEMENT**

Dear Mr. Scorzetti and Ms. Sweeney:

The appeal of Wayman Smith, a Residential Services Worker with the New Jersey Veterans Memorial Home at Paramus, Department of Military and Veterans Affairs, of his removal, on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on February 23, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on February 27, 2017. Accordingly, the time frame for the Commission to make its final decision expires on April 13, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective April 14, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 19011-16

AGENCY DKT. NO. 2017-1858

IN THE MATTER OF WAYMAN SMITH,
NJ VETERANS MEMORIAL HOME,
PARAMUS, DEPARTMENT OF
MILITARY AND VETERANS AFFAIRS.

Michael Scorzetti, Union Representative, IFPTE, Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Susan C. Sweeney, Esq., Administrator, for respondent New Jersey Department of Military and Veterans Affairs, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 23, 2017 Decided: February 23, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Wayman Smith, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 19, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/23/17 — DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

/nd

OAL DKT. NO. CSV 19011-2016S
AGENCY DKT. NO. 2017. 1358

SETTLEMENT AGREEMENT

IN THE MATTER OF

Wayman Smith

AND

DEPARTMENT OF Military + Veterans Affairs

~~NJ~~ Veterans Home @ Paramus

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 11/23/2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)6	Removal	11/23/16
2. NJAC 4A:2-2.3(a)12		
3. DD220.05(c-7)(c-11)(c-9)(e-1)*		

B. The Appellant Wayman Smith withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority NJDMAVA agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. NJAC 4A:2-2.3(a)6, (a)12	General Resignation
2. DD220.05(c-7),(c-11),(c-9),(e-1)*	
3.	

*Appellant to be paid for 88.0 hours of vacation time @ 15.62 per hour = 1374.56. Payment to be made via supplemental paycheck.

C. The parties have agreed to the following:

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The NJDMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the NJDMAVA will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of NJDMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

OAL DKT. NO. 19011-20165

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2-23-17
DATE

Appellant

2/23/17
DATE

ON BEHALF OF Appellant
LOCAL 195

2/23/17
DATE

ON BEHALF OF Respondent
NJDMAVA-NJ Vets Homes Paramus
Susan C. Sweeney ESQ
Administrator

DATE

Respondent

OAL DKT. NO. 19011-2016S

CERTIFICATION

I, Waymen Smith, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/23/17 _____

DATE

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

March 29, 2017

Arnold S. Cohen, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Emily M. Bisnauth, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0114

Re: *Felicia Bryant v. Department of Corrections* (CSC Docket Nos. 2016-3535 and 2016-4549 and OAL Docket Nos. CSV 5859-16 and CSV 9878-16 [consolidated]) - **SETTLEMENT**

Dear Mr. Cohen and DAG Bisnauth:

The appeals of Felicia Bryant, a Communications Operator, Secured Facilities with the Central Reception and Assignment Facility, Department of Corrections, of her 20 working day suspension and removal, on charges, were before Administrative Law Judge Dorothy Incarvito-Garrabrant (ALJ), who issued her initial decision on March 7, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on March 8, 2017. Accordingly, the time frame for the Commission to make its final decision expires on April 22, 2017.[1] *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final

[1] Since the expiration date of April 22, 2017, is a Saturday, the expiration date is actually April 24, 2017 pursuant to *N.J.A.C.* 1:1-1.4.

disposition. Thus, the Commission has determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective April 24, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Dorothy Incarvito-Garrabrant, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOS. CSV 5859-16 AND CSV 9878-16 (CONSOLIDATED)
AGENCY DKT. NOS. 2016-3535 AND 2016-4549

IN THE MATTER OF FELICIA BRYANT, CENTRAL RECEPTION AND ASSIGNMENT FAC DEPARTMENT OF CORRECTIONS.

Arnold S. Cohen, Esq. for appellant Felicia Bryant (Oxford Cohen, attorneys)

Emily M. Bisnauth, Deputy Attorney General, for Central Reception and Assignment, Department of Corrections, respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 7, 2017 Decided: March 7, 2017

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeals of Felicia Bryant from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matter was transmitted to the Office of Administrative Law for determination as a

contested case on April 15, 2016 and July 6, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

At the scheduled hearing on March 7, 2017, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 7, 2017
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 3/8/17

Date Mailed to Parties: 3/8/17

/lam

OAL DKT. NO. CSC 05859-2016 S & 9878-16 (CONSOLIDATED MATTER)

SETTLEMENT AGREEMENT

IN THE MATTER OF
FELICIA BRYANT
AND
CENTRAL RECEPTION AND ASSIGNMENT, DEPARTMENT OF CORRECTIONS

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. In this consolidated matter, the **Final** Notices of Disciplinary Actions dated March 14, 2016 & June 10, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

Final Notice of Disciplinary Action dated March 14, 2016:

1. N.J.A.C. 4A:2-2.3 General Causes (a)(2) Insubordination; 20 day suspension
2. HRB 84-17, as amended, C-9 Insubordination: Intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect, or use of insulting or abusive language to supervisor

Final Notice of Disciplinary Action dated March June 10, 2016:

1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee-Removal effective June 10, 2016; Removal effective June 10, 2016
2. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause;
3. HRB 84-17, as amended, C-5 Inappropriate Physical Contact or mistreatment of

an Inmate, patient, client, resident, or employee

3. HRB 84-17 as amended E-1, Violation of a rule, regulation, policy, procedure, order or administrative decision;

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 60 days.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: voluntary approved leave without pay.

C. The Appellant Felicia Bryant withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Corrections agrees that the following result will occur with regard to each charge: 60 day Suspension The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Corrections (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Felicia Bryant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Felicia Bryant agrees upon reinstatement to be reassigned to a New Jersey Department of Corrections Facility in the Central Region. (not central Reception and Assignment "CRAF")

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/7/17
DATE

Felicia Bryant, Appellant

3/7/17
DATE

ON BEHALF OF Appellant, Arnold S. Cohen
Attorney

3/7/17
DATE

ON BEHALF OF Respondent
Emily M. Bisnath
Deputy Attorney General
on behalf of Department
of Correction

CERTIFICATION

I, Felicia Bryant, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/7/17 — Felicia Bryant

DATE — Felicia Bryant

3-7-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
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ROBERT M. CZECH
Chair/Chief Executive Officer

June 6, 2017

Evan L. Goldman, Esq.
Goldman, Davis & Gutfleish, P.C.
Three University Plaza – Suite 410
Hackensack, New Jersey 07601

Nonee Lee Wagner, DAG
Department of Law & Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *Janusz Ksieski v. Department of Transportation* (CSC Docket Nos. 2015-2698 and 2016-1504 and OAL Docket Nos. CSV 4746-15 and CSV 1587-16)

Dear Mr. Goldman and DAG Wagner:

The appeals of Janusz Ksieski, an Electrical Mechanic with the Department of Transportation, of his 10 and 45 working day suspensions, on charges, were before Administrative Law Judge Jeff S. Masin (ALJ), who rendered his consolidated initial decision on March 7, 2017, recommending upholding the 10 and 45 working day suspensions. No exceptions were filed by the parties.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on April 21, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date the Commission secured a 45-day extension of time to render its final decision no later than June 5, 2017. *See N.J.A.C.* 1:1-18.8. However, since one of the three Commission members must be recused from participating on this particular matter, there is not a quorum of members available to vote. Accordingly, the Commission sought consent from the parties, as required, to secure a second 45-day extension. However, neither party provided consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective June 6, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Jeff S. Masin, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. CSV 4746-15 & CSV 1587-16
AGENCY DKT. NOS. 2015-2698 & 2016-1504 **(CONSOLIDATED)**

IN THE MATTER OF JANUSZ KSIESKI, DEPARTMENT OF TRANSPORTATION.

Evan L. Goldman, Esq., for appellant Janusz Ksieski (Goldman, Davis & Gutfleish, PC, attorneys)

Nonee Lee Wagner, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 8, 2017 Decided: March 7, 2017

BEFORE **JEFF S. MASIN**, ALJ t/a/:

Janusz Ksieski appealed to the Civil Service Commission from two suspensions issued by his employer, the New Jersey Department of Transportation (DOT). The first, CSV 4746-15, was a ten-day suspension, effective March 16, 2015, imposed by a Final Notice of Disciplinary Action (FNDA) issued on February 24, 2015. The second was a

forty-five-day working suspension, effective as of October 5, 2015, and imposed by a FNDA issued on September 21, 2015.[1] The Civil Service Commission deemed the matters to be contested cases and transferred them for hearing to the Office of Administrative Law, where they were consolidated by Order dated June 7, 2016. The parties each believed that the cases could be resolved by joint motions for summary decision, and arranged for the filing of briefs with the then-assigned administrative law judge, who they supplied with a Joint Stipulation of Facts and attached exhibits. Judge Bingham was then appointed to the Superior Court, and the cases were reassigned to this judge, sitting on recall. The final brief was received on February 6, 2017, and the record closed on that date.

Each of the cases involves alleged violations of N.J.A.C. 4A:2-2-3(a)12 (Other Sufficient Cause). More specifically, in each instance the appointing authority identifies that cause as Mr. Ksieski's consistent failure to be available for emergency overtime, which the appointing authority claims violated Ksieski's obligations under NJDOT Guidelines for Employee Conduct and Discipline, Policy #532, Appendix A, Section I-Attendance, Subsection F-Failure to be Available for Emergency Overtime.

The ten-day suspension is premised upon the allegation that Mr. Ksieski responded to none of the thirteen calls for emergency overtime within the period from April 1, 2013 to August 30, 2013. The forty-five-day suspension arises from the contention that he failed to respond to any of twenty-five such calls within the period from September 1, 2013 to February 2, 2014. Before addressing the stipulated facts concerning these charges, it is useful to note the policy language and the contractual provisions regarding emergency overtime. The DOT's Employee Disciplinary Policy states

F. FAILURE TO BE AVAILABLE FOR EMERGENCY OVERTIME

Employees involved in emergency work operations are expected to be available

[1] The Preliminary Notice of Disciplinary Action had sought Mr. Ksieski's removal, but the FNDA only imposed a forty-five-day suspension.

> to work emergency overtime as a condition of employment. Employees who are scheduled to be available for emergency work for specified periods, (such as a weekly, biweekly or monthly period) must request to be excused from a particular assignment 24 hours in advance of the start of the assignment so that the request can be evaluated in terms of the Department's needs. Once a request to be excused is approved and emergency overtime is actually scheduled and worked for the employee's emergency work shift, the employee shall be treated as if he/she rejected an offer of overtime for purposes of equalization of overtime. If such request is denied, the employee must be available for emergency work. Also, an employee who has repeatedly not been available for unplanned emergency overtime may be subject to discipline.

The penalties for violations of this policy are set forth for "CWA" employees and for "Others, and vary depending upon the number of violations."

Article 12, Section B.2, of the contract between the DOT and IFPTE Local 195 provides as follows, "A list showing the rotational order and the overtime call status of each employee and a record of the total overtime worked and refused by each employee shall be maintained in the work unit. Such records shall be made available for inspection on request to Union Officers, Stewards, and employees concerned." Article 12, Section. B.3., states, "the State will give advanced notice of all scheduled overtime to each employee concerned. Such scheduled overtime will be assigned minimally in units of one (1) hour and in hourly or half hourly increments thereafter when such overtime is to be performed contiguous to the employee's scheduled work shift. When overtime is scheduled not contiguous to the employee's work shift, it will be assigned minimally in units of two (2) hours and in hourly or half-hourly increments thereafter." Article 12, section C, provides "It is understood that each employee is expected to be available for a reasonable amount of overtime work. The existence of an emergency situation as defined by Article 14 shall be considered in determining the reasonableness of the amount of overtime work. An employee who refuses an overtime assignment because of a reasonable excuse shall be considered to have worked for the purpose of determining equal distribution of overtime and will not be subjected to disciplinary action." Article 14, section C, states, "The requirement of each employee to respond, if called when such emergency conditions are present, constitutes a condition of State employment. An employee who refuses an assignment because of a reasonable excuse

will not be subjected to disciplinary action. However, any abuse or repeated absence or refusal to respond without good and sufficient reason, may be cause for such action."

In regards to the ten-day suspension, the Stipulation of Facts includes entries that affirm that on the following dates, Mr. Ksieski either "refused" or "did not answer" calls for after-hours overtime: April 17, May 2, May 9, June 4, June 5, June 16, June 29, July 14, July 21, July 22, July 30, August 3, August 16, August 17, and August 26. As the parties agree that he did not work emergency overtime on these dates, I **FIND** that he did not.

For the forty-five-day suspension, the parties stipulated to Exhibit 45, which is a chart that shows Mr. Ksieski did not answer calls for emergency overtime on the following dates: September 14, 24 and 26; October 6, 7, 11 and 30; November 11, 17, 22, 25, 27, and 30; December 3, 10, 16 (twice), 20, 22, 23, 31 (twice), January 1, 3, and 28; and February 1.[2] Again, I **FIND** that he did not work this emergency overtime.

The parties have also stipulated to Mr. Ksieski's Performance Assessment Review, for the period from April 1, 2012 to March 31, 2013, which includes, as a "Job Responsibility," that he is to respond "immediately" to "Emergencies, including overtime." Additionally, the Performance Review notes that Mr. Ksieski must have the flexibility to deal with the "emergency situations." His "Interim Development Plan" includes as "Specific action to be taken by ratee . . . More electrical training needs to respond to more and after/weekend emergency calls." And lastly, a "Job Responsibility" is to be "be available for overtime, both planned and emergency." This document predates the start of the time period in which the alleged failures to be available that supported the imposition of the ten-day suspension occurred.

There are several types of emergency situations that arise which can call for emergency repairs. These include when traffic signals are knocked down or there is an

[2] The chart appears to show other dates after February 2, 2014, on which Ksieski did not answer calls for emergency overtime, but these fall outside of the time period specified in the PNDA. Therefore, they will not be considered.

emergency repair needed for a lighting facility on roadway or interstate highway. In addition to traffic signals, traffic lights are also occasionally knocked down.

An examination of the stipulated records documenting Mr. Ksieski's response to overtime opportunities shows that in April 2013, there were four occasions where he was asked to perform overtime that were contiguous to his scheduled workday, on April 2, 10 and 26, but on April 17, when a traffic signal was knocked down on Route 1 and Manhattan Avenue, he refused to work overtime that was contiguous to the workday. In May 2013, on May 2 and 9, he refused to work overtime that was contiguous to his scheduled workday. He did work five hours on May 13. On May 28, he refused to work overtime, due to a vacation, and this was not marked against him. None of these calls involved emergency work that was not contiguous to his work day.

In June 2013, the appellant was provided with opportunities for emergency overtime non-contiguous to his workday on June 4 and 5, when he did not respond to telephone calls. Earlier on June 5, he had worked six hours of overtime contiguous to his scheduled workday. Then on June 16, he did not answer a call for emergency overtime, later informing his supervisor that he had been out to dinner. On June 18, he worked three hours of overtime contiguous to his workday. On June 29, he refused overtime, first not answering a call and then advising that he "gets no standby pay."

On July 1 and 16, Mr. Ksieski worked overtime contiguous to his work day. On July 14, 20, 21, 22 and July 30, he was called for non-contiguous emergency overtime. He did not answer the call on July 14, July 20, July 21, and 22. As to this last date, he later informed his supervisor that he was babysitting. This was the same reason he later provided for not answering the phone for the July 30, emergency overtime. Mr. Ksieski did work overtime that was contiguous to his work day on July 16.

In August 2013, the appellant worked overtime on August 12, 15 and 27, each situation involving overtime that was contiguous to his workday schedule. However, he refused emergency overtime on August 3, 16, 17 and 26. He was excused from callouts for emergency overtime on August 28.

State's Argument

The appointing authority contends that it is entitled to summary decision, as the facts concerning Mr. Ksieski's repeated refusal of and failure to respond to situations involving emergency overtime are undisputed and clearly demonstrate a violation of the condition of State employment which is part of his job responsibility. The contract and DOT disciplinary policy directly memorializes this requirement. The failure to do so renders the employee subject to discipline. During the period from April 1, 2013 to August 30, 2013, the stipulated records demonstrate that the appellant failed to work on thirteen occasions when he was called for emergency overtime. Only on a very few of these occasions did he offer an explanation for his refusal, that he was babysitting. On other occasions he either did not answer the phone, refused the request, and on one occasion specified that he did not receive "standby pay," apparently offering this as an excuse for his refusal. Thus, the DOT contends that Mr. Ksieski's violation of his job responsibilities and of the disciplinary policy is evident. There being no genuine disputes as to facts material to the charges, judgment must be rendered in the State's favor.

Ksieski's Argument

Mr. Ksieski's response to the motion for summary decision does not appear to deny his refusal to accept these emergency overtime calls or his failure to answer phone calls that were made to him regarding his performing such duty. Additionally, he does not dispute the characterization that he in one form or another refused or did not perform this emergency work, Instead, the response focuses upon the contract between the State and the union, specifically Article 12, section C. This reads, "It is understood that each employee is expected to be available for a reasonable amount of overtime work." He notes that where an employee refuses an overtime assignment because of a reasonable excuse, "he is to be considered as having worked for the purposes of determining equal distribution of overtime and will not be subject to disciplinary action." He notes that the term "reasonable" is not expressly defined in the contract. No other document regarding DOT policy and procedure defines this term. The only guidelines defining what is a "reasonable" amount of overtime are "informal and in conflict, further

confusing the inquiry." In regard to this, the appellant points to Joint Exhibit 39, which the Joint Stipulation of Facts identifies as a "real and true copy of a summary created for the departmental hearing of the dates Ksieski worked, opportunities to work, and which opportunities and dates worked were contiguous or non-contiguous to the workday." Ksieski notes that on this document there is handwriting on the bottom of the second page (DOT 232) which appears to refer to some percentage which, according to his brief, "suggests an 'approx[imate]' 50% response rate is required for overtime calls.'" According to the brief, the note specifies that the appellant worked "42% of the requested times," just under this supposed 'approximate' 50% goal." In addition to this document, counsel for Ksieski includes with his Certification an e-mail, purportedly from Mr. Ksieski's former supervisor, Ralph Lewis, which talks about a "set 30% level for that time frame . . ." Counsel suggests that the e-mail indicates "that the standards and therefore application of discipline is not consistent within the department."

In his Certification, Mr. Ksieski claims that he was unaware of others working at the Newark location that were disciplined or terminated for failure to respond to "overtime work and/or meet certain overtime requirements allegedly imposed by the DOT." He denies ever seeing "specific standards or any other specific amount of overtime that employees were expected to work." He speaks of "differing standards that were verbally communicated to employees by managers . . . ." He also notes that after his discharge, DOT "no longer keeps any overtime records and does not enforce any "failure to be available for overtime issues," appearing to claim that his "raising these issues" caused DOT to "eliminate this requirement."

In summary, the appellant contends that the Department's application of discipline is "arbitrary and not based upon clearly defined and established guidelines." He notes that the Department's Policy 532, Section III, sub-section B, Item 4, provides that discipline is to be applied consistently, so as to ensure "that employees are treated equitably, disciplinary action shall be administered in a consistent manner. Similar penalties shall be imposed for similar breaches of discipline when the employees' disciplinary history, length of service and other mitigating circumstances are similar."

Summary Decision

The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986)(Anderson).

In Judson, supra, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, supra, at 477 U.S. 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to

determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Discussion

As noted above, Mr. Ksieski does not deny that he did not work the emergency overtime on the various days identified in the Joint Stipulation. He only questions the lack of a definition of what is "reasonable." As noted by the deputy attorney general, in the face of a record of repeated and complete refusal to work any emergency overtime in the two distinct periods addressed by the PNDA's, as opposed to contiguous overtime, Mr. Ksieski's argument about the uncertainty of what was "reasonable" seems quite irrelevant. While he conflates emergency with non-emergency overtime, the latter worked contiguous to his normal work hours, to try to maintain that he was at worst not far off some alleged standard referred to in Exhibit 39, page 2, DOT231, and the e-mail quoted above,[3] the issue here is not about the totality of overtime, but the specific form involved in non-contiguous, emergency overtime. With regard to that specific element of his work responsibility, which, it is noted, was a specific focus of the Performance Review that preceded the dates in question here and which had already been the subject of disciplinary actions against him on two separate occasions, Ksieski cannot remotely claim to have worked a reasonable amount of overtime, and his resort to a defense based upon the definition is meaningless. Further, the remark in his

[3] It is noted that the handwritten material on the bottom of DOT231 is quite apparently not part of the printed "Emergency Overtime" breakdown for "April 2013 thru August 2013" and is not identified as to who wrote the handwritten material or what its source or authority is.

Certification that he is "not aware" of others being disciplined for failure to work overtime or "meet certain overtime requirements" is bereft of any detail to support that no such disciplines have occurred or that others were indeed similarly situated as he was with regard to the specific violations for which the discipline has been imposed in his case, or his history as a repeat violator. And, while he claims that the DOT has changed its overtime policy, he asserts that this occurred after he was discharged (it is noted this case does not address a discharge). The issue in these consolidated matters is whether Ksieski comported himself in conformity with the job requirements and responsibilities existing at the time when the offenses are alleged to have occurred, not whether his actions might have been viewed differently at some later time when he apparently was not even an employee of the DOT. As such, claims as to later occurring developments, even if true, are irrelevant to the current appeals.

Mr. Ksieski has not disputed the material facts relevant to deciding his appeals. I **CONCLUDE** that there are no material facts in dispute and no hearing is required to make the determination as to his liability for these charges. I **FIND** that the evidence produced, in the form of stipulations of facts that prove his failure to accept and/or respond to calls for him to undertake required emergency overtime, establishes that in regard to the periods of time encompassed by each of the PNDA's and the ensuing FNDA's, he violated NJDOT Guidelines for Employee Conduct and Discipline, Policy #532, Appendix A, Section I—Attendance, Subsection F—Failure to be Available for Emergency Overtime. The assertions made in response to the DOT's presentation do not rise to a level of legal relevance or evidential support necessitating further proceedings. I **CONCLUDE** that Mr. Ksieski's lack of compliance with the requirements of his job and his contractual obligations is so manifestly evident as to mandate the issuance of summary decision in favor of the DOT.

As for the penalties to be imposed for each of the two cases, the stipulation of facts and exhibits includes a prior disciplinary history showing that Ksieski was disciplined twice before for violating the requirement to be available for emergency overtime. He received a one- and then a two-day suspension for these offenses. The Guidelines for Employee Conduct and Discipline, Policy #532, Appendix A, Section I-

Attendance, Subsection, provide that for a third such violation the penalty shall be between six and fifteen days, and for a fourth violation the penalty shall be between fifteen days and removal. While such internal penalty guidelines are not binding upon the Civil Service Commission, nevertheless they serve as indications of the employer's view of the seriousness of offenses, particularly where the employee has repeatedly violated the same policy. Based upon the evidence herein and the Guideline, a ten-day suspension for the third and a forty-five-day suspension for the fourth offense are certainly within reason, and perhaps generous, especially for the fourth such offense, where removal could likely have been sustained.

ORDER

IT IS HEREBY ORDERED that summary decision is **GRANTED** to the DOT. Mr. Ksieski's appeals are **DENIED. IT IS FURTHER ORDERED** that suspensions of ten days and forty-five days are imposed in CSV 4746-15 and CSV 1597-16 respectively.

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. 52:14B10.

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.

March 7, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 3/7/17

Date Mailed to Parties: 3/7/17

mph

Exhibits

Joint Exhibits:

J-1 Joint Stipulation of Facts, with 46 attached Bate-stamped exhibits

For appellant:

P-1 Certification of Janusz Ksieski, dated January 12, 2017

P-2 Certification of Evan L. Goldman, Esq., with attached Exhibit A—e-mail dated January 18, 2011, from Ralph Lewis to Howard Donovan and Exhibit B—Department of Transportation Policy/Procedure 532

3-9-17

STATE OF NEW JERSEY

In the Matter of Stephanie Baker
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NOS. 2017-2145 & 2017-2144
OAL DKT. NOS. CSV 00749-17 & 00750-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. CSV 00749-17
AND CSV 00750-17
AGENCY DKT. NOS. 2017-2145
AND 2017-2144

IN THE MATTER OF STEPHANIE BAKER,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 16, 2017 Decided: February 21, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

These matters concern the appeal of Stephanie Baker, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matters were transmitted to the Office of Administrative Law for determination as contested cases on January 18, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that these matters are no longer contested cases before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 21, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 2/23/17

Date Mailed to Parties: 2/23/17

/nd

OAL DKT. NO. CSV 350-2017 749-2017

AGENCY DKT. NO. 20 – 2017-2145 2017-2144

SETTLEMENT AGREEMENT

IN THE MATTER OF

Stephanie Baker

AND

Woodbine Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Action dated both dated 11/30/16 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	E.1.5 F.3.f, Conduct, Other	Removal	1/20/2016
2.	E.1.6, Conduct, Other	Removal	1/21/2016.
3.			
4.			
5.			

B. The Appellant Stephanie Baker withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	Parties agreed to General Resignation pursuant		
3.	to NJAC 4A:2-6.3(b)		

OAL DKT. NO. CSV 749-2017
750-2017

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 1/20/2016 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

✓ general resignation

which shall be effective 1/20/2016 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Stephanie Baker 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall not seek or accept employment with the Department of Human Services at any time in the future.

OAL DKT. NO. CSV 749-2017
750-2017

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2.16.17
DATE

Appellant

2.16.17
DATE

Respondent - ~~DHS~~ APPELLANT

2-16-17
DATE

ON BEHALF OF ~~RESPONDENT~~ DHS

2/16/17
DATE

ON BEHALF OF ~~ERC~~ WOODBINE DEV. CTR.

OAL DKT. NO. CSV 749-2017
750-2017

CERTIFICATION

I, Stephanie N. Baker, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2.16.17
DATE

Stephanie N Baker
NAME

3-9-17

STATE OF NEW JERSEY

In the Matter of Jianna Diggs
Newark Public School District

CSC DKT. NO. 2016-1806
OAL DKT. NO. CSV 20745-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAR 10 2017 **BW**

The appeal of Jianna Diggs, Teachers Aide, Newark School District, removal effective May 26, 2015, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on February 3, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 9, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Jianna Diggs.

Re: Jianna Diggs

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 20745-15

AGENCY DKT. NO. CSC 2016-1806

JIANNA DIGGS,

Appellant,

v.

NEWARK PUBLIC SCHOOL DISTRICT,

Respondent.

Joseph Fusella, Esq., appearing for appellant

Bernard Mercado, Esq., for respondent (Newark Public Schools)

Record Closed: January 13, 2017 Decided: February 3, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Jianna Diggs, appeals a Final Notice of Disciplinary Action, dated November 5, 2015, imposing a penalty of removal for Conduct Unbecoming a Public Employee, Neglect of Duty, Inability to Perform Duties and Other Sufficient Cause.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on December 16, 2015.

A Prehearing Order, dated January 20, 2016, was entered by the undersigned. A hearing was held on December 2, 2016. The record was kept open for counsel to submit written summations. Both appellant's and respondent's written summations were filed with the OAL on January 13, 2017. The record was closed on January 13, 2017.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of a removal is warranted.

STIPULATED FACTS

1. Appellant was employed by respondent, State-Operated School District of the City of Newark (District) as a Teacher Aide commencing on or about March 4, 2002.
2. At all material times, appellant was assigned to the South 17th Street School as a Teacher Aide.
3. On May 4, 2015, appellant was on duty as a Teacher Aide at the South 17th Street School.
4. Appellant's son, G.D., attended the same school that appellant worked in as a Teacher Aide.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Quadriyyah Williams testified as follows:

She is the Chief Innovation Officer for the South 17th Street School. She is responsible for the daily operation of the school.

Teacher Aide shifts start at 8:20 a.m. and end at 2:55 p.m. Teacher Aides are required to stay until the end of their shift. Teacher Aides require prior authorization from their supervisor to leave early. They are required to act appropriately in front of students. They are role models. Use of profanity, making threats, and being disruptive is not permitted.

Ms. Williams knows the appellant.

On May 4, 2015, she was advised that two male eighth-grade students were in a fight. She went upstairs to the eighth-grade classroom with a security guard. When she arrived the fight was over. One of the students, G.D. that engaged in the fight was the son of appellant. She spoke with both students. She advised them that fighting is an automatic suspension. She asked both if the matter was settled. While one of the students said the matter was settled, G.D. stated it was not.

After the conversation, she sent G.D. to the classroom where his mother was working as a Teacher Aide. Ms. Williams then went to the office to have a clerk type a report to give to the students' parents before school let out.

At this point, she heard appellant using profanity in the hallway. She was saying things like "Ain't going down this way," "Not my f***ing son," "I'm punching the f**k out." Appellant was with her son at this time. Ms. Williams asked them to go into the principal's office to talk about what happened. Appellant was screaming. She stated "You see my son's face," I am going to have him fight him until his f***ing face looks like that." Appellant was screaming when she made these statements. Ms. Williams perceived the statements by appellant as threats and thought them inappropriate.

Ms. Williams could hear appellant screaming from down the hallway. Everyone in the office heard her. There were children in the hallway at this time.

Assistant Principal Ramey then entered the office and tried to calm down appellant. At this point appellant stated "my people are going to come around and f**k him up," meaning the other student. Ms. Ramey was not able to calm appellant. Ms. Ramey walked appellant from the office. Appellant remained furious at this time. Ms. Ramey walked appellant and her son out of the school.

She then called the other student's parents to advise them of the threat by Appellant. She and security escorted the other student to the school bus.

Appellant had clocked out of work at 2:34 p.m. Her shift ends at 2:55 p.m. Appellant did not have authorization to leave early. Leaving early created a classroom disruption. Appellant needed to assist the students to get ready to leave upon dismissal.

She did notice that G.D. had a red mark on his face. She observed no other injuries to G.D. She did not observe any injury to the other student. She does not believe G.D. was sent to the school nurse. Generally, an injured student would be sent to the nurse. She is unsure why G.D. was not. G.D. was sent to his mother as he was still making threats. She thought it was more important to diffuse the situation then send G.D. to the nurse. Appellant never asked for her son to see the nurse.

Appellant works in the kindergarten class. School was still in session when she sent G.D. to appellant in her classroom. This was not the first time G.D. was sent to his mother's classroom when he was involved in something at school. In hindsight, she would not have sent G.D. to appellant on this occasion. Sending G.D. to appellant disrupted the kindergarten class.

She did not speak with the kindergarten teacher the day of the incident. She did speak with the teacher thereafter. She was not aware that the teacher permitted appellant to leave the classroom. The teacher told Ms. Williams that appellant was acting "crazy."

Ms. Williams agreed she is responsible to report violations of the law to the police. She did not report this incident to the police. If a fight can be resolved at the school level she does not contact the police.

Marie Ramey testified as follows:

She is the Vice Principal of the South 17th Street School. She is the supervisor for grades kindergarten through third grade. This includes teachers and support staff.

A teacher aide has much responsibility. They must assist the teacher when students arrive; prepare for lessons; assist with breakfast; make photocopies; assist with lessons; take students to the bathroom; monitor lunch; get students ready for dismissal; and, assist with other activities. The shift is from 8:20 a.m. to 2:55 p.m.

Should a teacher aide wish to leave early the protocol is to request the same from their immediate supervisor. The protocol is reviewed yearly with staff. Leaving early has a negative impact.

It is inappropriate to use profanity, yell, or scream. This is outside the standard of conduct. There is zero tolerance for threats, bullying, or violence. This is always reviewed with staff. This is disruptive to the instructional environment.

Standards are reviewed every year and staff sign off on them. They are also reviewed during the school year at staff meetings.

Students at the South 17th Street School come from a "tough environment."

Ms. Ramey is appellant's supervisor. She knows G.D. She authored the incident report regarding this matter.

She was summoned to the main office. As she was walking there, she heard loud talking in the principal's office. Appellant was out of control. She was screaming,

yelling, and cursing. Appellant was very upset with what happened with her son. She was irate and unstable. There were children in the hallway. Ms. Ramey tried to get appellant to calm down, but was not successful.

After appellant and her son left the school, she was going back to her office when she was summoned by security who advised that appellant and her son were still on school property. Ms. Ramey went outside and asked appellant why she was still there. Appellant replied that she was waiting for a ride. Thereafter appellant and G.D. walked down the street.

Ms. Ramey does not recall if appellant asked for her son to see the school nurse. Protocol is to send a student to the nurse if he or she is hurt in a fight.

Appellant punched out at 2:34 p.m. the day of the incident. She punched out early without authorization. Leaving early causes disruption in the classroom as teacher aides assist students for dismissal.

Appellant's actions were unprofessional, irresponsible, and inappropriate.

Ms. Ramey prepared performance evaluations of appellant, which were generally favorable. Evaluations do not have anything to do with appellant's conduct.

G.D. was sent to his mother's classroom in the past. Appellant had a calming effect on him.

Appellant's Case

Jianna Diggs, Appellant, testified as follows:

She is employed at the South 17th Street School as a teacher aide. She has been so employed for nineteen years. She is assigned to Ms. Cavalaro's kindergarten

class. She has no prior disciplinary history. She receives semi-annual evaluations, many of which were prepared by Ms. Ramey.

She saw her son come into her classroom with a black eye. She spoke with her son and then told the kindergarten teacher that she was leaving. She said, "I have to be a mother at this point." The teacher expressed no displeasure with her leaving.

She clocked out and was going to speak with someone in the office. She had just returned to work after a five-day bereavement period.

She works hard and diligently. She became irate when her son was sent to her classroom unescorted. Her son told her he walked there by himself. She was "fussing" at him, using vulgar language, and "cussing" him out. She confirms her shift ends at 2:55 p.m. and that she clocked out early. She then went to the main office as she wanted to speak with someone. She admits to using vulgar language. She states she was angry that her day was interrupted. She works very hard to get things accomplished. She was also upset that her son was not sent to the nurse.

She speaks with a strong voice. "When I speak, I speak with power." She admits to being very irate. She denied threatening the other student. She did say some things. She stated, "Yes, I am from the hood." She explained her comment was not meant as a threat, but something that could happen.

Ms. Diggs stated that Ms. Williams was upset with her that day, and "had every right to be upset with me."

She stated she had an agreement with Mr. Allen, the principal, when her son would go to see her. She stated everyone knew how to handle him, referring to her son.

Ms. Ramey had come into the office to try and calm her down. She confirms that she was cursing in the hallway, and stated she could not control herself at that time.

Ms. Diggs was upset that her son could not have been kept in the office. She was in her classroom working. She became irate. She felt as though she did not receive the proper respect. She was irate that day.

Ms. Diggs agreed that her actions were inappropriate. She lays blame on several factors: She had just returned from bereavement where she buried her grandmother; Ms. Williams should have kept her son in the office and waited for school to be over before summoning her to the office; and, she was interrupted during work.

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, supra, 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).

Ms. Williams testified in a straightforward, direct, and calm manner. She related the facts of the incident as she observed them. Nothing in her demeanor or manner

suggested that she was not merely relating what she observed. I deem her very credible.

Likewise, Ms. Ramey testified in a straightforward, direct, and calm manner. She too simply related the facts as she observed them. I deem her also very credible.

Ms. Diggs's testimony is problematic. While she does not dispute the basic facts regarding her behavior, the explanation she provides for why she acted as she did make little sense, and are not believable. She maintained that she was more upset that G.D. was sent to her classroom as it disrupted her job than the fact that he was in a fight. She further maintained that her comments regarding the threat were misinterpreted. Neither explanation makes sense. Both defy credulity. She blames Ms. Williams for causing the problem by not keeping G.D. in the office until after school. She admits to saying what she said, but maintains it was taken out of context. She was at times hostile. I deem her not credible. Her explanations for her actions are simply not believable.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

On May 4, 2015, appellant's son, G.D. was engaged in a physical altercation with another student in the eighth-grade classroom. Ms. Williams responded to the classroom and removed the two students to her office where she spoke with them. G.D. informed Ms. Williams that the matter was not over. Ms. Williams then sent G.D. to appellant in the kindergarten classroom where appellant worked as a Teacher Aide. It was not uncommon for G.D. to go to his mother in the classroom.

Upon G.D.'s arrival at appellant's classroom appellant became irate and began to loudly use vulgar and profane language in the presence of students. Appellant continued to use vulgar and profane language while waking in the hallway towards the main office her son.

Appellant threatened the other student, in a vulgar and profane manner, with physical violence.

Appellant was requested to calm herself by Ms. Williams, and later by Ms. Ramey. Appellant did not calm herself, but continued to use vulgar and profane language in a loud manner.

Appellant's shift on May 4, 2015, was from 8:20 a.m. to 2:55 p.m. Appellant clocked out at 2:34 p.m. without permission. This is a violation of school protocol. Appellant neglected her duty by leaving early, and thereby rendered herself unable to perform her duties as a teacher aide.

Appellant's actions on May 4, 2015, were entirely of her own choosing. Her actions were wholly inappropriate and unprofessional.

Appellant's conduct on May 4, 2015, was not a single outburst when confronted with unpleasant information. It was, rather, a sustained tirade, wholly avoidable but for her actions, that lasted for some time, in the presence and earshot of students, faculty, and staff.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory

responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but

having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, supra, 26 N.J. at 275. The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, supra, 218 N.J. Super. at 341. The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Appellant is charged in the Final Notice of Disciplinary Action with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); inability to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(3); and, other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). It is not necessary to engage in an exhaustive analysis of what constitutes the above behavior. Clearly, appellant is guilty of the charges, as she readily admitted in her testimony. The question is what the appropriate discipline is.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. W. New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

> [In re Herrmann, 192 N.J. 19, 33-34 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State-Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Center, 96 N.J.A.R.2d (CSV) 463, 465.

In Bock, supra, 38 N.J. at 522, which was decided more than fifty years ago, 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." Herrmann, supra, 192 N.J. at 29 (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523-24.

As the Supreme Court explained in Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . . .

> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [Hermann, supra, 192 N.J. at 30-33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Commission modified the penalty to a four-month suspension and the Appellate Court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." Id. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

The concept of progressive discipline has been used to reduce the penalty of removal in other cases involving a law enforcement officer who used racist language in public but who otherwise had a largely unblemished employment record. In In re Roberts, CSR 4388-13, Initial Decision (December 10, 2013), adopted, Commission (February 12, 2014), <http://njlaw.rutgers.edu/collections/oal/>, for example, an on-duty police officer who, while arresting an uncooperative black suspect, shouted to his K-9 police dog, "Zero, bite that nigger," had his penalty modified from removal to a six-month suspension. The ALJ had found that his misconduct was "plainly aberrational," as his past record only included an oral reprimand for a motor vehicle accident over the

course of seven years of service and several of his minority co-workers credibly testified that he had otherwise treated citizens in an impartial and respectful manner. While the ALJ found that, due to mitigating circumstances, "termination is too severe a penalty," he nonetheless concluded that, despite a past record that included only an oral reprimand, the "fitting" penalty "is the longest suspension which the law allows: six months."

While concept of progressive discipline in determining the level and propriety of penalties imposed requires a review of an individual's prior disciplinary history a "clean" record may be out-weighed if the infraction had issued a serious in nature. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Carter v. Bordentown, 191 N.J. 474 (2007). Further some disciplinary infractions are so serious that removal is appropriate. Destruction of public property is such an infraction. Kindervatter v. Dep't of Envt'l Protection, CSV 3380-98, Initial Decision (June 7, 1999), <http://lawlibrary.rutgers.edu/collections/oal/>.

In determining the penalty to be imposed, the court noted that none of the factors justifying mitigation of removal were present. Namely mistake, negligence, or remorse. The Court was compelled to hold that whatever the employee's motive, and regardless of the worth of the computer, she had to be subject to major discipline. While the goal of discipline is to either remove an employee unsuitable for public service or to impose some lesser sanction when the employee may be rehabilitated, the Court held that the extraordinary serious offense in this case could not be mitigated by a prior good-service record as that mitigation is reserved only for lesser offenses.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, supra, 38 N.J. at 523-24, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied,

167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter, appellant has no prior disciplinary record. Further, appellant has received generally good evaluations during her eighteen years of employment. However, appellant's actions were egregious. This was not a simple outburst. This was a sustained act which included profanity in a school setting with children present, a threat against another student, and a refusal to control herself even though given ample opportunity and requests to do so. Further, appellant is unable to accept full responsibility for her actions.

Based upon the above authorities, I **CONCLUDE** that progressive discipline should not apply. Here, appellant's actions were so egregious, coupled with her inability to accept full responsibility for actions, that removal is warranted.

ORDER

It is hereby **ORDERED** that appellant's appeal is **DENIED**.

It is further **ORDERED** that the Final Notice of Disciplinary Action, dated November 5, 2015, providing for a penalty of removal, effective May 26, 2015, is **AFFIRMED**.

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, P.O. 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.

February 3, 2017

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: February 3, 2017

Date Mailed to Parties: February 3, 2017

Db

APPENDIX

List of Witnesses

For Appellant:

Jianna Diggs

For Respondent:

Quadriyyah Williams

Marie Ramey

List of Exhibits

Joint Exhibit:

Joint Stipulation of Facts

For Appellant:

A Appellant Evaluation (January 3, 2012 to June 25, 2012)

B Appellant Evaluation (January 3, 2011 to June 28, 2011)

C Appellant Evaluation (September 6, 2011 to December 23, 2011)

D Appellant Evaluation (January 2010 to June 2010)

E Appellant Evaluation (January 2009 to June 2009)

F Appellant Evaluation (January 2008 to June 2008)

G Appellant Evaluation (September 2007 to January 2008)

H Appellant Evaluation (January 2007 to June 2007)

I Appellant Evaluation (September 2006 to December 2006)

J Appellant Evaluation (January 2005 to June 2005)

K Appellant Evaluation (January 2005 to June 2005)

L Appellant Evaluation (January 2004 to June 2004)

M Appellant Evaluation (January 2003 to June 2003)

N Appellant Evaluation (December 2001)

O Appellant Evaluation (September 2000 to December 2000)

P Incident Report (V.P. Marie Ramey)

Q Incident Report (Teacher Trevor Scott)

R Time Detail Report (Jianna Diggs)

For Respondent:

A Preliminary Notice of Disciplinary Action with attached specifications dated June 19, 2015

B Final Notice of Disciplinary Action dated November 5, 2015

C Newark Public Schools File Code Policy 4119.22, Conduct and Dress Code

D District Incident Report by V.P. Marie Ramey, dated May 4, 2015 (identical to Appellant's Exhibit P)

E School Leadership Team Incident Report dated May 5, 2015 (identical to Appellant's Exhibit Q)

F Kronos Time Detail Report for Appellant (identical to Appellant's Exhibit R)

3-9-17

STATE OF NEW JERSEY

In the Matter of Rahmaun Horton
City of Newark Police Department

CSC DKT. NO. 2013-3267
OAL DKT. NO. CSV 08351-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08351-13
AGENCY DKT. NO. 2013-3267

IN THE MATTER OF RAHMAUN HORTON,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., for Rahmaun Horton (Fusco & Macaluso, attorneys)

Corrine E. Rivers, Assistant Corporation Counsel, for City of Newark Police Department (Willie Parker, Corporation Counsel, attorney)

Record Closed: January 23, 2017 Decided: February 1, 2017

BEFORE **RICHARD McGILL**, ALJ:

Rahmaun Horton appeals from a suspension on charges from the position of Police Officer with the City of Newark Police Department. The matter was transmitted to the Office of Administrative Law on June 14, 2013, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that proceedings in this matter be concluded.

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.

Feb. 1, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 2-3-17

Date Mailed to Parties: FEB 3 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

RAHMAUN HORTON, Appellant, -v- CITY OF NEWARK Respondent,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 08351-2013** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Police Officer Rahmaun Horton ("Horton" or "Appellant"), The Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (Horton, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against his by the City's Preliminary Notice of Disciplinary Action dated April 17, 2013 (PNDA) and Final Notice of Disciplinary Action dated May 21, 2013 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about July 11, 2012, Police Officer Rahmaun Horton, was counseled on his sick time.

2. On or about October 26, 2012, Officer Horton was placed on the Medical Certification List.

3. After being placed on the Medical Certification List, Officer Horton continued to abuse sick leave.

4. As a result of the conduct outlined in paragraph one (1), two (2), and three (3) herein, the PNDA was issued and Horton was brought up on disciplinary charges for violating the following Newark Police Department ("NPD") Rules and Regulations: (1) Official Inefficiency or Incompetency.

5. At the departmental hearing, Horton plead not guilty and waived the hearing to the Office of Administrative Law. He was suspended for sixty (60) days beginning June 3, 2013 and ending August 23, 2013 and the FNDA was issued.

6. Horton appealed the decision on the FNDA to the Office of Administrative Law.

7. The parties have agreed to resolve all issues herein and herein referenced as follows:

    1. The City agrees to reduce Horton's suspension from sixty (60) days to thirty (30) days.

    2. Horton further waives any and all rights and/or claims which he has and/or may have to: 1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; 2) To challenge the PNDA, FNDA and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts.

    3. Horton and the Union each further agree that there is no consideration due Horton, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the

execution of this Agreement, except as otherwise provided herein.

4. Horton and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

5. Horton and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

6. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Horton's estate, and purchasers and/or assignees of Horton's, the City's and/or the Unions interests shall also be bound.

7. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

8. Horton and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as

precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

9. Horton and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

10. This Agreement contains the sole and entire agreement between Horton, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Horton specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

11. Horton agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

12. Horton agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

13. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

14. By signing this Settlement Agreement, Horton states that:

a. He has read it;

b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c. He agrees with everything contained in this Agreement;

d. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;

e. He consulted with his Attorney prior to executing this Agreement;

f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHISEOF, the Parties have caused this Settlement Agreement to be executed.

1/18/17
Date

BY: _____
Anthony Ambrose, Director
Newark Police Department

10-3-2016
Date

BY: _____
Rahmaun Horton

10/3/2016
Date

_____
Anthony J. Fusco, Jr., Esq.
Attorney for Rahmaun Horton

Approved as to Form and Legality:

10/6/16
Date

_____
Corinne E. Rivers, Esq.
Law Department, City of Newark

CERTIFICATION

I, Rahmaun Horton, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-3-2016
DATE

Rahmaun Horton

Angiulo, Nicholas

From: Rivers, Corinne <riversc@ci.newark.nj.us>
Sent: Friday, February 17, 2017 10:58 AM
To: Angiulo, Nicholas; ajfuscojr@aol.com
Subject: RE: Rahmaun Horton

It is my understanding that he will receive those days back with back pay.

Sincerely,

Corinne

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Friday, February 17, 2017 10:57 AM
To: ajfuscojr@aol.com; Rivers, Corinne
Subject: RE: Rahmaun Horton
Importance: High

Mr. Fusco and Ms. Rivers:

I have not yet received a response to the below e-mail. Please respond as soon as possible so the matter may be placed on an upcoming Civil Service Commission meeting for acknowledgment.

Sincerely,

Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Monday, February 6, 2017 2:24 PM
To: 'ajfuscojr@aol.com' <ajfuscojr@aol.com>; 'riversc@ci.newark.nj.us' <riversc@ci.newark.nj.us>
Subject: Rahmaun Horton
Importance: High

Mr. Fusco and Ms. Rivers:

I am the Assistant Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Rahmaun Horton indicating his 60 working day suspension is being modified to a 30 working day suspension.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, we need to know how to account for the remaining 30 work days. Is that time frame to be categorized as an unpaid leave of absence or something else?

Please let me know as soon as possible the intention of the parties regarding the above. An e-mail response is sufficient so long as it is agreed upon by the parties. The sooner the information is provided the better.

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

J-9-17

STATE OF NEW JERSEY

In the Matter of Vivian Maynard
Town of West New York,
Department of Public Safety

CSC DKT. NO. 2017-434
OAL DKT. NO. CSV 12219-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 12219-16

AGENCY DKT. NO. 2017-434

IN THE MATTER OF VIVIAN MAYNARD,
TOWN OF WEST NEW YORK,
DEPARTMENT OF PUBLIC SAFETY.

Vivian Maynard, pro se, appellant

Angelo Auteri, Esq., for respondent (Scarinci and Hollenbeck, attorneys)

Record Closed: February 14, 2017 Decided: February 14, 2017

BEFORE **ELLEN S. BASS,** ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law on August 15, 2016 for determination as a contested case.

The parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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**, who 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.

February 14, 2017
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 2-16-17

Date Mailed to Parties: FEB 16 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 10th day of February, 2017 between the Town of West New York (hereinafter referred to as the "Town") and Vivian Maynard (hereinafter referred to as "Maynard" or the "Employee").

WHEREAS, the Employee is employed with the Town as a Clerk; and

WHEREAS, the Town instituted a disciplinary action against Maynard in a Preliminary Notice of Disciplinary Action dated May 9, 2016, ("hereinafter referred to as the Disciplinary Action"), and charging the following violations: conduct unbecoming a public employee; neglect of duty; other sufficient cause; incompetency, inefficiency or failure to perform duties; insubordination; and misuse of public property; and

WHEREAS, the Employee requested a departmental hearing which occurred on June 10, 2016; and

WHEREAS, the charges of conduct unbecoming a public employee; neglect of duty; incompetency, inefficiency or failure to perform duties; insubordination; misuse of public property and other sufficient cause were sustained by the Hearing Officer at the conclusion of the departmental hearing; and

WHEREAS, following the departmental hearing, the Hearing Officer set forth a penalty of removal; and

WHEREAS, a Final Notice of Disciplinary Action dated July 21, 2016 was issued to the Employee following the outcome of the departmental hearing; and

WHEREAS, Maynard was terminated from employment with the Town effective

July 22, 2016; and

WHEREAS, Maynard filed an appeal of the Hearing Officer's determination to the Office of Administrative Law, Docket No. CSV 12219-2016 N; and

WHEREAS, the Town and Maynard desire to resolve all outstanding issues with respect to the Disciplinary Action and the appeal filed in the Office of Administrative Law;

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the Town and Maynard agree as follows:

1. **DISCIPLINARY ACTION**

   a. Maynard agrees that the charges set forth in the Preliminary Notice of Disciplinary Action dated May 9, 2016, are sustained.

   b. The Town agrees to reduce the penalty of removal to a ninety (90) day suspension without pay, which shall be recorded as such with the New Jersey Civil Service Commission.

   c. Maynard agrees to a general resignation effective November 23, 2016 which the Town agrees to accept. Maynard further agrees that she shall not seek future employment with the Town of West New York.

   d. In exchange for a general resignation, the Town agrees to provide three (3) months of back pay to Maynard, which shall be subject to all applicable withholdings.

   e. Except as set forth above in Paragraph 1.d., Maynard agrees to waive any and all claims to back pay, benefits, and any and all other monetary claims

including, but not limited to, attorney's fees with respect to the Disciplinary Action.

2. **COMPLETE RELEASE**

In further consideration of the settlement herein above, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the Town, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which,

among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of or under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she

reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the Town or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by the Town and/or the Releasees, including reasonable attorney's fees.

3. **NON ADMISSION OF LIABILITY.**

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the Town, by whom any such obligation or liability is expressly denied.

4. **CONSULTATION WITH ATTORNEY.**

Releasor has had an opportunity to consult with an attorney and/or Union Representative with respect to this Agreement and to review with her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

5. **REASONABLE PERIOD OF TIME.**

Releasor agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

6. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between the Employee and the Town, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Town to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality,

validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

9. **EMPLOYEE ATTESTS**

Releasor represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that she enters into this Agreement voluntarily, of her own will, without any pressure or coercion from any person or entity including, but not limited to, the Town and/or Releasees.

10. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to Municipal Administrator, James Cryan, at the Town of West New York. This seven (7) day revocation period may not be waived by the Employee.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Vivian Maynard, executed the foregoing Agreement this 10th day of February 2017.

Vivian Maynard
VIVIAN MAYNARD

Sworn and Subscribed to before me
this ____ day of _____, 2017.

_____
Notary Public
State of New Jersey

EMPLOYEE

BY: _____

Dated: _____

TOWN OF WEST NEW YORK

BY: _____

Dated: 2/10/17

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 day period referred to in the 5th recital on page 7 of this Agreement.

Vivian Maynard
VIVIAN MAYNARD

3-9-17

STATE OF NEW JERSEY

In the Matter of Johnny Mendez
City of Newark,
Department of Water and Sewer

CSC DKT. NO. 2017-858
OAL DKT. NO. CSV 15234-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAR 13 2017 BW

The appeal of Johnny Mendez, Senior Maintenance Repairer/Water Repairer, City of Newark, Department of Water and Sewer, resignation not in good standing effective July 5, 2016, on charges, was heard by Administrative Law Judge John P. Scollo, who rendered his initial decision on February 7, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 9, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Although the resignation not in good standing is reversed, since the appellant was retired before the alleged infraction occurred, he is not entitled to any back pay or seniority pursuant to *N.J.A.C.* 4A:202.10.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was not justified. The Commission therefore reverses that action and grants the appeal of Johnny Mendez.

Re: Johnny Mendez

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DOCKET NO. CSV 15234-16

JOHNNY MENDEZ,
Appellant,
v.
CITY OF NEWARK, WATER AND SEWERS,
Respondent.

John D. Feeley, Esq., for Appellant Johnny Mendez (Feeley & LaRocca, attorneys)

Kenneth Calhoun, Esq., Corporation Counsel for Respondent, City of Newark

Record Closed: January 3, 2017 Decided: February 7, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Johnny Mendez, appeals from the Final Notice of Disciplinary Action (FNDA) dated September 1, 2016, rendered after an August 8, 2016, disciplinary hearing before Hearing Officer L'Tanya L. Williamson.

Newark alleges that Mendez took fifteen vacation days that he had not yet earned and must compensate Newark for same.

In both the Preliminary Notice of Disciplinary Action (PNDA) dated July 15, 2016, and the FNDA, the employer, Respondent City of Newark, Department of Water and Sewers (Newark) charged Mendez with Resignation Not In Good Standing under N.J.A.C. 4A:2-6.2.

A hearing was held on August 8, 2016, out of which came the unsigned FNDA stating: "Resignation Not In Good Standing, effective July 5, 2016." The FNDA was served on Mendez on September 12, 2016.

Mendez requested a fair hearing before the Office of Administrative Law. The matter was filed on October 5, 2016, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52: 14F-1 to -13.

The tribunal received Appellant's Motion to Dismiss the Charges on December 19, 2016. The City of Newark has not submitted opposition and the time for doing so expired on January 3, 2017, and the record closed that day.

ISSUE

The issue in this case is whether the charge of failing to report to work on July 1, 2016, through July 5, 2016, pursuant to N.J.A.C. 4A:2-6.2 can be sustained. This legal question depends upon the determination of the question of whether or not Mendez was still an employee on July 1, 2016, and thereafter.

FACTUAL DISCUSSION

The following facts are not in dispute:

On May 18, 2016, Mendez submitted his application to the Public Employees Retirement System (PERS) for early retirement with an effective retirement date of July

1, 2016. On June 9, 2016, the City of Newark submitted its Certification to PERS in connection with Mendez's application. In its June 22, 2016, letter sent simultaneously to Mendez and Newark, PERS approved Mendez's retirement application with an effective date of July 1, 2016.

On May 25, 2016, Mendez submitted a request to take fifteen vacation days between June 10, 2016, and June 30, 2016, stating on the request that he would return to work on July 1, 2016. This vacation request was approved by Newark. According to the PNDA, Mendez called in sick on July 1, 2016; Mendez has not disputed this assertion. Mendez did not report to work on July 1, 2016, or on any date thereafter. According to Mendez, he became retired effective July 1, 2016; Newark has not disputed that Mendez's status was "retired" as of July 1, 2016.

The FNDA was not signed. Besides the unsigned FNDA, actual adjudication has not been received by this tribunal. The "Memorandum" of Hearing Officer L'Tanya L. Williamson dated August 29, 2016, does not set forth an adjudication of the charges, but only makes a "recommendation" that the Newark Law Department should "pursue repayment" of the vacation days that Mendez had used but (allegedly) had not yet earned.

LEGAL ANALYSIS AND CONCLUSION

Under N.J.A.C. 4A:2-6.1(a) any employee may resign in good standing by giving the appointing authority at least fourteen days written or verbal notice.

Under N.J.A.C. 4A:2-6.2(a) if an employee resigns without complying with the required notice set forth in N.J.A.C. 4A:2-6.1, he is considered and recorded as having resigned not in good standing.

Under N.J.A.C. 4A:2-6.2(b) an employee who fails to return to duty for five consecutive business days without the approval of his superior is considered to have abandoned his position and shall be recorded as having resigned not in good standing.

Under N.J.A.C. 4A:2-6.2(c) an employee who fails to return to duty for five consecutive business days following an approved leave of absence shall be considered to have abandoned his position and shall be recorded as having resigned not in good standing.

It is beyond question that Mendez met the notice requirement set forth in N.J.A.C. 4A:2-6.1 when he submitted his written application for retirement on May 18, 2016. Newark submitted its Certification in connection with Mendez's retirement application on June 9, 2016, which makes it clear that Newark knew about Mendez's retirement application and that the requested effective date of July 1, 2016. The June 22, 2016, letter that PERS sent to Mendez approving his retirement application with an effective date of July 1, 2016, was simultaneously sent to Newark.

From the undisputed facts and the logical deductions that follow from them, I **CONCLUDE** that Newark was put on notice by Mendez and by PERS that on July 1, 2016, Mendez would no longer be an employee, but would be a retiree. I **CONCLUDE** that under the aforesaid regulations only employees are required to report to work and I **CONCLUDE** that retirees are not required to report to work. I **CONCLUDE** that on July 1, 2016, Mendez was a former employee and was a retiree as of that date forward, and, therefore, was not required to report to work.

I **CONCLUDE** that inasmuch as N.J.A.C. 4A:2-6.1 and -6.2 only apply to employees—and not to retirees—it was impermissible to charge Mendez for violation of these sections for any action or inaction of his from July 1, 2016, forward. I **CONCLUDE** that the charges brought by Newark against Mendez under the aforementioned sections were null and void when brought. Given the fact that the FNDA has not been signed, it is not clear to this tribunal that an adjudication has actually been made against Mendez.

I nonetheless **CONCLUDE** that any adjudication of wrongdoing against Mendez under said charges must be and hereby is reversed.

Newark raises an issue as to whether Mendez was entitled to take fifteen vacation days or some other amount of vacation days or none at all between June 10, 2016, and June 30, 2016. Newark alleges that Mendez was paid for vacation days that he had not yet earned as of his last official day as an employee, June 30, 2016. As noted above, the only issue properly before this tribunal is the issue of whether Mendez complied with the requirements of N.J.A.C. 4A:2-6.1 and -6.2. This tribunal has decided that Mendez fully complied with said notice requirements. I **CONCLUDE** that the issue of whether Mendez owes or does not owe money to Newark for vacation days he used with Newark's approval (whether due to Newark's mistake or due to some other reason) is beyond the scope of the issue before this tribunal. As noted above, the only proper issue before this tribunal is whether Mendez was still an employee on July 1, 2016, and thus obligated to report to work. That question has been answered herein.

ORDER

It is hereby **ORDERED** that the charges brought against Johnny Mendez under N.J.A.C. 4A:2.6.2 must be **DISMISSED**; and it is **ORDERED** that any adjudications of wrongdoing entered against Johnny Mendez on the basis of the aforesaid charges must be and hereby are **REVERSED**.

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, P.O. 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.

February 7, 2017
DATE

John P. Scollo
JOHN P. SCOLLO, ALJ

Date Received at Agency: February 7, 2017

Date Mailed to Parties: February 7, 2017

List of Exhibits submitted by Appellant:

Mendez's Application for Retirement dated May 18, 2016

Letter dated June 22, 2016, from PERS to Mendez, copy to Newark

Newark's June 9, 2016, Certification of Service and Final Salary Retirement

Mendez's Time Off Request Form dated May 25, 2016, signed by Newark's agent

PNDA dated July 15, 2016

FNDA dated September 1, 2016

Hearing Officer L'Tanya L. Williamson's "Memorandum" dated August 29, 2016

3-9-17

STATE OF NEW JERSEY

In the Matter of Nicholas Mionie
Bayside State Prison,
Department of Corrections

CSC DKT. NO. 2016-2984
OAL DKT. NO. CSV 04084-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 04084-16
AGENCY DKT. NO. 2016-2984

IN THE MATTER OF NICHOLAS MIONIE,
BAYSIDE STATE PRISON,
DEPARTMENT OF CORRECTIONS.

William G. Blaney, Esq., for appellant, Nicholas Mionie (Blaney & Karavan, P.A., attorneys)

Karen Campbell, Legal Specialist, Office of Employee Relations, for respondent, Bayside State Prison, Department of Corrections, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)

Record Closed: February 7, 2017 Decided: February 13, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 14, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2-13-17
DATE

JEFFEREY WILSON, ALJ

Date Received at Agency: 2/16/17

Date Mailed to Parties: 2/16/17

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 7, 2017

State of New Jersey
DEPARTMENT OF CORRECTIONS
WHITTLESEY ROAD
PO BOX 863
TRENTON NJ 08625-0863

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

GARY M. LANIGAN
Commissioner

February 2, 2017

The Honorable Jeffrey R. Wilson, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625

Re: Nicholas Mioni v. Bayside State Prison
OAL Docket No. CSV 04084-2016S

Dear Judge Wilson:

This matter is scheduled for a Status Conference on February 16, 2017. However, the parties have reached an agreement. I have attached the fully executed Settlement Agreement for your review and approval.

Should you have any questions, I can be reached at (609) 292-4036, ext. 5253.

Thank you kindly.

Respectfully submitted,

Karen Campbell, Esq.
Legal Specialist

c: William G. Blaney, Esq.
File

IN THE MATTER OF
NICHOLAS MIONIE,

APPELLANT

AND

BAYSIDE STATE PRISON,
CORRECTIONAL FACILITY,

RESPONDENT

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSV 04084-2016
AGENCY DOCKET NO. 2016-2984

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated February 23, 2015, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(6) Conduct Unbecoming	Sixty (60) working days suspension	2/23/15
2.	NJAC 4A:2-2.3(a)(7) Neglect of duty	same	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4.	HRB 84-17, as amended C8 Falsification; Intentional Misstatement of material Fact in connection with work, Employment application, or Any other record, investigation Or other proceeding.	same	same
5.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same
6.	HRB 84-17, as amended D7 Violation of Administrative procedures	same	same

	And/or regulations Involving safety and security		
7.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

Charge		Disposition

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

1.	NJAC 4A:2-2.3(a)(6) Conduct Unbecoming	Five (5) working days suspension	
2.	NJAC 4A:2-2.3(a)(7) Neglect of duty	same	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4.	HRB 84-17, as amended C8 Falsification; Intentional Misstatement of material Fact in connection with work, Employment application, or Any other record, investigation Or other proceeding.	Withdrawn	same
5.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same
6.	HRB 84-17, as amended D7 Violation of Administrative procedures And/or regulations Involving safety and security	same	same

7.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

C. The parties have agreed to the following:

1. The Appellant has served sixty (60) working days suspension. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.

2. The personnel file for the Department of Corrections will indicate that the appellant received a five (5) working days suspension, for record keeping purposes only. Any other time off shall be reflected in appellant's record as authorized leave without pay. As set forth above, any claim for back pay or attorneys' fees is waived by the Appellant.

3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

4. As set forth in paragraph B(1), the Appellant shall not receive back pay, no counsel fees, return of vacation, sick days or any other monetary relief.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(2).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to

the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties acknowledge that a minor disciplinary sanction of 5 days or less may be eligible for expungement pursuant the terms of IMP PSM.002.EXP.01, providing any necessary conditions are satisfied.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 01/20/17

NICHOLAS MIONIE, Appellant

DATE: 1/24/17

WILLIAM BLANEY
On Behalf of Appellant

DATE: 2/1/17

KAREN CAMPBELL, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, NICHOLAS MIONIE, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 01/20/17

Nicholas Mionie

NICHOLAS MIONIE

3-9-17

STATE OF NEW JERSEY

In the Matter of Christopher Monahan
Township of Scotch Plains,
Department of Recreation

CSC DKT. NO. 2016-4051
OAL DKT. NO. CSV 08691-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAR 10 2017 BW

The appeal of Christopher Monahan, Greenskeeper, Township of Scotch Plains, Department of Recreation, 10 working day suspension, on charges, was heard by Administrative Law Judge Kimberly A. Moss, who rendered her initial decision on February 7, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 9, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

Re: Christopher Monahan

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO.CSV 08691-16
AGENCY DKT. NO. 2016-4051

IN THE MATTER OF CHRISTOPHER MONAHAN, TOWNSHIP OF SCOTCH PLAINS DEPARTMENT OF RECREATION.

Steven I Adler, Esq., for appellant (Mandelbaum Salsburg, attorneys)

Amanda E. Miller, Esq., for respondent (Decotiis, Fitzpatrick & Cole, attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Record Closed: January 23, 2017 Decided: February 7, 2017

STATEMENT OF THE CASE

Appellant, Christopher Monahan (Monahan), appeals his ten day suspension by respondent, Township of Scotch Plains Department of Recreation (Scotch Plains or respondent), on charges of violation of federal drug and alcohol use by and testing of employees who perform functions related to the operation of commercial vehicles and other sufficient cause. At issue is whether Monahan engaged in the alleged conduct, and, if so, whether that warrants a ten-day suspension.

PROCEDURAL HISTORY

On April 18, 2016, respondent served Monahan with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on April 26, 2016. Respondent served Monahan with a Final Notice of Disciplinary Action dated May 5, 2016, sustaining charges of violation of federal drug and alcohol use by and testing of employees who perform functions related to the operation of commercial vehicles and issued a ten-day suspension.

Following Monahan's appeal to the Civil Service Commission, it transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on June 10, 2016, for determination as a contested case. A motion for Summary Decision was filed by respondent on November 2, 2016. Petitioner filed opposition on November 22, 2016. I denied that motion on November 28, 2016. The hearing was held on December 2, 2016. Respondent submitted closing briefs on January 18, 2017. Appellant submitted closing briefs on January 20, 2017, at which time I closed the record.

FACTUAL DISCUSSION

I **FIND** the following undisputed **FACTS**:

Monahan has been employed by Scotch Planes for thirty-three years. Monahan has had numerous random drug screenings as an employee of Scotch Plains. On April 16, 2016, Monahan was on a list of individuals to be given a random drug and alcohol test by Lexann Francis (Francis) an on-site collector. Monahan reported for the testing to give a urine sample. He was told that he had not provided enough urine and would have to provide another sample. Monahan left the building where the testing was taking place before attempting to give an additional urine sample. Monahan received an employee handbook from Scotch Plains in 2012.

TESTIMONY

Lexann Francis

Francis works for Valley Medical Group as a collector tech. Her duties include drug and alcohol testing. She has trained as a collector tech and has retraining every three to five years. She follows the collection guidelines of the Department of Transportation (DOT). Francis has done on-site testing for Scotch Plains for sixteen years.

Francis is given a list of approximately three employees from Valley Medical group. The list is a random list of safety sensitive employees. It includes employees who are required to have a commercial driver's license. She arrives on site and locates the supervisor. She gives the supervisor the list of people to be tested. Prior to the test, the employee's identification is checked and the custody and control form is done. The employees are asked if they need to take anything out of their pockets, the employee then choses a test cup. Francis puts a line on the cup to show the amount of urine that is required for the test. If the employee does not provide enough urine, the sample is discarded and the employee is told to drink water and stay in her eye sight and do not leave. When an employee does not provide enough urine it is called shy bladder. The testing site is the garage of the Department of Public Works. The entrance to the garage is between where her table is set up and the restroom. There is another set of doors fifty yards from the restroom. Francis can see both doors from the table.

On April 14, 2016, Francis was on-site testing in Scotch Plains. She was going to other test sites after Scotch Plains but was not rushing to leave the site. Francis sets up outside of the supervisor's office. The testing site is where her supplies and kits are. Monahan came for testing on April 14, 2016, at approximately 7:15 a.m. She told him to choose a cup. Francis marked the cup with a line to show the amount of urine that was required. She puts the mark at the sixty-five milliliter (ML) on the cup. The cup has a temperature strip and she marks the cup above the temperature strip. The temperature strip is always near seventy-five ML. The cup has a line at forty-five ML. Monahan was

told not to run the water. Francis did not secure the water source but did check that the toilet had a blue covering agent in it. She also took the garbage can out of the room. Francis does not sit during the testing process.

Monahan was the first person she tested that day. She asked him to empty his pockets and he took out his wallet. He provided a urine sample that was not sufficient for testing. She did not have to hold the cup to the light to know that the sample was insufficient. Francis followed the shy bladder guidelines. For shy bladder guidelines the tester has to wait up to three hours for the employee to provide a sufficient urine sample. She told Monahan that he had to provide another sample, to drink water, and not to leave until he provided a second sample. She told him if he left it would be considered a refusal. She discarded the insufficient sample in accordance with the protocol. Francis next prepared the chain of custody form for the next person to be tested. She did not see Monahan drink any water after he was told that he had to provide a sufficient sample. As Francis was doing the procedure with the next person, she realized that Monahan had left. Monahan did not ask her if he could leave. Francis was the only collector present at that time.

When an employee leaves in the middle of shy bladder testing, it is considered a refusal to test. Monahan returned after 8:00 a.m. He was advised that since he left the site that it was considered a refusal and the test could not be completed. Monahan became upset when he could not provide another sample. He never stated that he had provided a sufficient urine sample. Francis called Alexander Mirabella, the city administrator, and informed him that Monahan had left the testing area before completing the testing. She faxed a report to Mirabella from Westfield, which was her next stop. On Monahan's report controlled substance and alcohol use testing, Francis did not check that Monahan did not provide sufficient urine. The specimen bottle was not released to Fed Ex as stated in the custody and control form. Francis filled out this form prior to the testing being completed.

Francis had previously tested Monahan more than ten times. He was always told that he had to provide 45 ML of urine for the test to be complete.

Alexander Mirabella

Mirabella is the municipal manager and appointing authority for Scotch Plains. Scotch Plains has a drug and alcohol testing policy for employees with commercial driving licenses. Valley Medical does the drug and alcohol testing.

On April 14, 2016, three employees were called for testing. Mirabella was informed that one of the employees, Monahan, left the testing area which is considered a refusal. He gathered information and then spoke to Monahan. Monahan stated that he was called for the test and he left the area to conduct other business. After the meeting Monahan emailed him to further explain his version of what happened. In the email Monahan stated that he gave a urine sample and was told it was insufficient. He drank five bottles of water. He then left the testing site in a golf cart to go to his jobsite. When he returned to the testing site, he was told that his leaving the test site was considered a refusal. Mirabella spoke to witnesses Frank Dinizzo, Nick Dinizzo, Franco Sabino, Richard Dare, and Ron Walkonic, who all saw Monahan leave the test site. They also knew that you could not leave the test site.

The employees are given an Employee Handbook, which contains the drug policies one of which is if an employee refuses a drug test they are subject to disciplinary action. The Handbook follows the DOT guidelines. The Handbook does not state where the drug testing site is located or what happens when an employee gives an insufficient urine sample.

April 14, 2016, was Monahan's first day back to work after a vacation. He was beginning new duties.

Richard Dare

Richard Dare (Dare) works for Scotch Plains doing maintenance and repair. Monahan was his supervisor. Monahan explained the drug testing policy to Dare and a group of other people. He told them that there was random testing, that they had to stay in the facility until the testing was done and the testing was done in the DPW

building. This conversation was not done in connection with Dare being a new hire. There were six people present during this conversation. Dare worked in the Recreation Department for Scotch Plaines until 2015.

Christopher Monahan

Monahan has been employed by Scotch Plains for thirty-three years. He is the facility and golf course manager. He works for the Recreation Department which shares space with DPW. He went on vacation in early April 2016. Once he returned he would have increased job responsibilities. The drug testing was done in the front sixth of the recreation building. The recreation section is in the right rear section of the building. The drug testing table is in the left two-thirds of the building.

Monahan began getting drug tested approximately twenty years ago. Francis is the only person that he can remember who has drug tested him. In prior testing he had to wait to give a full urine sample. He waited near the building but not in the testing area. Previously he went to the recreation area while waiting to give a second sample, other employees left before the second test. Monahan later stated that he does not know if any of the people he saw were in the shy bladder protocol. Monahan had never previously given insufficient urine in a drug test. The people he saw walking around were waiting to give a urine sample.

Monahan arrived at work at 7:00 a.m. He learned that he was to be tested at 7:10 a.m. He went to the testing area and saw Francis and the kits. Two-thirds of the area is visible from the testing table. He did not see other employees that were not being tested that day using the rest room. There were people walking around at this time. Monahan waited five to ten minutes before providing a urine sample. He was not asked to take anything out of his pockets. Francis drew a line on the sample cup. He was told to fill the cup to the line and give the cup back to Francis. He would normally turn on the water and flush the toilet to facilitate using the bathroom. The urine sample that he gave was at the area where the temperature strip was. The sample was more than 45 ML.

Monahan gave Francis the cup with urine, she held it eye level and told him that the sample was not sufficient and he would have to provide another sample. He was not told that he could not leave the site or he had to stay in a specific area. He drank two bottles of water that he retrieved from a water cooler next to the testing table. Monahan went outside, spoke to some people then took a golf cart to the golf course. He went to the pro shop where his office is to conduct golf course business. He checked emails and receipts. He returned to the testing site seven or eight minutes later. He did not leave township property.

When Monahan returned to the testing site Francis told him that he was in violation. He asked could he give the sample at that time and was told that he could not. He had previously left the testing are prior to giving a urine sample and never told that he had violated the policy. He was not told that he had the right to get his own test done.

Monahan does not recall speaking to Dare about drug testing. The most he would have said is that there was random drug testing. On cross-examination he stated he never told any of the people that work for him that there would be random drug testing or the drug testing procedures. Monahan emailed Mirabella and stated that he had provided four ounces of urine.

He went home and put four ounces in a cup that was similar to the cup used in the testing. He estimated that was the amount of urine he provided to Francis. Four ounces is 120 ML. He believes that the urine sample that he provided was seventy-five ML. Monahan did not write down the sample size or take a photograph of it. He had previously received the Employee Handbook, which he reviewed approximately five years ago.

Monahan did not tell Francis that he had provided a sufficient amount of urine. He did not know in April 2016 what the dimensions of the testing site were. He did not ask about the dimensions of the test site.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant, the resolution of the charges against Monahan requires that I make credibility determinations with regard to the critical **FACTS**.

The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961).

A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Francis, Mirabella, and Dare are credible. Francis's testimony regarding the procedure for the urine testing was clear. Her reasoning for putting a line on the cup above the forty-five-ML line was understandable. She admitted that she did not secure the water source but did check that the toilet had the blue covering agent. Mirabella was also credible his testimony regarding his conversation with Monahan and Monahan's email were uncontested. Dare has no reason to not be truthful regarding Monahan speaking to a group of people who he supervised regarding drug tests. I **FIND** Monahan to be less credible, his testimony was contradictory. He stated that he previously had gone to

the recreation area before being required to give a second urine sample. He later testified that he had never previously given an insufficient urine sample. He testified that he gave a four-ounce urine sample but four ounces is one hundred and twenty MLs. He testified that other workers left the test site before a second test but later testified that he did not know if the other workers were in the shy bladder protocol.

Having reviewed the testimony and evidence and credibility of the witnesses, I make the following additional **FINDINGS** of **FACTS**:

When Monahan reported for the urine test, he did not provide a urine sample that was at least forty-five ML. A urine sample must be at least forty-five ML. When someone does not provide a sufficient urine sample the tester disregards the insufficient sample. The tester then tells the employee to drink fluids. If the employee leaves the test site before the collection process is complete, the tester must discontinue the collection. This is considered a refusal to test. There is no requirement for the tester to inform the employee that failure to remain at the test site constitutes a refusal. Francis told Monahan that he had to give another urine sample, drink water and do not leave the area. He was in the shy bladder protocol. He was supposed to wait and provide a second sample with sufficient urine. Monahan drank some water and left the DPW building where the testing was taking place.

Monahan went to his office in the pro shop of the golf course and returned to the testing site at approximately 8:00 a.m. Francis informed him that his leaving the test site prior to giving the second urine sample is considered a refusal to take the urine test. He asked could give the urine sample now but Francis said that he could not.

Monahan has been taking drug and alcohol tests for Scotch Plains for twenty years. It strains credibility to believe that he did not know where the testing site was. When he was told that he was going to be tested on April 16, 2016, he went to the DPW garage where the collection table was located. Monahan had previously told Dare and approximately five other employees about the drug policy and that the drug testing was done in the DPW building and that they had to stay at the testing site until the testing was completed.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of violation of federal drug and alcohol use by and testing of employees who perform functions related to the operation of commercial vehicles and other sufficient cause are sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

49 C.F.R. § 40.65(a) provides:

> As a collector, you must check the following when the employee gives the collection container to you:
>
> (a) Sufficiency of specimen. You must check to ensure that the specimen contains at least 45 mL of urine.
>
> (1) If it does not, you must follow "shy bladder" procedures (see § 40.193(b)).
>
> (2) When you follow "shy bladder" procedures, you must discard the original specimen, unless another problem (i.e., temperature out of range, signs of tampering) also exists.

(3) You are never permitted to combine urine collected from separate voids to create a specimen.

(4) You must discard any excess urine.

49 C.F.R. § 40.193(a) and (b) provide:

(a) This section prescribes procedures for situations in which an employee does not provide a sufficient amount of urine to permit a drug test (i.e., 45 mL of urine).

(b) As the collector, you must do the following:

(1) Discard the insufficient specimen, except where the insufficient specimen was out of temperature range or showed evidence of adulteration or tampering (see § 40.65(b) and (c)).

(2) Urge the employee to drink up to 40 ounces of fluid, distributed reasonably through a period of up to three hours, or until the individual has provided a sufficient urine specimen, whichever occurs first. It is not a refusal to test if the employee declines to drink. Document on the Remarks line of the CCF (Step 2), and inform the employee of, the time at which the three-hour period begins and ends.

(3) If the employee refuses to make the attempt to provide a new urine specimen or leaves the collection site before the collection process is complete, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER. This is a refusal to test.

(4) If the employee has not provided a sufficient specimen within three hours of the first unsuccessful attempt to provide the specimen, you must discontinue the collection, note the fact on the "Remarks" line of the CCF (Step 2), and immediately notify the DER.

(5) Send Copy 2 of the CCF to the MRO and Copy 4 to the DER. You must send or fax these copies to the MRO and DER within 24 hours or the next business day.

In this matter Monahan left the test area after he failed to provide a sufficient urine sample and was told to stay in the test area. The DOT regulations are clear that if an employee leaves the collection area during the shy bladder protocol prior to providing a sufficient urine sample that it is considered a refusal. Monahan left the collection site to go to his office, prior to giving a sufficient urine sample.

When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522–24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In this case Monahan violated the federal drug testing policy by leaving the test area before providing a forty-five ML urine sample.

Under the circumstances, major discipline is appropriate; I **CONCLUDE** that the penalty of a ten-day suspension is appropriate.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of the Township of Scotch Plaines, Department of Recreation that Christopher Monahan be suspended for ten days is **AFFIRMED**.

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, P.O. 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.

2-7-17

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

FEB 13 2017

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

WITNESSES

For Appellant:

Christopher Monahan

For Respondent:

Lexann Francis

Alexander Mirabella

Richard Dare

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Controlled Substance and alcohol use Testing Program Form dated April 14, 2016

R-2 Urine Collection Kit

R-3 Federal Drug Testing Custody and Control Form

R-4 Preliminary Notice of Disciplinary Action dated April 18, 2016

R-5 Email from Monahan to Mirabella dated April 14, 2016

R-6 Not in Evidence

R-7 Not in Evidence

R-8 Township of Scotch Plains Employee Handbook

R-9 Monahan signed receipt for Employee Handbook dated May 3, 2012

R-10 Not in Evidence

R-11 Not in Evidence

R-12 Not in Evidence

R-13 DOT Urine Specimen Collection Guidelines

3-9-17

STATE OF NEW JERSEY

In the Matter of Sean Padua
Jersey City Public Schools

CSC DKT. NO. 2016-4524
OAL DKT. NO. CSV 09885-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 09885-16
AGENCY REF. NO. 2016-4524

IN THE MATTER OF SEAN PADUA,
JERSEY CITY PUBLIC SCHOOLS.

Kathi F. Mazzouccolo, Esq., appearing for appellant Sean Padua (AFSCME Local 52, attorneys)

Teresa L. Moore, Esq., appearing for respondent Jersey City Public Schools (Riker Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: February 14, 2017 Decided: February 15, 2017

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action effective June 17, 2016, Jersey City Public Schools (Schools) terminated custodian Sean Padua (appellant) from his civil service position for neglect of duty, chronic absenteeism, and other just cause. Appellant filed a request for a hearing appealing his termination which appeal was filed with the Office of Administrative Law by the Civil Service Commission for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on July 6, 2016.

The matter was assigned to me on July 11, 2016. On July 29, 2016, I convened a telephonic case management conference. Among other issues discussed, a hearing date for November 28, 2016, was scheduled. On August 1, 2016, I entered an Order relieving counsel for the appellant. On October 20, 2016, the Schools filed a Motion for Summary Decision, which I denied under Letter-Order dated October 21, 2016, explaining that a de novo hearing was required and that the evidentiary hearing date would stand. A Motion for Interlocutory Review of my Letter-Order was denied by the Commission. Thereafter, and prior to the scheduled hearing date, and at the joint request of the parties, the hearing was cancelled because the parties were in productive settlement discussions.

After periodic inquiries from the undersigned as to the status of the settlement, under cover of February 14, 2017, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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.

Gail M. Cookson

February 15, 2017
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

2-17-17

FEB 17 2017

Mailed to Parties:

id

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800
Attorneys for Respondent, Jersey City Public Schools

SEAN PADUA, Petitioner, vs. JERSEY CITY PUBLIC SCHOOLS, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. 09885-2016N AGENCY DOCKET NO. 2016-4524 **SETTLEMENT AGREEMENT**

This Settlement Agreement and General Release ("Agreement") is made by and between the JERSEY CITY PUBLIC SCHOOLS, with an address at 346 Claremont Ave., Jersey City, New Jersey 07305 ("School District"), and SEAN PADUA ("Padua" or "Employee") (collectively, the "Parties").

WHEREAS School District is an employer subject to the New Jersey Civil Service Act, N.J.S.A. 11A: 1 *et seq.*;

WHEREAS Padua was a custodian employed by the School District;

WHEREAS the School District brought a charge of unbecoming conduct, neglect of duty, insubordination and other just cause against Padua, resulting in Padua's termination and this subsequent appeal to the Civil Service Commission captioned *Sean Padua v. Jersey City Public Schools* under Agency Docket No. 2016-4524 (the "Appeal"); and

WHEREAS the Parties wish to resolve this matter in accordance with the terms set forth herein;

NOW, THEREFORE, subject to approval by the Civil Service Commission ("Commission"), the Parties hereby agree as follows:

1. Padua hereby agrees to resign from his position effective June 16, 2016. Upon inquiry from any third parties, the School District will only confirm Employee's employment, position, title, salary and dates of employment.

2. Padua agrees to withdraw with prejudice any and all claims or suits that he has previously filed against the School District that are still pending in any and all courts and/or before any and all agencies, including the Civil Service Commission. This Settlement is intended to be the final resolution of all outstanding matters between the School District and Padua. Should Padua fail to withdraw any such pending claims or suits, this Settlement Agreement will serve as Padua's formal written notice of withdrawal of those pending claims or suits.

3. As of the effective date of his resignation, all of Padua's employment rights, including but not limited to salary and insurance coverage, will permanently end.

4. Padua agrees that he will not apply for reemployment with the School District at any time. Specifically, Padua will be considered to have permanently resigned from his position as a result of this Settlement Agreement. If Padua does apply for reemployment with the School District and is approved for employment in any capacity, the terms of this Settlement Agreement shall control and be grounds for immediate termination of Padua's employment.

5. In exchange for Padua's resignation, the School District will take all steps necessary to adjust Padua's status with the Civil Service Commission from "termination" to "resignation" effective June 16, 2016.

6. This Settlement shall not constitute a precedent in any matters involving other employees.

7. Padua waives all claims of any nature against the School District with regard to his employment with and/or his separation from the School District, including fees, or other monetary relief.

8. By entering into this Settlement Agreement, and in exchange for good consideration as set forth above, the sufficiency of which is hereby acknowledged by the parties, Padua releases and discharges the School District and any and all other School District officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that he has or may have against the School District regarding his employment with the School District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Padua's employment with the School District and separation from the School District. It specifically includes, without limitation, all claims which Padua may have regarding discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensation laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having

any bearing whatsoever on his employment by and the termination of his employment with the School District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss. Padua agrees to save, hold harmless and indemnify the School District for any legal costs and attorneys' fees associated with the enforcement of the terms of this Settlement Agreement should enforcement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the School District based upon any of the above-released claims in Paragraph 8, Padua agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Padua of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Settlement Agreement. Accordingly, by executing this Settlement Agreement, Padua acknowledges that he: (i) fully understands the terms and conditions of this Settlement Agreement; (ii) has consulted with an attorney to review the Settlement Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given sufficient time within which to consider this Settlement Agreement; and (v) has seven (7) days from the date of the execution of this Settlement Agreement to revoke it. Padua understands that he may rescind this Settlement Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the School District either by hand or by certified mail within the seven-day period.

11. The Parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

12. This Settlement Agreement constitutes the full agreement between the Parties, and shall be construed and enforced in accordance with New Jersey law.

13. If any provision or portion of a provision of this Settlement Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

14. This Agreement shall be and is subject to final approval by the Commission. The effective date of this Agreement ("Effective Date") shall be the date of the School District's receipt of this Agreement, approved by the Commission, or the eighth day after the School District's receipt of this Agreement executed by Employee, whichever is later. provided that Employee has not exercised any right to rescind this Agreement. In the event of disapproval by the Commission or any failure to act on such approval, this Agreement shall be void and of no effect, and both Parties shall have the right to pursue any and all matters relating to the other, including but not limited to the Appeal.

Dated: 1/12/17

Sean Padua
SEAN PADUA

Dated: 1/12/2017

Kathleen Mazzouccolo
KATHI MAZZOUCCOLO, ESQ.
Attorney for Sean Padua

Dated: _____

DR. MARCIA LYLES
State District Superintendent
Jersey City Public Schools

Dated: 2/10/17

Teresa L. Moore
TERESA L. MOORE, ESQ.
Attorney for Jersey City Public Schools

CERTIFICATION

I, SEAN PADUA, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my legal representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my legal representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 1/12/17

Sean Padua
SEAN PADUA

3-9-17

STATE OF NEW JERSEY

In the Matter of Esther Tyndall,
City of East Orange,
Department of Property Taxation

CSC DKT. NOs. 2013-733 & 2013-3452
OAL DKT. NOs. CSV 13300-12 & 09602-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAR 10 2017 **BW**

The appeal of Esther Tyndall, Clerk 1, City of East Orange, Department of Property Taxation, two 180 calendar day suspensions, on charges, was heard by Administrative Law Judge Joan Bedrin Murray, who rendered her initial decision on February 3, 2017. Exceptions were filed on behalf of the appellant. A reply to exceptions were filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 9, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the first 180 calendar day suspension to a 90 calendar day suspension and uphold the second 180 calendar day suspension.

Since the penalty has been modified, the appellant is entitled to back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10, following the 90 calendar day suspension. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at

hand, although one of the penalties was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the first 180 calendar day suspension to a 90 calendar day suspension and upholds the second 180 calendar day suspension. The Commission further orders that appellant be granted 90 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C.* 4A:2-2.10. 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.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. CSV 13300-12
and CSV 09602-13
AGENCY DKT. NOS. 2013-733
and 2013-3452
CONSOLIDATED

IN THE MATTER OF ESTHER TYNDALL, CITY OF EAST ORANGE, DEPARTMENT OF PROPERTY TAXATION.

Jason L. Jones, Esq., for appellant Esther Tyndall (Weissman & Mintz LLC, Attorneys at Law)

Marlin G. Townes, Assistant Corporation Counsel, for respondent City of East Orange (Khalifah L. Shabazz, Esq., Corporation Counsel)

Record Closed: May 29, 2016 Decided: February 3, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE

This consolidated matter involves disciplinary charges against appellant Esther Tyndall, who was employed as a Clerk 1, (previously known as Assessing Clerk, Typing), with respondent City of East Orange (the City), Department of Property Taxation (the Department). Appellant appeals from the imposition of two separate one hundred eighty-

day suspensions beginning September 6, 2012, and May 29, 2013. The suspensions stemmed from determinations that appellant engaged in a pattern of performing tasks unrelated to her duties as Clerk 1, that she failed to advise her supervisor that she had taken leave time under the Family and Medical Leave Act (FMLA), that she failed to perform her assigned duties in a timely manner if at all, that she argued with her supervisors when directed to perform a task, that she was hostile and non-communicative in her dealings with them, and that she engaged in other acts of insubordination as set forth below. Appellant contends that she conducted herself in an appropriate manner at all times herein, and that she could not complete her assigned duties due to her large workload and for other reasons.

PROCEDURAL HISTORY

On May 23, 2012, the District issued a Preliminary Notice of Disciplinary Action (PNDA) informing appellant of the charges of insubordination, conduct unbecoming a public employee, and neglect of duty against her. N.J.A.C. 4A:2- 2.3(a)(2), (6), (7). (R-6.) Specifically, appellant was charged with taking leave time under the Family and Medical Leave Act (FMLA) without notifying her supervisor, Tom Small, who was the newly-appointed tax assessor. Further, when she returned from such leave, she engaged in a course of conduct that proved disruptive to the Department. Namely, she persisted in performing duties unrelated to those performed in the Tax Assessor's Office, while neglecting the duties assigned to her. In addition, appellant was charged with ignoring her immediate supervisor's directive to complete a "request for time" form when she was called for jury duty. The PNDA also alleged that appellant provided certain information to a taxpayer, despite being directed not to do so, aiding that person's prosecution of her property tax appeal against the City of East Orange. Further, appellant was charged with refusing to comply with the directives of Diane Ross (Ross), her immediate supervisor, and being argumentative and disrespectful. Finally, the PNDA charges appellant with extending her one-hour lunch break by a half hour, despite being told not to do so.

After a departmental hearing, the District issued an amended Final Notice of Disciplinary Action (FNDA) dated September 5, 2012, sustaining the charges and providing for appellant's suspension for one hundred eighty days. (P-2.) Appellant

requested a hearing, and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 27, 2012, for hearing and determination as a contested matter under OAL docket number CSV 13300-12.

The Department issued a separate PNDA dated August 7, 2012, informing appellant of the charges of insubordination and neglect of duty issued against her. N.J.A.C. 4A:2-2.3(a)(2) and (7). (R-9.) Specifically, appellant was charged with failing to perform certain tasks assigned to her, including those that were time-sensitive. Further, the Department alleged that appellant filled out a request for personal time that was effective on that same date, leaving pressing work undone and the office understaffed.

After a departmental hearing, the Department issued a Final Notice of Disciplinary Action (FNDA) dated May 23, 2013, sustaining the charges and providing for appellant's suspension for one hundred eighty days. (P-3.) Appellant filed an appeal and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 8, 2013, under OAL docket number CSV 09602-13.

CSV 13300-12 was initially assigned to be heard by the Hon. Tahesha Way, A.L.J.; CSV 09602-13 was initially assigned to be heard by the Hon. Tiffany Williams, A.L.J. On February 6, 2014, the matters were consolidated and scheduled to be heard by the Hon. Tahesha Way, A.L.J. Thereafter, the consolidated matters were assigned to the undersigned. A hearing was scheduled for October 9, 2014, and October 21, 2014, but was adjourned at the request of respondent with the consent of appellant. The matters were rescheduled to be heard on January 12, 2015, and January 13, 2015, but was adjourned at the request of the appellant with the consent of respondent. The matters were heard on May 11, 2015, and May 12, 2015. After the conclusion of testimony, the record remained open for the receipt of post-hearing submissions. Following a number of requests by both parties for additional time within which to file documents, the record closed upon receipt of the last submission on May 29, 2016.

FACTUAL DISCUSSION

Appellant was hired as an Assessing Clerk/Typing by the Department on April 1, 2007. Her job title changed to Clerk 1 on or about April 9, 2011. She remained in that position until leaving the Department sometime in 2013. These matters pertain to the period of time after the appointment of Thomas Small (Small) as Tax Assessor for the City of East Orange (the City) on March 28, 2011. As director of the Department, Small was appellant's supervisor, and Diane Ross (Ross), the Senior Assessing Clerk in the Department, was appellant's immediate supervisor.

1. AS TO CSV 13300-12

This matter concerns various infractions with regard to appellant's work activities from March 2011 through May 2012. As to these charges, the Department presented testimony by Thomas Small, Diane Ross, and Annmarie Corbitt, and appellant testified on her own behalf. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following preliminary **FACTS**:

A. Incident as to FMLA Leave

Approximately two weeks after Small's appointment as tax assessor in March 2011, appellant became ill and thereafter was admitted into the hospital. She never informed Small that she was hospitalized, or that she would not be returning to work for an extended period of time. Nor did she notify Ross, her immediate supervisor, that she had fallen ill. Instead, she told her friend, Sonia Harris (Harris), another employee in the Department, that she was in the hospital. Harris obtained the necessary paperwork that appellant needed in order to apply for FMLA leave. Harris was not appellant's supervisor. Small did not know of appellant's whereabouts until he contacted the City's personnel director, who informed him that she had taken FMLA leave. During said leave, appellant did not contact Small. Small relied on the personnel director to send her letters asking that she contact his office intermittently. Appellant returned to her post on August 1, 2011.

B. Incident at the Tax Collector's Office

On October 28, 2011, appellant was working with a senior couple in the tax assessor's office. They wanted to replace their deceased daughter as the record owner of certain property in the City. Their goal was to then apply for property tax relief under the Property Tax Reimbursement Program (Senior Freeze). As Assessing Clerk, Typing, appellant's job was defined by the New Jersey Department of Personnel as follows:

> Under direction performs routine clerical work involved in the assessment of real and personal property; does other related duties and typing as required. (See R-3.)

In addition to the above job definition, appellant defined her job duties as Assessing Clerk, Typing, in an attachment to a May 28, 2008, letter to Reginald Lewis, City Administrator notifying him of her passing the Civil Service Exam. (R-4.) She listed the following duties, in pertinent part:

> Compiling list to be used in appeal process;
> Compiling property record cards on all tax appeals (County and State;)
> Reviewing each appeal for tax status and municipal charges;
> Notify Assessor of outstanding taxes on all appeals;
> Compiling list of appeals on schedule for hearing at the County Board of Taxation;
> Process all deeds received from the County Board of Taxation;
> Review the usable status with the Assessor;
> Key in all deeds into the MOD IV System;
> Update Property Record Cards with new ownership information. Ibid.

Appellant's job duties did not include assisting residents in completing and filing the Senior Freeze application. This was a function of the Office of the Tax Collector, headed by Annmarie Corbitt (Corbitt). Corbitt credibly testified that the collection staff fills out the Senior Freeze forms, entering the property block and lot numbers and other information, and verifies that the applicants have paid their property taxes. The applicants can choose to send their receipts directly to the New Jersey Division of Taxation (the State), or Corbitt can sign the form acknowledging that the property tax has been paid.

The Tax Collector's Office is located next to the Tax Assessor's Office, where appellant works. The two offices have separate entrances off the main hallway in the municipal building. In order to visit the tax collector, one must pass through a closed double doorway that opens into a hallway. At the end of the hallway are two windows that provide counter service. One window is staffed by the cashier. Residents wait in the hallway for service. Behind the windows lies the office space for the tax collection staff, including Corbitt. This area is accessed through a locked door near the windows.

On the aforesaid date, the above-mentioned senior couple approached the cashier's window asking to have their Senior Freeze application filled out. They were upset because the cashier told them that they were not the record owners of the property, and there was no proof that they paid the property taxes. The couple left, then returned to the office with appellant. They stood in the hallway inside the tax collection office, in front of the windows. Other customers were present. Corbitt testified that appellant asked her if she was going to sign the form, to which she replied that she could not. She asked appellant to come into the office behind the windows, testifying that she wanted to tell appellant in private why she was unable to sign the form. Appellant became loud and disruptive, demanding that Corbitt talk to her in front of the couple. Corbitt repeated that she would not sign the form, telling appellant that the couple's daughter died two years ago, and that the property taxes were being paid by the lender. She said that the couple could send their receipts to the State instead. At that point, appellant and the senior couple left Corbitt's office, only to return a few minutes later. Corbitt testified that appellant yelled at her, demanding that she sign the form. When Corbitt declined, appellant told her that she had just called Trenton, and Trenton said she could sign the form. Again, this occurred in the presence of other customers waiting in the hallway. Corbitt did not sign the form. She stated that she was angry and embarrassed by the incident, maintaining that she kept her composure due to the fact that the incident occurred in the crowded hallway of her office. Later that day, she memorialized the incident in an email to Small, appellant's supervisor. (See R-2.)

With the exception of the nature of her demeanor and tone during this incident, which is addressed in the following section, appellant did not dispute Corbitt's testimony.

She explained that she accompanied the couple to the tax collector's office to find out why the form was not signed, and had an exchange with Cheryl at the window. She first testified that she changed the deed itself to reflect that the parents owned the property, but later stated that she changed the address on the deed. She was under the impression that once the address was changed to that of the couple, they were eligible to complete the Senior Freeze application. When rebuffed by Cheryl, she returned to her own office and called Trenton. She did not elaborate as to what she meant by "Trenton." She said that Trenton told her that the tax collector's office could complete the application. She then brought the couple back to Corbitt's office. She acknowledged that Corbitt asked her to join her in the back office, but that she refused to speak with Corbitt privately because she wanted the couple to hear what she had to say. Appellant told Corbitt that she explained the circumstances to Trenton, and was told that Corbitt could sign the application. She testified that Corbitt was upset during this exchange "because she felt as though I was telling her what to do." She denied raising her voice at Corbitt, explaining that she would not do that with seniors present. She said that she did not believe that she was behaving unprofessionally. She asserted that it was her job to help seniors with tax relief, but conceded that it was not listed in her own description of her job duties. (See R-4.)

Small refuted her testimony, credibly testifying that it was not appellant's job to fill out the Senior Freeze applications. Further, these applications were unrelated to the assessing department. Instead, she was required to simply give a Senior Freeze book to the taxpayer, and not take any further action. Small stated that after he received Corbitt's email, he made it clear to appellant that this was her sole responsibility.

C. Incidents as to Appellant's Non-Compliance with Directives

The Department offered undisputed testimony regarding appellant's unwillingness to comply with directives on a number of occasions.

In March 2012, Appellant advised Ross, Senior Assistant Clerk and her immediate supervisor, that she was called to report for jury duty. Ross directed appellant to fill out

a time request form. Appellant refused to do so since she was not taking personal time, even though Ross explained to her that she would not be charged for the time. Ross testified that as part of her job duties, she needed to keep track of time for the Department's staff. Appellant acknowledged that there was a "back and forth" with Ross concerning her refusal to fill out a time request form. She justified her recalcitrance by stating that the time request form was only for personal, vacation, or sick time, not jury duty. She then asked her union representative for guidance. She insisted that usually you need to show only your jury duty letter to the supervisor, and that is sufficient. However, she acknowledged that this was her first experience with jury duty. Eventually, appellant saw the box on the time request form marked "Other", and agreed to complete the form. She also testified that she had not been given any written policy regarding jury duty procedure.

In another incident, Ross asked appellant to search on the computer for unpaid water bills. She directed her to not make copies of the bills, but simply make a notation of the amount owed, so that the tax appeal petitions could be flagged for non-payment of water services. Appellant disregarded this directive, making copies of the water bills. She testified that she would need to make copies later anyway, as Ross did not have access to the water system. She then corrected her statement, saying that Ross did have access but never used the system. She then said that Ross's code to get into the system was outdated; therefore, Ross did not have access to the water system. She based this on a conversation she overheard in the office. Regardless, appellant did not dispute that Ross directed her to not make copies.

In addition, Small testified that appellant habitually combined her one-hour lunch break with her two fifteen-minute breaks, leaving the office for one and a half hours. He credibly testified that she continued to do so, even after he told her it was an unacceptable practice. In response, appellant told Small that under the prior tax assessor, the practice was to permit a combined lunch period. Small countered that he later became informed that this was not the case. Nevertheless, it is undisputed that she was given notice that she was limited to a one-hour lunch break, and disregarded that directive.

In addition to the evidence underlying the above preliminary facts, other pertinent testimony follows:[1]

D. Incident as to Notifying the NJHMFA about Alleged Over-Assessments

Sometime in October 2011, a taxpayer approached appellant in the tax assessor's office to complain about her assessment being high, in preparation for filing a property tax appeal. Appellant stated that she was unable to provide the person, Mrs. Bellamy (Bellamy), with pertinent information. Appellant testified that she later received a telephone call from Linda Gargiulo (Gargiulo), who was the Operation Manager of the Housing Affordability Service (HAS) within the New Jersey Housing and Mortgage Finance Agency (NJHMFA). This state agency monitors the assessments of affordable housing units. According to appellant, she did not initiate the call to Gargiulo, instead stating that Bellamy had taken appellant's business card, and must have called Gargiulo herself to question the assessment. Appellant stated that she directed Gargiulo to contact Small. However, communications from Gargiulo indicate that a detailed conversation ensued. (See R-7; R-8.)

Small then received an email from appellant dated October 27, 2011, stating: "Good Morning Tom, Attached please fine [sic] the information regarding the affordable housing units prices." (R-7.) Appellant attached an email from Gargiulo referencing their discussion about certain properties in the City that were over-assessed pursuant to NJHMFA regulations. Ibid. Small testified that he had no prior notice of a conversation between appellant and Garguilo until he received the email. He never directed appellant to confer with the NJHMFA, nor was it part of her job duties. Small then received a copy of a letter addressed to appellant from Gargiulo. (R-8.) The letter included a spreadsheet listing approximately forty properties in the City with their current values under the affordable housing program. The Department was directed as follows: "Your prompt attention to adjusting the assessed values would be appreciated . . . " Ibid. Small testified that a reduction in assessments would have resulted in a loss of revenue to the City. He

[1] For purposes of clarity and in order to distinguish the two appeals, the lettering of the sections is continuous through the undisputed and disputed testimony in CSV 13300-12.

then had a number of conversations with Gargiulo, and was able to rectify the situation only with the intervention of the City's legal department.

E. Second Incident at the Tax Collector's Office

Several months later after the first incident detailed in Section B above, Corbitt again found appellant in her office hallway helping two seniors fill out the Senior Freeze applications. She did not engage her, but simply walked past and entered the back office. Corbitt stated that she spoke to someone about this, and was told to send a memo to Small. On July 10, 2012, she emailed Small about the second incident. (See R-1.) Appellant, on the other hand, denied helping seniors in Corbitt's office after the October 2011 incident.

F. Appellant's Tone and Demeanor

Both Ross and Small credibly testified as to appellant's inappropriate tone and demeanor. Ross stated that appellant responded to most directives with a harsh, disrespectful tone, and was routinely argumentative. Small stated that appellant continued to have problems following instructions, and at times would simply refuse to do certain tasks.

ADDITIONAL FINDINGS OF FACT

In view of the divergent testimony regarding certain matters noted above in Sections D, E, and F, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its

rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

After carefully considering the evidence and evaluating the demeanor and credibility of the witnesses, I found Corbitt, Small, and Ross to be forthright and credible. They presented candid testimony as to pertinent facts; further, their testimony was not undermined or impaired on cross-examination. For example, Corbitt's anger at appellant for barging into the tax collector's office and trying to force her to sign the Senior Freeze application was palpable. Her description of the incident was detailed and believable. On the other hand, an evaluation of the totality of appellant's testimony casts doubt on the reliability of her version of events; namely, that she was not loud or disruptive in the tax collector's hallway. Her acknowledgment that she rejected Corbitt's request to speak privately in the back office points to her desire to keep the matter public. It also is evidence of appellant's lack of professionalism and good judgment. In fact, she admitted that Corbitt was upset "because she felt as though I was telling her what to do." Appellant's self-assessment in this regard was correct. Her testimony that she was not loud, disruptive, or unprofessional does not hang together with the other evidence, including her own contradictory statements.

In addition, I am persuaded by Corbitt's credible testimony that she again saw appellant in her office several months later with another senior couple.

As to the incident in which appellant is alleged to have contacted the NJHMFA about over-assessments of property in the City, I credit the testimony of Small while finding appellant's version of the incident to be improbable. Interestingly, this matter occurred at approximately the same time as the incident in the tax collector's office. Appellant is charged with contacting a manager at NJHMFA to question if a homeowner's property was over-assessed. She testified that it was the homeowner who contacted the NJHMFA, who then contacted appellant. She further stated that she told the NJHMFA administrator to contact Small. This is a highly unlikely scenario. Appellant's testimony simply does not hang together with the other evidence, including an email and letter directed to appellant from Gargiulo at the NJHMFA referencing their conversation. I note that the letter makes no reference to Gargiulo being contacted by the homeowner. Once

again, it is clear that appellant reached out to a higher authority without permission from her supervisor.

Ross's testimony regarding appellant's non-compliance with directives was also credible, as opposed to appellant's versions of why her work was not completed. An example is her contradictory testimony regarding Ross not having access to the water system. I also credit Small's testimony concerning appellant's recalcitrance and refusal to do certain tasks. The manner in which appellant justified her actions makes it clear that she did not feel bound by office protocol or directives.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

On or about October 28, 2011, appellant entered the tax collector's office with a senior couple. Other customers were present. Appellant tried to induce Corbitt, the Tax Assessor, to complete and sign the couple's Senior Freeze application. This was outside of appellant's job duties; the Senior Freeze applications were handled by Corbitt's office. Corbitt declined to process the application. Appellant persisted, yelling at Corbitt and disrupting the business of the office. She rejected Corbitt's attempt to bring her into the private office in order to explain why she could not sign the form. She then brought the couple back to the tax assessor's office, returning to Corbitt's office a few minutes later. Appellant claimed that she had spoken to Trenton, and that Corbitt could sign the form. The incident caused Corbitt to be embarrassed and angry. Several months later, Corbitt witnessed appellant helping another couple in the hallway of the tax collector's office, despite having been told by Small to not do so.

On or about October 2011, without the permission or knowledge of Small or Ross, appellant contacted the NJHMFA to advise that certain properties in the City were over-assessed. This was in response to a homeowner who believed the assessment on her property was too high. This act was outside of her job duties. As a result of her intervention, the Department was contacted by the NJHMFA with a directive to reduce

the assessments on approximately forty properties in the City. In order to rectify the situation, the matter had to be referred to the City's legal department.

Appellant habitually used a harsh, disrespectful tone with her supervisors, and was argumentative when asked to perform a task.

2. AS TO CSV 09602-13

This matter concerns various infractions with regard to appellant's work activities from June 2012 through August 7, 2012, the period of time when municipalities defend against property owners' tax appeals before the County Boards of Taxation. As to these charges, the Department presented testimony by Thomas Small, Diane Ross, and Ryan Linder, and appellant testified on her own behalf. The pertinent facts surrounding this appeal are not disputed. Therefore, based upon a review of the testimony and the documentary evidence presented, I **FIND** the following pertinent **FACTS:**

A. Incident as to Appellant's Failure to Prepare the Tax Appeal Calendars

On or about June 19, 2012, Small emailed the Department's staff instructing them on certain procedures that would be in place while he was on vacation, which was during tax appeal season. (R-10.) In short, Ross was left in charge. The staff was directed to not ask Ross for specific work requests in writing. Small said this was necessary because appellant was in the habit of demanding that all tasks required of her be put in writing. Nonetheless, on June 21, 2012, Ross prepared a memo directing appellant to perform certain tasks with regard to pending tax appeals, to wit: "Please see attached list for Tax Appeals calendars date July 23, 25 & 26 will you please pull application and make copies. Also please advise me whether water is current for the following properties." (R-13.) The memo also directed appellant to check the status of the water bills for the July 12 calendar. Ibid. Having received no response to her request, Ross wrote a second memo to appellant on July 5, 2012, asking her to provide the requested information by July 6, 2012. (R-14.) Again, no response was forthcoming. Ross made a third request to appellant by memo dated July 9, 2012, with no action taken by appellant. (R-15.) She

sent a fourth memo to appellant dated July 10, 2012, reminding her that the homeowners must be notified ten days before the tax appeal hearing. She requested that the work be completed by the end of the day. (R-16.) Ryan Linder (Linder), the City's assistant corporation counsel, clarified that if a homeowner was noticed seven days before his or her appeal date that he or she owed municipal charges, the City could properly move to dismiss the appeal if the charges remained open on the hearing date. Thus, the work product requested of appellant was important to the City's ability to defend against the large number of appeals filed. In fact, Linder testified that as the attorney representing the City before the Essex County Board of Taxation during this time period, he was unable to raise non-payment of water charges as a defense in those cases where the letters were sent out late. He did not elaborate on the number of appeals affected. On July 12, 2012, Ross sent a fifth memo to appellant asking for the information no later than July 16, 2012 at noon. (R-17.) Appellant finally complied with the request on said date, delivering the work to Ross at 12:40 p.m.

Appellant testified that she could not perform the above tasks because she was busy working on deeds. Referring to the first memo Ross sent her, dated June 21, 2012, appellant stated:

> [W]hat I didn't understand is that [Ross] also knew that our sampling period was coming to an end June 30th. So that means that the deed needed to be updated, and the records in the computer, the MOD4 and the Microsystem need to be updated and maintained. So this date here is coming close to the June 30th date, and now I'm swamped with deeds.

She asserted that her former supervisor, Barbara Williams (Williams), told her that working on the deeds was a priority. Williams left the Department almost one year prior to Small being appointed tax assessor. She acknowledged that neither Small nor Ross directed her to give priority to the deeds. Appellant knew that Ross needed the information requested in the five memos, but felt that Ross should have known that her workload was significant. Nevertheless, she made no effort to tell Ross that she was having issues completing the work. She simply did not do it until after receipt of Ross's fifth memo on July 12, 2012.

B. Incident as to the Water System Software

Ross testified that along with the above incident as to her neglect of the tax appeals, appellant blamed inoperable software for her inability to check on the status of the water bills. Rather than notify Ross or Small, she contacted the Information Technology (I.T.) Department for help. When Ross asked her how long the system had been inoperable, appellant could not answer. Ross told appellant that she should have notified her instead, as she would be able to contact the supervisor at the water department directly. As a result of the passage of time, many of the water bills were not sent to the taxpayers in a timely manner. Ross also stated that the delays occasioned by appellant in all aspects required her to step in and complete the work, since the appeals packets had to be ready for review by Linder and Small prior to each hearing date.

C. Incident as to Last-Minute Personal Leave

In Small's above-mentioned vacation memo dated June 19, 2012, he wrote that if someone had a personal emergency, he or she should notify Ross of their absence, and he would approve the time upon his return. (See R-10.) Ross testified that during the week that Small was on vacation, she saw appellant toss a paper into her basket and leave the office at approximately noontime. She did not know if appellant was going to lunch or elsewhere until she picked up the paper and saw that it was a request for a personal half day, effective as of the moment appellant walked out of the office. Small testified that the protocol was for the staff to tell him they needed personal time, and then submit the request to Ross. It was not protocol to submit the request and then walk out the door. Ross stated that appellant did not say anything to her before leaving.

Appellant explained that she had a dire emergency and had to leave work. She testified that she told Ross that there was an emergency, handed her the paper, and departed. When asked on cross-examination how Ross would know if she was returning that day, appellant replied: "The paper stated that I was taking the remainder of the day." As to how she knew the request was approved, she stated: "I didn't know it was approved. I was merely giving that paper to her to let her know that I was going to take. That was covering myself for my time not being in the office."

The emergency appellant referred to was that she had effected a lockout of her tenant, and the tenant was going to court to vacate it. Appellant wanted to ensure that the lockout took place.

Small approved the above time request on June 26, 2012, after he returned from vacation. (R-11.) He explained that she had already taken the time, and he did not want to get into a fight over how to handle the situation. He stated that she was extremely hostile, and that he did not want to engage her. He summarized his feelings as follows:

> I knew what was going on and I was new in the job. I didn't want to come into a new position and then immediately start a conflagration with . . . an old employee. I was hoping it would take care of itself; time passed, but it didn't.

Ross echoed Small's sentiments, characterizing appellant as very hostile and non-communicative.

> She refused to communicate with me and as far as work it was hard to ask or to get – to get [appellant] to do anything that I needed in a timely fashion. So she was very hostile to me.

In general, appellant was hostile and non-communicative with Small and Ross during all relevant time periods. I further **FIND** that Small and Ross were disinclined to address the above issues with appellant, taking a passive stance while appellant ran amok in the Department, rejecting their authority.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de

novo hearing are whether the employee is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

In this matter, the Department bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for various causes as set forth in N.J.A.C. 4A:2-2.3. With regard to the FNDA dated September 5, 2012, the Department charged appellant with insubordination, conduct unbecoming a public employee, and neglect of duty. N.J.A.C. 4A:2-2.3(a)(2), (6) and (7). As to the FNDA dated May 23, 2013, the Department charged appellant with insubordination and neglect of duty. N.J.A.C. 4A:2-2.3(a)(2) and (7).

Insubordination encompasses an employee's failure or refusal to follow a directive, order or instruction of a supervisor. Eaddy v. Dep't of Transp., 208 N.J. Super. 156, 158–59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967). Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <http://njlaw.rutgers.edu/collections/oal/>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985).

Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). It is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531.

Based upon the aforesaid **FINDINGS of FACT**, I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's actions in intervening with the business of the tax collector's office on two occasions, non-complying with her supervisor's directives, unilaterally contacting the NJHMFA to report alleged over-assessments by the City, and exhibiting a pattern of being disrespectful and uncommunicative with her supervisors constitute insubordination, conduct unbecoming a public employee, and neglect of duty. The record clearly demonstrates that appellant's actions disrupted the Department for an extended period of time. Although there is no evidence that appellant was obligated to notify Small of her FMLA leave, the incident is another example of her repeated failure to communicate with her supervisors. Aside from the credible testimony of the Department's witnesses, appellant's own testimony leads to the unmistakable inference that she simply did not believe that she owed a duty to the Department.

Based upon the aforesaid **FINDINGS of FACT** with regard to appellant's failure to prepare the tax appeal calendars, obtain the water bills, along with her taking personal leave time without permission, and continuing to foment a hostile work environment by virtue of her disrespectful conduct, I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's dereliction amounts to insubordination and neglect of duty.

The only remaining issue concerns the penalty that should be imposed. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d

(CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

Here, appellant has no prior disciplinary history. Nonetheless, I am persuaded that the pattern of conduct that she engaged in with regard to CSV 13300-12 merits a major discipline. In determining if the one hundred eighty-day suspension imposed is warranted, I am guided by the testimony of Small, wherein he candidly stated that he knew what was going on with appellant, and he hoped the situation would take care of itself over time, but it did not. Unfortunately, Small and Ross remained passive, failing to take meaningful steps to alter appellant's conduct. While one can appreciate the discomfort in reprimanding a hostile employee, in this matter appellant was simply emboldened to continue her pattern of dereliction and insubordination. Therefore, I **CONCLUDE** that a ninety-day suspension is reasonable and appropriate under the circumstances presented.

With regard to the one hundred eighty-day suspension imposed with regard to CSV 09602-13, I **CONCLUDE** that such discipline is reasonable and appropriate under the circumstances, and comports with the concept of progressive discipline. It is clear that appellant returned from her first suspension determined to continue to make her own rules. During this time period, the Department was in the midst of tax appeal season. Appellant was well aware that in order for the City to be successful, all Department employees had to perform their jobs in a timely manner. Appellant's excuses for not being able to do her job are plainly without merit. At this point, appellant had ample notice and warning of the deficiencies in her performance. Yet, she continued the pattern of insubordination and neglect of duty, to the detriment of the Department and her co-workers.

ORDER

I **ORDER** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated September 5, 2012, the charges of insubordination, conduct unbecoming a public employee, and neglect of duty be and hereby are **SUSTAINED**. I further **ORDER**

that, based upon the aforesaid sustained charges, appellant be and hereby is suspended for ninety days.

I **ORDER** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated May 23, 2013, the charges of insubordination and neglect of duty be and hereby are **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charges, appellant be and hereby is suspended for one hundred eighty-days.

I further **ORDER** that back pay and other benefits be issued to appellant as may be dictated by 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.

February 3, 2017
DATE

Joan Bedrin Murray
JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 2-3-17

Date Mailed to Parties: 2-3-17

dr

APPENDIX

List of Witnesses

For Appellant:

Esther Tyndall

For Respondent:

(As to CSV 13300-12)

Thomas Small

Diane Ross

Annmarie Corbitt

(As to CSV 04692-14)

Thomas Small

Diane Ross

Ryan Linder

List of Exhibits in Evidence

For Petitioner:

P-1	Memorandum from Jillian Barrick, City Administrator to Claude Craig Sr., Director-HRS dated June 25-2012
P-2	Final Notice of Disciplinary Action dated September 5, 2012
P-3	Final Notice of Disciplinary Action dated May 23, 2013
P-4	Attachment to Final Notice of Disciplinary Action dated May 23, 2012
P-5	Memo to Appellant from Ross dated July 16, 2012
P-6	Sample - Book of Property Sales
P-7	Letter from Beth Wood to Tracy Hackett, Esq. dated June 18, 2013
P-8	Letter from Tracey Hackett, Esq., to Beth Wood and Henry Maurer dated May 25, 2013
P-9	Certificate dated October 29, 2008

P-10 Certificate dated April 22, 2009

P-11 Certificate dated September 2007

P-12 Certificate dated October 2007

For Respondent:

R-1 07/10/12 Email from Anne Marie Corbitt to Tom Small

R-2 07/10/12 Email from Anne Marie Corbitt to Tom Small

R-3 Job Specification for Assessing Clerk

R-4 05/28/08 Letter from Esther Tyndall

R-5 Tax Assessor's Office Organizational Chart

R-6 05/23/12 Preliminary Notice of Disciplinary Action

R-7 10/27/11 Emails with NJHMFA

R-8 10/27/11 Letter from Linda Garguilo

R-9 08/07/12 Preliminary Notice of Disciplinary Action

R-10 06/19/12 Email from Thomas Small

R-11 06/26/12 Time Request

R-12 08/29/12 Memo re: Office Protocols

R-13 06/21/12 Memo from Diane Ross to Esther Tyndall

R-14 07/05/12 Memo from Diane Ross to Esther Tyndall

R-15 07/09/12 Memo from Diane Ross to Esther Tyndall

R-16 07/10/12 Memo from Diane Ross to Esther Tyndall

R-17 07/12/12 Memo from Diane Ross to Esther Tyndall

3-9-17

STATE OF NEW JERSEY

In the Matter of Bethzaida Vallejo
City of Newark Police Department

CSC DKT. NO. 2014-333
OAL DKT. NO. CSV 11740-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11740-13

AGENCY DKT. NO. 2014-333

IN THE MATTER OF BETHZAIDA VALLEJO,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., for Bethzaida Vallejo (Fusco & Macaluso, attorneys)

Corrine E. Rivers, Assistant Corporation Counsel, for City of Newark Police Department (Willie Parker, Corporation Counsel, attorney)

Record Closed: January 23, 2017 Decided: February 1, 2017

BEFORE **RICHARD McGILL**, ALJ:

Bethzaida Vallejo appeals from a suspension on charges from the position of Police Officer with the City of Newark Police Department. The matter was transmitted to the Office of Administrative Law on August 12, 2013, for determination as a contested case.

Prior to completion of the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that proceedings in this matter be concluded.

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.

Feb. 1, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 3 2017

ljb

2-3-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

BETHZAIDA VALLEJO,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
	:	
-v-	:	**OAL DOCKET NO.: CSV 11740-2013**
	:	
CITY OF NEWARK	:	
	:	**SETTLEMENT AGREEMENT AND**
Respondent,	:	**GENERAL RELEASE**
	:	

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Police Officer Bethzaida Vallejo ("Vallejo" or "Appellant"), The Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (Vallejo, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against her by the City's Preliminary Notice of Disciplinary Action dated May 8, 2013 (PNDA) and Final Notice of Disciplinary Action dated July 16, 2013 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about March 31, 2013, Police Officer Bethzaida Vallejo, assigned to the Fourth Precinct Patrol, did commit an act of insubordination directed at Sergeant Marilouise Dorch, a superior officer, assigned as Central Communications Supervisor, to wit: during a telephone conversation regarding queue being backed up.

2. Moreover, Officer Vallejo talked over Sergeant Marilouise Dorch and continued to question her authority of having the ability to request updates from Officer Vallejo.

3. As a result of the conduct outlined in paragraph one (1) and two (2) herein, the PNDA was issued and Vallejo was brought up on disciplinary charges for violating the following Newark Police Department ("NPD") Rules and Regulations: (1) acts of insubordination, and (2) demonstration of respect.

4. At the departmental hearing, Vallejo plead not guilty and waived the hearing to the Office of Administrative Law. She was suspended for thirty (30) days beginning August 5, 2013 and ending September 13, 2013 and the FNDA was issued.

5. Vallejo appealed the decision on the FNDA to the Office of Administrative Law.

6. The parties have agreed to resolve all issues herein and herein referenced as follows:

    1. The City agrees to reduce Vallejo's suspension from thirty (30) days to fourteen (14) days.

    2. Vallejo further waives any and all rights and/or claims which she has and/or may have to: 1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; 2) To challenge the PNDA, FNDA and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts.

    3. Vallejo and the Union each further agree that there is no consideration due Vallejo, her counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from her employment and/or the

execution of this Agreement, except as otherwise provided herein.

4. Vallejo and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

5. Vallejo and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

6. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Vallejo's estate, and purchasers and/or assignees of Vallejo's, the City's and/or the Unions interests shall also be bound.

7. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

8. Vallejo and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as

precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

9. Vallejo and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

10. This Agreement contains the sole and entire agreement between Vallejo, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Vallejo specifically represents and acknowledges in executing this Agreement that she has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

11. Vallejo agrees and acknowledges that she has been fully and fairly represented by her Attorney and the Union in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.

12. Vallejo agrees and acknowledges that she has had a full opportunity to review this Agreement with her Attorney and/or Union representative and she enters into same knowingly and voluntarily.

13. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

14. By signing this Settlement Agreement, Vallejo states that:

a. She has read it;

b. She understands it and knows that she is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c. She agrees with everything contained in this Agreement;

d. Her Attorney and Union representative negotiated this Agreement in her presence and with her knowledge and consent;

e. She consulted with her Attorney prior to executing this Agreement;

f. She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

1/18/17
Date

BY: _____
Anthony Ambrose, Director
Newark Police Department

5-19-16
Date

BY: Bethzaida Vallejo
Bethzaida Vallejo

_____
Date

_____
Shay S. Deshpande, Esq.
Attorney for Bethzaida Vallejo

Approved as to Form and Legality:

10/6/16
Date

Corinne E. Rivers
Corinne E. Rivers, Esq.
Law Department, City of Newark

CERTIFICATION

I, Bethzaida Vallejo, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE

Bethzaida Vallejo

Angiulo, Nicholas

From: Rivers, Corinne <riversc@ci.newark.nj.us>
Sent: Friday, February 17, 2017 10:58 AM
To: Angiulo, Nicholas; sdeshpande@fmnj-law.com
Subject: RE: Bethzaida Vallejo Settlement

It is my understanding that she will receive those days back with back pay.

Sincerely,

Corinne

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Friday, February 17, 2017 10:57 AM
To: sdeshpande@fmnj-law.com; Rivers, Corinne
Subject: RE: Bethzaida Vallejo Settlement
Importance: High

Mr. Deshpande and Ms. Rivers:

I have not yet received a response to the below e-mail. Please respond as soon as possible so the matter may be placed on an upcoming Civil Service Commission meeting for acknowledgment.

Sincerely,

Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Monday, February 6, 2017 2:18 PM
To: 'sdeshpande@fmnj-law.com' <sdeshpande@fmnj-law.com>; 'riversc@ci.newark.nj.us' <riversc@ci.newark.nj.us>
Subject: Bethzaida Vallejo Settlement
Importance: High

Mr. Deshpande and Ms. Rivers:

I am the Assistant Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Bethzaida Vallejo indicating her 30 working day suspension is being modified to a 14 working day suspension.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, we need to know how to account for the remaining 16 work days. Is that time frame to be categorized as an unpaid leave of absence or something else?

Please let me know as soon as possible the intention of the parties regarding the above. An e-mail response is sufficient so long as it is agreed upon by the parties. The sooner the information is provided the better.

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

3-9-17

STATE OF NEW JERSEY

In the Matter of Marion Wilson
Camden County,
Department of Corrections

CSC DKT. NO. 2016-2350
OAL DKT. NO. CSV 01809-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAR 10 2017 BW

The appeal of Marion Wilson, County Correction Sergeant, Camden County, Department of Corrections, 60 calendar day suspension, on charges, was heard by Administrative Law Judge Sarah G. Crowley, who rendered her initial decision on February 8, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 9, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

Re: Marion Wilson

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01809-16
AGENCY DKT. NO. 2016-2350

IN THE MATTER OF MARION WILSON, CAMDEN COUNTY, DEPARTMENT OF CORRECTIONS.

William Hildebrand, Esq., for appellant Marion Wilson

Antonieta Paiva Rinaldi, for respondent Department of Corrections

Record Closed: January 13, 2017 Decided: February 8, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Marion Wilson appeals from a Final Notice of Disciplinary Action dated January 28, 2016, suspending her for sixty days from her position as a Correction Officer with the respondent Camden County Department of Corrections (CCDOC). Officer Wilson was served with a Preliminary Notice of Disciplinary Action on July 15, 2015, charging her with the following: N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. She was also charged with violating CCCF

Rules of Conduct 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 2.8 Leaving Assigned Duty Post; 2.10 Ineffectiveness to Duty: 3.1 Supervision; 3.2 Security; et al. The specifications in the Notice of Disciplinary Action allege that Officer Wilson left her post in the visiting area for approximately one and a half hours, when there were visitors coming and going. This was a blatant disregard of her duties and jeopardized the safety of the visitors, the staff, and the facility.

On January 28, 2016, CCDOC issued a Final Notice of Disciplinary Action sustaining the above charges. Officer Wilson appealed and the matter was transmitted to the Office of Administrative Law (AOL), where it was filed on January 29, 2016, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1to 13. The matter was heard on January 9, 2017. The record was held open for a submission from CCDOC on the issue of past disciplinary record, which was filed on January 13, 2017, and the record closed on that date.

FACTUAL FINDINGS AND TESTIMONY

The following facts are not in dispute. Petitioner has been employed with the CCDOC for nineteen years. She was assigned to the fourth floor visiting area on July 20, 2013. She was working the 7:00 a.m. to 7:00 p.m. shift. At approximately 2:30 p.m., she went down to the information desk, and remained there for an hour and a half. Petitioner was aware that there were visitors and that she was required to be up there to supervise and check visitors for contraband. When Captain Taylor came out and saw her at the information desk, at approximately 4:00 p.m., she told her to get back to her post and advised her supervisor to write her up for leaving her post. Appellant does not dispute any of the foregoing facts, but claims "it was no big deal." She challenges the duration of the suspension.

Warden Karen Taylor has been at the CCDOC for approximately twenty years. She was promoted from Captain to Warden three months ago. She is

familiar with this case, because she witnessed petitioner away from her designated post on the afternoon of July 20, 2013. When she saw her down at the information desk, instead of at her post in the visitor's area on the fourth floor, she instructed her to get back to her post. She also instructed her supervisor to write her up for being away from her post. The video was viewed by the court. The video shows petitioner leaving her post at approximately 2:40 p.m. and going to the information desk in the lobby of the main jail, where she remains until 4:03 p.m., when Captain Taylor advised her to return to her post.

Warden Taylor testified regarding the importance of staying at your post. The visitors need to be supervised during their visitation for several reasons, all having to do with the safety and security of the facility. There are fights that break-out between the visitors or the children that are brought in can be left unattended and get hurt. There is also a risk of inappropriate conduct between visitor and inmates. Although there is a Plexiglas divider between them, inappropriate sexual interactions have been known to occur. In addition, you are supposed to limit the time of the visits and check for contraband. Petitioner was out of her post and failed to supervise the visitation and check for contraband for one hour and a half.

Warden Taylor discussed the various infractions which petitioner was cited for. In addition to the neglect of duty and conduct unbecoming, there are very specific rules regarding leaving an assigned post. Rule 2.10 relates to inattentiveness to duty and 3.1 apples to supervisors, who are held to a higher standard. Warden Taylor discussed the rules which relate to security. Petitioner was to monitor visitors on her post, and check for contraband before and after each visit. Warden Taylor felt it was a very serious infraction, since she left for not just a few minutes but for an hour and a half and that the resulting risk to safety and security of other inmates, visitors and other officers.

For appellant:

Marion Wilson is a correction officer at the CCDOC, where she has worked for the last nineteen years. She was posted on the visitor's station on the fourth floor and was working the 7:00 a.m. to 7:00 p.m. shift on July 20, 2015. She did not dispute that she left her posit at approximately 2:40 p.m. and did not return until Warden Taylor instructed her to return to her post at approximately 4:00 p.m. She testified that she was down at the information desk. She testified that visitors had no physical contact and they communicate by phone only, so it was no big deal. She testified that in protective custody they do not have a guard on duty, so she is not sure why she has to remain on the visitor's area. She acknowledged that she was assigned to that post, she was aware of the rules with respect to staying there and she probably should not have left. She testified that she did not check anyone for contraband during the time she was down at the information desk. She also acknowledged that visitors were supposed to be there for only twenty minutes and she did not monitor this during the day in question.

FINDINGS OF FACT

The resolution of the charges against Officer Wilson requires that I make a credibility determination regarding some of the facts. However, the critical facts in this case are undisputed. Officer Wilson does not dispute that she left her post for approximately one and a half hours, and she failed to check visitors for contraband, supervise visits or monitor the duration of the visits. The only factual issue that is in dispute is the importance of the rules in question. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of fact.-Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances, See Spagnuolo V. Bonnet, 16 N.J. Super. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality,

internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions that alone or in connection with other circumstances in evidence, excite suspicion as to its truth. In re Perrone, 5 N.J. Super. 514, 521-22 (1950). See DAmato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). With respect to the importance of remaining in your post and doing your job in a correction center, I found the testimony of Warden Taylor sincere and credible. I found that appellant's claim that "it was no big deal" to leave your post for an extended period of time to be not credible.

Based on this testimony and evidence in the record I **FIND** that Officer Wilson left her post in the visitor's area for approximately one hour and a half. I further **FIND** that the duties of the visitor's post required her to remain in the visitor's area. I further **FIND** that the duties of this post required Officer Wilson to check visitors for contraband, supervise all visitors and monitor the duration of the visitation. I further **FIND** that Officer Wilson failed to perform her duties and that such failure presented a significant safety risk to visitors, inmates as well as fellow officers

CONCLUSIONS OF LAW

A civil service employee's rights and duties are governed by the Civil Service Act and the regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1to 12-6; N.J.A.C. 4A:1-1,1 to 4A:10-3.2. A civil service employee who engages in misconduct related to his or her duties or who gives another just cause may be subject to major discipline. N.J.A.C. 4A:2-2.2 -2.3(a). In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. Super. 550 (1982); Atkinson v. Parsekian,

37 N.J. Super. 143 (1962).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant seeking a sixty-day suspension. The appellant is charged with inability to perform duties, neglect of duty, conduct unbecoming and other sufficient cause. She is also charged with violating Rules of Conduct 1.1; Rule 2.8 Leaving Assigned Duty Post; Rule 2.10 inattentiveness to Duty; Rule 3.1 Supervision; and Rule 3.2 Security. The charges all relate to the appellant leaving her post in the fourth floor visiting area for approximately one hour and a half on July 20, 2015. She is also charged with the failure to supervise, check for contraband or monitor duration of visits. Officer Wilson does not dispute the forgoing violations, and I have found as fact that she did in fact violate all of the foregoing rules. In addition to the undisputed testimony, there is a video which cooperates all the foregoing undisputed facts.

I therefore **CONCLUDE** that the respondent has satisfied its burden of proving that appellant violated all the foregoing rules by failing to remain in her post, monitor visitors, or check for contraband. I **CONCLUDE** that the charges are **SUSTAINED**.

PENALTY

Once a determination is made that an employee has violated a statute, rule, regulation, etc., concerning his/her employment, the concept of progressive discipline must be considered. West New York v. Bock, 38 N.J. Super. 500 (1962). While this case did not specifically use the phrase "progressive discipline," its facts strongly suggest that a record of progressive discipline should precede the ultimate penalty, which is removal. The concept of progressive discipline involves consideration of the number of prior disciplinary infractions, the nature of those infractions and the imposition of progressively increasingly penalties. It is well settled that correction officers, like police officers are held to a higher standard of conduct

than other public employees because of the sensitive nature of the position they occupy. Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert, denied, 47 N.J. Super. 80 (1966). It has also been noted in corrections cases, that failure to adhere to security precautions could have potentially serious consequences, which may give rise to a more serious penalty regardless of the lack of any past disciplinary consequences. I /M/O Martha Hicks and Antonio Price, OAL Dkt. Nos. CSV 11373 and CSV 11494-13; 2014 N.J. Agen. Lexis 469 (2014).

The appellant received a sixty-day suspension for the foregoing violations, which were not only a violation of her specific duties, but such duties were critical to security of both inmates, visitors and fellow employees. The appellant has argued that under the applicable case law, only seven years of discipline should be reviewed. The respondent argues that all prior discipline should be considered. I **CONCLUDE** that regardless of whether I go back seven years or fifteen years in appellant's disciplinary history, the penalty is appropriate under the circumstances and is sustained. Appellant sustained major discipline in 2009 resulting in a thirty-day suspension for a Supervision charge, and two other Supervision charges as well as three neglect of duty charges in the seven years preceding the charge in the within matter. I also find that the appellant's lack of remorse and position that these infractions which jeopardized the security in the facility were "no big deal," is an aggravating factor in this case. I therefore, **CONCLUDE** that the sixty-days suspension without pay is appropriate under these circumstances.

ORDER

I hereby **ORDER** that the charges be **AFFIRMED**, and the suspension of sixty-days **SUSTAINED**.

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.

February 8, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: February 8, 2017 (emailed)

Date Mailed to Parties: February 8, 2017 (emailed)

SGC/mel

APPENDIX

WITNESSES

For appellant:

Officer Marion Wilson

For respondent:

Warden Karen Taylor

EXHIBITS

For appellant:

None

For respondent:

R-1 Supervisor's Staff Complaint Report authored by Lt. Reginald Adkins dated July 1, 2015

R-2 Video/Timeline

R-3 Preliminary Notice of Disciplinary Action (13A) dated July 16, 2015

R-4 Camden County Department of Corrections Rules of Conduct

R-5 Camden County Department of Corrections Post Order #013 Visiting Officer

R-6 Camden County Department of Corrections General Order #073 Person Conduct of Employees

R-7 Camden County Department of Corrections General Order #074 Professional Code of Conduct

R-8 Sgt. Marion Wilson Chronology of Discipline

3-9-17

STATE OF NEW JERSEY

In the Matter of Stephanie Winner
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NOS. 2017-1981 & 2017-1982
OAL DKT. NOS. CSV 00179-17 & 00180-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 9, 2017 BW

The Civil Service Commission, at its meeting of March 9, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 9, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. CSV 00179-17
AND CSV 00180-17
AGENCY DKT. NOS. 2017-1981
AND 2017-1982

IN THE MATTER OF STEPHANIE WINNER,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 16, 2017 Decided: February 21, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

These matters concern the appeal of Stephanie Winner, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matters were transmitted to the Office of Administrative Law for determination as contested cases on January 4, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that these matters are no longer contested cases before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 21, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/23/17

Date Mailed to Parties: 2/23/17

/nd

OAL DKT. NO. CSV 180-2017
179-2017

AGENCY DKT. NO. 20 – 2017-1981
2017-1982

SETTLEMENT AGREEMENT

IN THE MATTER OF

Stephanie Winner

AND

Ancora Psychiatric Hospital
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Action dated both dated 12/13/16 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
FNDA	1. A.4.4, A.8.1, E.1.2	Removal	12/15/16
FNDA	2. A.4.5, A.8.2	Removal	12/15/16
	3.		
	4.		
	5.		

B. The Appellant Stephanie Winner. withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. A.4.4, A.8.1, E.1.2	Sustained	20 days suspension
2. A.4.5, A.8.2	Sustained	40 days suspension
3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of since 12/15/16 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay suspension days total 63 days.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Stephanie Winner 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant withdraws her appeal of 3 days suspension for offense A143. at the Joint Union Management Panel and the action is sustained. The 3 days suspension shall be scheduled and served in addition to the 60 days

J. The ~~total~~ suspension days, 63 days, shall be recorded beginning 12/15/16.

K. Any further chronic or excessive absenteeism charge will result in Respondent seeking Ms. Wimer's removal.

L. Appellant ACKNOWLEDGES THAT NECESSITY TO REPORT TO WORK AS SCHEDULED AND SHE ACKNOWLEDGED SHE IS MEDICALLY CAPABLE OF RETURNING TO DUTY.

M. APPELLANT UNDERSTANDS SHE MUST REPORT TO WORK ON TIME. ANY LATENESS IS SUBJECT TO ACTION AND CANNOT BE MADE UP WITHOUT SUPERVISORY APPROVAL. APPELLANT CANNOT TAKE IT UPON HERSELF TO MAKE UP LATENESS.

N. ~~THE~~ A PNDA DATED 11/3/16, WHICH IS PENDING, SHALL BE ~~REVOKED~~ RESCINDED BUT THE SPECIFICATION AND OFFENSE ~~ARE~~ TO BE COMBINED WITH THE DISCIPLINE OF 40 DAYS SUSPENSION. ~~AND ALL RIGHTS~~

OAL DKT. NO. CSV 180-2017
179-2017

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2-16-17
DATE

Appellant

2-16-17
DATE

~~Respondent~~ Appellant's rep.

2-16-17
DATE

ON BEHALF OF APH

2-16-17
DATE

~~ON BEHALF OF~~
RESPONDENT

OAL DKT. NO. CSV 180-2017
179-2017

CERTIFICATION

I, Stephanie M Winner, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2-16-17
DATE

NAME

3-17-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

June 13, 2017

Michelle Joy Munsat, Esq.
111 Dunnell Road
Suite 201
Maplewood, New Jersey 07040

Caroline Jones, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0114

Re: *Sherray Brooks v. Kean University* (CSC Docket No. 2016-969 and OAL Docket No. CSV 17380-15)

Dear Ms. Munsat and DAG Jones:

The appeal of Sherray Brooks, a Motor Vehicle Operator 2 with Kean University, of her removal, effective May 14, 2015, on charges, was before Administrative Law Judge John P. Scollo (ALJ), who rendered his initial decision on March 17, 2017, recommending upholding the removal. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on May 1, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date the Commission secured a 45-day extension of time to render its final decision no later than June 15, 2017. *See N.J.A.C.* 1:1-18.8. However, since one of the three Commission members must be recused from participating on this particular matter, there is not a quorum of members available to vote. Accordingly, the Commission sought consent from the parties, as required, to secure a second 45-day extension. However, the appointing authority did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective June 16, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable John P. Scollo, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 17380-15
AGENCY DKT. NO. ~~N/A~~ 2016-969

SHERRAY BROOKS,
Appellant,
v.
KEAN UNIVERSITY,
Respondent.

Michelle Joy Munsat, Esq., for Appellant

Caroline Jones, Deputy Attorney General (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: February 2, 2017 Decided: March 17, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, Kean University (Kean), brought a major disciplinary action against appellant, Sherray Brooks (Brooks), a "Motor Vehicle Operator 2" or shuttle bus driver. The event which gave rise to the charges brought against Brooks occurred on Tuesday May 5, 2015, when Brooks called her supervisor, Denis Castanon to report that she had been involved in an accident involving her shuttle on the premises of a Burger King

Restaurant at 439 Morris Avenue, Elizabeth, New Jersey. According to the Police Report dated May 5, 2015, (Exhibit K-5, bearing Bates stamp KU 43) the incident was reported at 1753 hours or 5:43 p.m.

Kean alleged in its May 13, 2015, PNDA that Brooks's conduct was actionable under three different sections of the New Jersey Administrative Code:

(1) N.J.A.C. 4A:2-2.3(a)(1) [Incompetency, Inefficiency, Failure to Perform Duties];

(2) N.J.A.C. 4A:2-2.3(a)(7) [Neglect of Duty]; and

(3) N.J.A.C. 4A:2-2.3(a)(8) [Misuse of Public Property].

The Preliminary Notice of Disciplinary Action (PNDA) was presented to Brooks on May 14, 2015, at a Loudermill meeting. A confirming letter was sent to Brooks via Registered Mail-R.R.R. on May 18, 2015. (K-6.)

A disciplinary hearing was held on July 15, 2015. Brooks did not attend the hearing. Her Union representative appeared on her behalf. Hearing Officer Kenneth C. Green concluded that, based on the evidence, Kean proved that Brooks violated the above-cited regulations and so the charges were sustained. (K-7.) Kean served a Final Notice of Disciplinary Action (FNDA) dated August 24, 2015, removing Brooks from her job effective May 14, 2015. (K-7.)

On August 27, 2015, Brooks requested a hearing and forwarded her appeal to the Civil Service Commission, which in turn on October 26, 2015, transmitted the matter to the Office of Administrative Law (OAL). This matter was filed with the OAL on October 29, 2015, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The Tribunal heard the matter on November 15, 2016, and December 5, 2016, and the record closed on February 2, 2017, after receipt of written summations from both parties.

FACTUAL DISCUSSION

Testimony of Denis Castanon

Denis Castanon is Kean University's Director of Residential Student Services. His duties include the direct supervision of the shuttle bus drivers. He is familiar with Sherray Brooks's employment history and her shuttle bus driving record. On May 5, 2015, at approximately 5:53 p.m. he received a telephone call from Sherray Brooks informing him that she had been involved in a shuttle-related accident at the Burger King restaurant on Morris Avenue about a block and a half from the Kean University campus. He testified that he notified the campus police and the Elizabeth Police about the accident and personally went to the accident scene. While there he spoke with Brooks about how the accident happened and took photographs (K-3) of the damage to the driver's-side rear roof area of the shuttle and severe damage to an awning at the Burger King's drive-through lane. He testified that Brooks told him that she drove around a first awning but made contact with a second awning causing the damage. Castanon testified that a shuttle driver is responsible for knowing the dimensions of his/her vehicle and is responsible to take appropriate notice of height and other restrictions when driving the shuttle. Kean's argument is that Brooks's inattention to the dimensions of her shuttle and the height restrictions of the Burger King drive-through lane demonstrate Brook's incompetency. Castanon also testified that a shuttle driver is responsible to stay on his/her assigned route, to keep to the time schedule for all stops and departures, and not to deviate from the route. He testified that Brooks deviated from her assigned route by going to the Burger King in question. Kean's argument is Brooks's deviation from her route demonstrates her neglect of duty. Kean's argument is that Brook's use of the shuttle to run an off-route errand solely for her own purposes during work hours demonstrates her misuse of public property.

Castanon also testified about Brooks's history of prior accidents and a cell phone violation while driving a shuttle for Kean. He testified about the following:

(1) On September 20, 2004, Brooks, with students on board her shuttle, backed into another vehicle while in an intersection causing damage (K-21);
(2) On January 18, 2005, Brooks damaged her shuttle (K-20);
(3) On November 10, 2008, Brooks, with students aboard, damaged the shuttle's passenger side mirror on a gate as she crossed a bridge (K-19);
(4) On September 1, 2011, Brooks hit two parked vehicles with her shuttle (K-17 and K-1);
(5) On October 20, 2012, a Kean student photographed Brooks using her cell phone while driving the shuttle and reported this to Kean. This led to an investigation, charges, a settlement, and the imposition of discipline in the form of a suspension. Brooks was also required to complete a defensive driving course (K-10 through 13).

Testimony of Ken Green, Chief Labor Counsel for Kean University

Ken Green testified that in his position, among his many duties is the duty to review and be responsible for hearing and ruling on any and all disciplinary matters at Kean University. Ken Green was not personally familiar with Brooks, but he testified about the progressive disciplinary process at Kean University (called the "corrective action continuum"). He testified that the primary goal of Kean's policy is to correct problematic employee behavior and to prevent its re-occurrence. The corrective action continuum starts with a letter of counseling and written warning. Should problematic behavior continue, the continuum switches to discipline where a written reprimand is issued and charges are brought. If sustained, the charges can result in suspension, demotion, or removal. Green testified that if a single offense was serious enough, Kean could proceed directly to the disciplinary process and any penalty, including removal, could be imposed. Green also testified that in evaluating discipline, Kean would look at how many times an employee had been given notice of problematic conduct, how many times the employee had had an opportunity to correct his/her conduct, and what things management did to assist the employee in improving his/her conduct.

Turning specifically to the case of Sherray Brooks, Green identified K-1, her corrective action continuum. He testified that the May 5, 2015, accident at the Burger

King led to the issuance of a PNDA. Green testified that Kean considered this May 5, 2015, accident to be a serious safety issue justifying disciplinary measures in and of itself. Green testified that Kean considered the circumstances of the May 5, 2015, accident, Brooks's prior accident and disciplinary history, and Kean's own efforts to motivate Brooks to change her conduct, including participation in a defensive driving course. Green concluded that Brooks demonstrated a lack of concern for rules. Green also concluded that the only responsible course of action was to remove Brooks from her position in the interest of the safety of Kean's students and constituents.

On cross-examination, Green re-iterated that in evaluating this matter he considered Brooks's entire corrective action continuum.

Testimony of Sherray Brooks

Sherray Brooks is presently forty-eight years old and, until removed, had worked as a shuttle bus driver for Kean since 2001. Previously she had worked as a bus driver, teen counselor, and data-entry clerk.

Brooks described her typical daily duties as a shuttle bus driver for Kean as picking-up and dropping-off students according to a pre-planned route within a pre-determined time schedule. She described how and when she would take her break time.

Regarding the fifth of May in 2015, Brooks recalled that she was involved in an accident while driving her shuttle bus at a Burger King restaurant on Morris Avenue, which was a short distance from the Kean campus. She recalled that she departed the campus to go to the Target Store. She testified that she was to take a break from 5:55 p.m. to 6:25 p.m. and then depart Target to return to the Kean campus. However, Brooks testified that when she departed the campus she did not proceed directly to Target, but rather drove to the Burger King to buy food which she planned to consume during her upcoming break. Brooks did not deny that she left her designated route when she drove to the Burger King. She stated that she thought that she had enough

time to stop at the Burger King and still arrive at the Target store at the designated arrival time.

Brooks testified that while at the Burger King she saw a white bar warning drivers of the height restrictions of the drive-through lane. She avoided the first such awning, shouted her meal order to the clerk and drove to the pick-up area where there was a second awning. She stopped the shuttle, alighted to pay for and pick-up her meal and then re-boarded the shuttle. Then she began to drive forward. However, she made contact with the second awning and damaged it and her vehicle's roof. Brooks immediately called Denis Castanon, her supervisor to report the accident. Sometime later Castanon arrived to speak with her and to take scene photos. Brooks also gave a statement to the Elizabeth Police officer who arrived at the scene. Brooks offered no explanation for why she drove her shuttle in a way that made it contact the awning.

Brooks next testified about why she did not testify at the July 15, 2015, hearing. She agrees that her union representative represented her at said hearing and that the hearing resulted in an adverse result for her. Brooks produced medical documentation stating that she was undergoing medical care following the May 5, 2015, incident and was taking prescription medications for anxiety, etc., which she testified was due to the stress of the charges brought against her. However, none of the medical documents (including P-15, a disability claim form dated June 14, 2015) produced during discovery or during the hearing stated that Brooks was unable to participate in her defense at the hearing. (Brooks Transcript at p. 62, ll. 2-19.) On cross-examination Attorney Jones established that in K-25 Dr. DiGiacomo cleared Brooks to return to school or work on June 22, 2015, which was twenty-three days before the July 15, 2015, hearing date.

Brooks next testified about her prior accidents and about the discipline meted-out for using a cell phone while driving the shuttle on October 20, 2012. (See K-9 through 13.) Most of this testimony was focused on establishing that she settled the charges without admitting to texting while driving. (Brooks Transcript of testimony at p. 37, ll. 1-22 (December 5, 2016).) During the hearing Brooks admitted to using her cell phone and an earpiece to receive an incoming call, to have a conversation of indeterminate length and then to end the call. (Brooks Transcript, p. 37, l. 25 to p. 38, l. 7.) Moreover,

Brooks added that it was her understanding that she was not doing anything wrong when she took that phone call. (Brooks Transcript at p. 38, ll. 9-12 (December 5, 2016).) During cross-examination, Brooks asserted that Denis Castanon was lying when he testified that she admitted to him that she was indeed texting during the October 20, 2012 incident. She also asserted that the two complaining students (K-8 and 9) were also lying.

On cross-examination, Brooks admitted that the Burger King restaurant was not on the route that she was supposed to take on May 5, 2015. (Brooks Transcript at p. 45, l. 6-17.)

SUMMARY AND ANALYSIS OF RELEVANT EXHIBITS

Appellant's Exhibits

P-1 through P-12 are Brooks's Job Expectations & Evaluations (JE&Es) covering certain periods of her employment with Kean University (July 1, 2005 to June 30, 2015) but not all periods. They were offered by Appellant Brooks to demonstrate her "satisfactory" ratings. The favorable JE&E's are noted. However, there are multiple time gaps in these records.

The significance of the time gaps is that Brooks's accidents fall within the gaps, i.e. the time periods not covered by these "satisfactory" ratings. The accident of October 4, 2004, occurred in the gap period between P-2 and P-3. The accident of January 18, 2005, occurred in the gap period between P-2 and P-3. The accident of November 10, 2008, occurred in the period covered in P-6, but is not mentioned therein. The accident of September 1, 2011, occurred in the gap period between P-8 and P-9. The cell phone incident of October 22, 2012, occurred in the period covered by P-9.

The overall assessment of Brooks's performance set forth in P-9 demonstrates that she scored a "one" out of a possible "three" in six of ten categories, including "Quality of Work" (failed to achieve most or all essential quality criteria"); "Timeliness" (rarely met work schedules or deadlines"); "Conscientiousness" (being "off-schedule"

and being "resistant to learning new skills to enhance her work"); "Job Knowledge/Skills" ("rarely demonstrating application of skills and knowledge which has an adverse effect on job performance"); "Problem Solving" ("failed to identify and/or distinguish risks and benefits"); and "Safety" ("failed to follow safety rules").

P-13 is the attachment to the PNDA issued in connection with the October 22, 2012, cell phone incident. P-14 (also marked as K-11) is a photo taken by the complaining student. P-15 is a June 14, 2015, Disability Application containing entries by Brooks's physician, Manfred K. Obi, M.D. This document does not say that Brooks was unable to participate in her July 15, 2015, hearing. It does not offer the Tribunal assistance in determining the issues in this case. In K-25, discussed below, Dr. DiGiacomo, another doctor consulted by Brooks, states that she would be ready to return to school/work by June 22, 2015.

Respondent's Exhibits

K-1 lists Brooks's disciplinary history at Kean.

K-2 through K-7 chronicle the facts, charges and hearing results of the May 5, 2015, shuttle accident at the Burger King.

K-8 through K-13 chronicle the allegations, proofs, charges and outcome of the October 22, 2012, cell phone incident.

K-14 through K-16 chronicle the reporting of a driving incident as alleged by a concerned citizen, the investigation thereof, the proofs submitted, and Kean's decision not to implement formal disciplinary action. Exhibits K-14 through K-16 are not being given any consideration by this Tribunal in the outcome of the case at bar.

K-17 and K-18 chronicle the investigation of Brooks's shuttle accident dated September 9, 2011.

K-19 chronicles Brooks's shuttle accident dated November 10, 2008.

K-20 chronicles Brook's shuttle accident dated January 18, 2005.

K-21 chronicles Brooks's shuttle accident of September 20, 2004

K-22 is the same as P-11; however, K-22 contains two additional pages plus Brooks's time records.

K-23 is the same as P-12, they are the JE&E for the period July 1, 2014, through June 30, 2015. The tribunal notes that on the last page of both exhibits, titled "Section 6 – Fact Sheet of Significant Performance Events," there is no information about the May 5, 2015, Burger King accident.

K-24 is a map of the greater Kean University area showing the locations of Kean University, the subject Target store, and the subject Burger King restaurant.

K-25 is the "Certificate to Return to Work or School" signed by Dennis DiGiacomo, M.D. dated June 5, 2015, stating that Brooks would be able to return to work/school on June 22, 2015.

FINDINGS OF FACT

The parties agreed that all of their Exhibits would go into evidence. They also agree that this matter is a progressive discipline case and that evidence of past incidents and past disciplinary matters are relevant to the issue of the appropriateness of the type and amount of discipline imposed, if any. There is no dispute between the parties about the fact that shuttle drivers must be aware of the physical dimensions of the shuttles and must be aware of the physical limitations of the areas over and through which they drive the shuttles.

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following **FACTS**:

(1) On May 5, 2015, Brooks was employed by Kean as a shuttle bus driver under her supervisor Denis Castanon. On that same date, Brooks was scheduled to depart the Kean campus on Morris Avenue in Elizabeth, N.J. at 5:30 p.m. and proceed westbound on Morris Avenue to the Target store in Union, N.J. along a designated route assigned to her. Her scheduled arrival time at the Target store was 5:55 p.m. Instead of proceeding on the designated route, Brooks, driving Kean's shuttle, departed the Kean campus and proceeded eastbound on Morris Avenue to a Burger King restaurant at 439 Morris Avenue in Elizabeth, N.J., which was not on her designated route to purchase food for her own consumption during her upcoming break scheduled for the time period 5:55 p.m. to 6:25 p.m. The purchase of food was not a work-related function and was a personal errand which Brooks performed solely on her own behalf.

(2) Brooks arrived in the shuttle at the Burger King a few minutes before 5:53 p.m. and became involved in an accident involving the shuttle and part of the structure of the Burger King building (an awning), which was reported to the Elizabeth Police Department at 5:53 p.m. (K-5.) Brooks immediately called her supervisor, Denis Castanon, to report the accident.

(3) After receiving Brooks's call informing him of the accident, Denis Castanon went to the accident scene at the Burger King and, once there, spoke with Brooks about the accident and took photographs of the damaged shuttle and the damaged Burger King awning. (K-3.)

(4) Brooks admitted that she saw a sign at the subject Burger King's drive-through lane, which she referred to as a "white bar," and was aware of the height restrictions at the Burger King's drive-through lane. Brooks drove around a first awning, stopped to pay for and pick-up her food order, but upon re-entering the shuttle drove away making, contact with a second awning causing damage to it and to the Kean shuttle.

(5) Neither P-15 nor K-25 contain anything that says that Brooks was or would not be able to attend the July 15, 2015, disciplinary hearing. Although she did not

personally attend the July 15, 2015, disciplinary hearing, Brooks was represented at that hearing by her labor union representative.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

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 proving 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 inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, 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." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 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.) Greater weight of credible evidence in the case—a preponderance—depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47,

49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." Perrone, supra, 5 N.J. at 522.

N.J.A.C. 4A:2-2.3(a)(1) Incompetence, Inefficiency or Failure to Perform Duties

In this type of breach an employee performs his or her duties, but in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is sub-standard. See Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315.

Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. Steinel v. City of Jersey City, 7 N.J.A.R. 91, modified, 193 N.J. Super. 629 (App. Div. 1984), aff'd, at 99 N.J. 2 (1985).

N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty

Neglect of duty means not performing one's job. That duty may arise by specific statute or may arise from the nature of the position itself. Steinel, supra, 7 N.J.A.R. 91.

Neglect of duty arises when an employee, without just cause, fails to perform the normal duties required by the position which he or she holds, either by failing to initiate the discharge of those duties or failing to complete same. It includes, but is not limited to, official misconduct or misdoing along with negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), http://njlaw.rutgers.edu/collections/oal/. This is in contrast to insubordination, which involves the employee's refusal to discharge his or her duties or his or her willful failure to carry out a specific order.

Neglect of duty has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), http://njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re

Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing, cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

N.J.A.C. 4A:2-2.3(a)(8) Misuse of Public Property

Misuse of Public Property arises when an employee uses property owned by a public entity for his/her own gain; without authorization; and/or for a purpose that is contrary to the public entity's purposes or for other than its intended use for the public entity's business, that is, for an inappropriate use.

The Chair of the Civil Service Commission interpreted N.J.A.C. 4A:2-2.3(a)(8) so as to define conduct that constitutes misuse of public property in the case of In re Gray, CSV-6389-13 Final Decision, Civil Service Commission (June 18, 2014), issued on July 17, 2014. There, Chairman Szuch stated:

> N.J.A.C. 4A:2-2.3(a)(8) was enacted to curb an employee's improper use of a State car and to make such a violation a specific cause of discipline. However, it was not just limited to penalize employees for the use of the State car for their own personal gain or other inappropriate use. An improper use of a vehicle may encompass an employee's act of negligence in operating the vehicle.

Legal Issues Presented

(1) Does the aforementioned conduct constitute Incompetency or failure to perform duty under N.J.A.C. 4A:2-2.3(a)(1)?

(2) Does the aforementioned conduct constitute neglect of duty under N.J.A.C. 4A:2-2.3(a)(6)?

(3) Does the aforementioned conduct constitute misuse of public property under N.J.A.C. 4A:2-2.3(a)(8)?

First Legal Issue

Regarding the first legal issue, in the definition of "Incompetence, Inefficiency or Failure to Perform Duties" the emphasis is on the employee's failure to produce the necessary quantity or quality of results which a person in his position should be expected to produce. Emphasis is also put on the employee's knowledge or skill level (i.e. competence) needed to perform the types of work for which he was hired. In the case at bar there is evidence that Brooks lacked or was significantly deficient in demonstrating that she had the requisite skills needed for the performance of a shuttle bus driver's duties. The evidence presented went to the issue of whether Brooks's failure to reconcile the known dimensions of her shuttle bus with the posted height restrictions at the Burger King's drive-through lane was due to some dereliction of duty or was due to circumstances which Brooks had little or no control over.

I **CONCLUDE** that respondent Kean has proven, by a preponderance of the competent, credible evidence—including the testimony of Brooks herself that she saw and understood the posted height restrictions at the Burger King's drive-through lane—that the accident in question was the result of Brooks's negligence, a dereliction of duty, and that the Respondent proved the charge of Incompetency, Inefficiency or Failure to Perform Duties, N.J.A.C. 4A:2-2.3(a)(1) by a preponderance of the competent, credible evidence.

Second Legal Issue

Regarding the second legal issue, in the definition of "Neglect of Duty" the emphasis is placed on the negligent performance of one's duty or on the actor's neglect to perform an act required by his job duties. In the case at bar, Brooks knowingly and willfully proceeded off her designated, assigned route to go to the Burger King rather than proceed along her route to the Target store. Brooks admitted during cross-

examination that the Burger King was not on her designated route for the assignment she was supposed to be performing. I **CONCLUDE** that Brooks knowingly and willfully deviated from the route that she was obligated to follow in order to pursue her own personal interests and therefore was neglectful of her duties.

Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has proven, by a preponderance of the competent, credible evidence, the charge of Neglect of Duty, N.J.A.C. 4A:2-2.3(a)(7).

Third Legal Issue

Regarding the third legal issue, evidence was presented that at the time of her deviance from her prescribed route Brooks was using Kean's shuttle bus to pursue her own personal interests at the Burger King. I **CONCLUDE** that using Kean's shuttle to run an errand for herself was conduct that constituted a misuse of public property, namely the shuttle. At the time of the accident, Brooks was not using the Shuttle to further the interests of her employer. I **CONCLUDE** that this too was a misuse of public property. Since the shuttle Brooks was driving was only one of two shuttles in service, and since Brooks did not move the shuttle between the time of the accident at 5:53 p.m. and the 9:00 p.m. conclusion of the Police department's interview, Brooks almost certainly caused transportation interruptions or delays affecting the Kean students who required the services of the shuttle. I **CONCLUDE** that Brooks's misuse of the shuttle had an adverse effect upon the operations of her employer's business. Brooks's disregard of the shuttle's dimensions and of the height restrictions posted at the Burger King's drive-through lane was negligent conduct which caused the accident resulting in damage to the shuttle. I **CONCLUDE** that Brook's driving of Kean's shuttle in an area where signs warned that the shuttle would not fit constitutes Misuse of Public Property.

I **CONCLUDE** that the respondent has proven, by a preponderance of the competent, credible evidence, the charge of Misuse of Public Property under N.J.A.C. 4A:2-2.3(a)(8).

APPROPRIATNESS/INAPPROPRIATNESS OF REMOVAL

I **CONCLUDE** that Brooks's failure to know and/or appreciate the dimensions of the shuttle in relation to the physical roadway over and through which she was driving the shuttle on May 5, 2015, at the Burger King restaurant's drive-through lane was a significant failure on her part which directly caused the accident in question and the damage to the shuttle and to the Burger King building. I **CONCLUDE** that Brooks's conduct on this occasion alone—willfully leaving her designated, assigned route to pursue personal matters during work hours in Kean's shuttle, and then failing to reconcile the dimensions of the shuttle to the restrictions of the roadway environment (i.e. the drive-through lane at the Burger King) and then failing to drive her vehicle forward in a safe manner—was in and of itself enough to warrant her removal from her employment. See Klusaritz v. Cape May County, 387 N.J. Super. 305 (App. Div. 2006), where the Appellate Division ruled that where an employee cannot competently perform the work required of his position, termination, rather than progressive discipline, is the appropriate action.

I **CONCLUDE** that Brooks's past driving and disciplinary history at Kean contains prior instances of accidents and willful a violation of established rules (e.g. cell phone use while in the act of driving the shuttle), contains ample numbers of counseling and Kean's attempts to enable her to improve her conduct, and an insufficient response on the part of Brooks to abide by the rules governing proper and safe operation of a shuttle bus. Brooks's prior record bolsters the correctness of the finding of the disciplinary hearing of July 15, 2015, and of the conclusion of this Tribunal, stated above. Therefore, Brooks's removal from her employment is hereby affirmed.

ORDER

It is **ORDERED** that the determination of sustaining the charge of Incompetency, Inefficiency or Failure to Perform Duties, specifically N.J.A.C. 4A:2-2.3(a)(1), involving the violation of the aforesaid sections of the Regulations is hereby **AFFIRMED**.

It is further **ORDERED** that the determination of sustaining the charge of Neglect of Duty, specifically N.J.A.C. 4A:2-2.3(a)(7), involving the violation of the aforesaid sections of the Regulations is hereby **AFFIRMED**.

It is further **ORDERED** that the determination of sustaining the charge of Misuse of Public Property, specifically N.J.A.C. 4A:2-2.3(a)(8), involving the violation of the aforesaid sections of the Regulations is hereby **AFIRMED**.

It is further **ORDERED** that the determination that Brooks be removed from her employment is hereby **AFFIRMED**.

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, P.O. 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.

March 17, 2017

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: March 17, 2017 /db

Date Mailed to Parties: March 17, 2017 /db

db

APPENDIX

List of Witnesses

For Appellant:

None

For Respondent:

Denis Castanon, Director of Residential Student Services

Ken Green, Chief Labor Counsel for Kean University

List of Exhibits in Evidence

For Appellant:

P-1 Job Expectations and Evaluations (JE&E) for 7/1/02-6/30/03

P-2 JE&E for 7/1/03-6/30/04

P-3 JE&E for 7/1/05-6/30/06

P-4 JE&E for 7/1/06-6/30/07

P-5 JE&E for 7/1/07-6/30/08

P-6 JE&E for 7/1/09-6/30/10

P-7 JE&E for 7/1/10-6/30/11

P-8 JE&E for 7/1/10-6/30/11

P-9 JE&E for 7/1/12-6/3013

P-10 JE&E for 7/1/12-6/30/13 (clerical)

P-11 JE&E for 7/1/13-6/30/14

P-12 JE&E for 7/1/14-6/3015

P-13 Attachment to PNDA regarding 10/20/12, Cell Phone Incident

P-14 Photo of Brooks with cell phone on 10/20/12

P-15 6/14/15 Disability Claim Form

For Respondent:

K-1 Brooks's Disciplinary History

K-2 Rivera's memo to Brooks dated May 6, 2015

K-3 Nine photos taken by Castanon at Burger King on May 5, 2015

K-4 Shuttle Schedule

K-5 5/5/15, Elizabeth Police Department Accident Report

K-6 PNDA dated 5/13/15, for 5/5/15, Burger king Incident

K-7 Chowdhury's letter to Brooks dated August 24, 2015, regarding removal

K-8 Letter from Rivera to Murray-Laury dated October 23, 2012, regarding October 20, 2012, cell phone incident

K-9 Rivera to Scott memo dated March 13, 2012

K-10 Memo from Castanon to brooks dated November 21, 2012, regarding Brook's admission to texting while driving on October 20, 2012 and, further, reminding Brooks that cell phones may not be used during working hours

K-11 PNDA dated 9/20/13

K-12 FNDA issued on 1/14/14, in conjunction with Settlement Agreement (K-13)

K-13 Settlement Agreement dated 1/13/14

K-14 Memo from Castanon to Brooks dated November 21, 2012, regarding a "concerned citizen's" complaint

K-15 E-mail dated November 19, 2012, from Kevin H. ("concerned citizen") to Kean's President, Farahi

K-16 Memo from Scott to Brooks dated September 25, 2013

K-17 Letter from Castanon to Brooks dated September 9, 2011

K-18 Memo dated July 17, 2012, from Scott to Brooks

K-19 Memo from Castanon to brooks dated November 11, 2008

K-20 Memo from DiMichele to brooks dated January 19, 2005

K-21 Letter from Rivera to brooks dated November 8, 2004

K-22 Performance Assessment 7/1/13-6/30/14

K-23 Performance Assessment 7/1/14-6/30/15

K-24 Map of Greater Kean University Locale

K-25 Certificate to Return to Work or School dated June 5, 2015, signed by Dennis DiGiacomo, M.D.

3-22-17

STATE OF NEW JERSEY

In the Matter of John Baker
Ann Klein Forensic Psychiatric Hospital, Department of Human Services

CSC DKT. NO. 2012-3655
OAL DKT. NO. CSV 09967-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 23, 2017 BW

The appeal of John Baker, Senior Security Officer, Ann Klein Forensic Psychiatric Hospital, Department of Human Services, removal effective June 14, 2012, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on February 10, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of John Baker.

Re: John Baker

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09967-12
AGENCY DKT. NO. 2012-3655

IN THE MATTER OF JOHN BAKER, ANN KLEIN FORENSIC PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES.

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Adam Verone, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: September 28, 2015 Decided: February 10, 2017

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Respondent Ann Klein Forensic Psychiatric Hospital, Department of Human Services (Ann Klein) removed senior medical security officer (SMSC), John Baker, for N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty; A.O. 4:08 B2 Neglect of duty, loafing or idleness or willful failure to devote attention of tasks which could result in danger to persons or property; A.O. 4:08 B3 2 Sleeping while on duty; A.O. 4:07E1 Violation of a rule, regulation,

policy, procedure or Administrative decision; and A.O. 4:07 C8 Falsification: Intentional misstatement of fact in connection with work in any record or report. The matter arises from appellant allegedly sleeping on duty, and failing to make his required counts and census of the patient population.

PROCEDURAL HISTORY

On May 24, 2012, respondent served on appellant a preliminary notice of disciplinary action removing him. Appellant did not request a departmental hearing. Respondent Ann Klein issued a Final Notice of Disciplinary Action on June 13, 2012, removing appellant effective April 28, 2012. Appellant filed an appeal with the Civil Service Commission on or about July 25, 2012. The Office of Administrative Law (OAL) filed the matter as a contested case on July 25, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on August 21, 2013, and September 17, 2014. The record was held open for submission of closing briefs, and the record closed on September 28, 2015. Orders were entered in this matter to allow for the extension of time in which to file the initial decision.

FACTUAL DISCUSSION

Ron McMullen (McMullen) testified on behalf of the appellant. He has been employed at Ann Klein for eighteen years, is a senior medical security officer, and is also the union president. He described the role that he plays in disciplinary proceedings as trying to keep employees employed, or to reduce their disciplines. He is familiar with sleeping cases, but cannot remember how many he has been involved with. McMullen is familiar with a number of cases, but is not aware of similar employees being removed from Ann Klein regarding intentional misstatement or for violation of a rule. He was involved in negotiating the penalty for appellant in the present matter. Appellant has never received a major discipline. One major discipline appellant was charged with was reduced to a five-day suspension that he did not serve. Baker has no prior charge for falsification of documents; one prior discipline for sleeping on the job; and one prior discipline for neglect of duty. McMullen has observed officers fail to make their checks, and has been aware of it as union rep as well.

Sandy Hereford (Hereford) testified on behalf of the respondent. Hereford has worked at Ann Klein since November 4, 1989, and was serving as a security supervisor on the third shift, with hours between 10:30 p.m. to 6:30 a.m. The position involved ensuring the well-being of patients and staff. Hereford was working on April 12 through 13, 2012, and knows the appellant who was also employed at Ann Klein. Hereford and the appellant had no problems outside of work.

On April 12, 2012, Hereford was on duty in base two. A call was received from another supervisor, Thomas Savage, requesting Hereford's presence in unit four. When Hereford arrived the unit nurse was present, and asked Hereford to look at the unit. Hereford observed the appellant sitting in front of the television, with no other people around him. Security supervisor Savage then asked the supervising nurse to also describe what she observed. Hereford went to check on patients at about 4:20 a.m. Hereford began with room one, and by the time she got to room five, the appellant jumped-up, but stayed where he was while Hereford continued to check the rooms. Hereford picked-up the census and the periodic patient observation (PPO) sheets, performed a check of all twenty-five rooms, and noted appellant had been one and one-half hours behind on inspection logs.

Hereford reviewed the policy about counts, (R-2) including a description of what was required of the patient room check. It is important that the policy be followed because patients are vulnerable. Beginning at 10:30 p.m., a patient-check is to be performed every half-hour by walking around, checking-in, and signing-off on the names. Signing-off ahead of time defeats the purpose of the check, and the form should never be signed-off if the check was not actually performed.

Hereford noted that the 4:30 a.m. check was initialed, but not signed. The backs of the documents were signed by nursing at 4:20 a.m. and 4:25 a.m. Hereford also reviewed documents which memorialize the PPO check. This requires that you get-up, go to the door, and look-in on the patients. PVL stands for periodic visual observation, and one of the memorializing documents requires face-to-face observation.

Hereford also reviewed document R-5. These were notations for patient W.M., who required fifteen minute observations as a precaution for self-harm and assault. From 12:45 a.m. to 3:00 a.m., all indications were that the patient was resting. Although there should have been, no checks were performed between 3:00 a.m. and 4:15 a.m. The unit nurse signed off at 4:20 a.m., and the supervisor of nursing signed off at 4:25 a.m. Hereford also reviewed document (R-6), which was her statement, which she believes is accurate and consistent.

The video of the incident was then shown in the hearing room. Hereford identified Baker in the video, as he was the only officer inside working on the third shift. The video shows Baker sitting in a chair, and there was considerable movement and conversation. Between 12:46 a.m. and 1:08 a.m., Baker had not moved from the chair, and is observed switching channels on the television. At 1:55:29 a.m. Baker gets up from the chair, walks around for about forty seconds, and later appears to be surveying the area before sitting again. At 2:08 a.m., Baker gets up, sits down again at 2:09 a.m., without performing a check. At 2:11 a.m., he performs a check, and sits down at 2:19 a.m. At approximately 2:58 a.m., the unit nurse comes through. At 3:19 a.m. no check has been performed, and Baker appears to be reclined in his chair. At 4:17 a.m., supervisor Savage is seen entering the control room, and at 4:18:58 brings in the unit nurse. At 4:20 a.m. Hereford enters the control unit, Baker does not react to these three individuals staring at him. At 4:25 a.m. Baker stands-up, takes the sheets, stands by the television. At 4:33 a.m. Baker goes to the bathroom, returns and sits down again at 4:34 a.m. He does not perform a check. At 5:35:50 a.m. Baker gets-up and performs a check. At 5:48:21 a.m. he sits back-down. At 6:21 a.m. there is a shift-change, Baker puts the chair back where it belonged, and performed no further checks. At 6:25:18 a.m. the video concluded.

On cross-examination, Hereford noted that there are twelve medical supervisors at Ann Klein, and three are usually on the third-shift. It is noted that the center officer can see the inside officer. Nothing was reported to Hereford about Baker. Hereford did not see the supervisor perform a check, and noted that the nurse sign-off was on a PPO sheet, not a census sheet. Hereford's statement was written on April 18, 2012, five days after the incident. Hereford did not want to be involved, and did not want to be accused of harassing Baker. Hereford described it as frustrating when you need to keep redirecting someone

about their regular job duties. Hereford did not actually see Baker with his legs up, and could not see his face, therefore, could not see that Baker's eyes were closed. It is noted that a buzzer sounds when the door opens. Baker did not say anything when Hereford asked for his sheets. Hereford noted that Baker never listens to redirections.

Thomas Savage (Savage), security supervisor for Ann Klein, also testified on behalf of the respondent. He knows Baker, and remarked that they started at the same time. He was a supervisor for about five years at the time of the incident in question. He had no problem with Baker outside of the work area, and had no personal issues with him. He believes that a supervisor is negligent if not adequately supervising the officers under them. Savage states that he had spoken with Baker on a few occasions about being more attentive. He notes that the third-shift sometimes has a lax attitude, and generally was reserved for the older officers. Savage observed Baker in the chair, and noted that he appeared to be asleep. Baker was not aware of Savage's presence or any nurse who came in after. Savage called a fellow supervisor and a supervising nurse down to observe, as past practice in these instances was to get a second set of eyes. He identified his statement in the matter document (R-7), and asserted that it is accurate.

On cross-examination, Savage explained that four- to six-checks are performed per shift. The checks involve going to the unit to make sure that everyone is attentive. It is not required for Savage to physically observe patients during his shift. Earlier in the day of the incident, he had knocked on the glass, and described it as knocking three times in rapid succession. He could see Baker in the front and right side, sitting in the chair, though Savage does not recall if Baker's feet were up. He did observe that his eyes were closed. He has never seen the video of this incident, and testified based on his report as recollection. Savage was never asked to provide a report; he wrote the statement on his own.

Savage noted that the third-shift is fairly quiet and cold. Officers often wear jackets and hats, they are not permitted to bring blankets with them. A collar being up is not appropriate, but is not an issue. Having the jacket over one's head, however is not acceptable. Savage advised that he has never had to go to the lengths with other officers which he has had to with Baker.

Rosita Kane (Kane), a registered nurse who works at Ann Klein, also testified on behalf of the respondent. She was working the overnight shift on April 12 through 13, 2012. She knows Baker from work, and has no problems with him outside of work. Kane described that Savage asked her to come out of the nursing room and to come to the center. He asked her what she saw, and she responded that she saw Baker sitting in the chair as her signature indicated on Exhibits R-3 and R-5. On cross-examination, she noted that she performed her own check earlier. Kane was doing paperwork when Savage contacted her. All she saw was Baker sitting in the chair, she could not see if his head was up, and she does not remember what side she saw. She could not see Baker's face. Kane went back to her station, and does not know how long it was before she signed the paperwork. She signed the documents because Savage asked her to.

Sharon Herring (Herring) also testified on behalf of the respondent. She's worked at Ann Klein for twenty-five years, and was the third-shift nursing supervisor. She knows the appellant, and has worked with him on the third-shift. Herring was working on the date in question, on the third-shift. She recalled that she was called into unit four by Savage to witness Baker, who was not attentive. In her words, he appeared to be sleeping. Savage wanted witnesses, and she recalls that they were talking loudly while they were in the unit, and Baker did not even acknowledge their presence. Herring referred to the census sheet for that date, and signed at 4:25 a.m., because it had not been updated. Baker did sign from 2:36 a.m. to 4:20 a.m. She signed document (R-5), because it was not updated. A self-harming patient needs to be observed for fear of suicide, self-mutilation, and such a patient is more likely to harm himself overnight. No check was performed since 3:00 a.m., and she signed the document at 4:25 a.m.

Herring reviewed the video of the April 19, 2012 incident, and identified Baker in the lower right-hand corner. By 2:00 a.m., Herring had not seen any checks by Baker. At 2:05 a.m. she entered the control center, and saw Baker sitting in the chair with a coat over his head. She could not see his face. Herring asked the center officer to knock on the window to get Baker to bring the census check form for her to sign. As of 3:30 a.m., there still was not any census check performed. The same was true at 4:30 a.m. At 6:03 a.m. there is a

shift change, and by 6:30 a.m., there still were not any checks performed at the end of Baker's shift.

FINDINGS OF FACT

The appointing authority presented video evidence and testimony by witnesses which was credible and consistent. Appellant's only testimonial evidence did not contradict the eyewitness versions of the events, but largely spoke to the appropriateness of penalty. Considering the forgoing, I **FIND** that on April 12 and 13, 2012, and again on April 19, 2012, appellant slept while on-duty and in so doing failed to perform the majority of his required checks and counts of the patient census. I further **FIND** that appellant submitted paperwork indicating he had performed checks which he had not.

CONCLUSIONS OF LAW

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, respondent has charged appellant with violating N.J.A.C. 4A:2-2.3(a)7 (neglect of duty); and violations of Administrative Orders 4:08 B2 (neglect of duty), B3 (Sleeping While on Duty), E1 (Violation of a Rule . . .) and C8 (Falsification).

"Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/collections/oal/>. The term

"neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "'the legal standard of reasonable conduct in the light of the apparent risk.'" Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

In the present matter, the record reflects that appellant did not perform the majority of his required census checks on April 12 and 13, 2012, and April 19, 2012. I **CONCLUDE** that his failure to do so constituted omissions of required duties, and therefore, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charges of violating N.J.A.C. 4A:2-2.3(a)7 (neglect of duty), and Administrative Order 4:08 B2 (Neglect of Duty) should be and are hereby **SUSTAINED.**

Appellant was also charged with a violation of AO 4:08 B3, Sleeping while on duty. The record reflects that on both dates in question appellant was observed sleeping while he was on duty and while expected to be performing his census checks. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of violating Administrative Order 4:08 B3 should be and is hereby **SUSTAINED.**

Appellant was also charged with a violation of AO 4:08 C8, Falsification: Intentional misstatement of material fact in connection with work, employment, application attendance or in any record, report, investigation or other proceeding. The record reflects that on both dates in question appellant completed forms indicating he had performed census checks of patients when in fact he had not. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of violating Administrative Order 4:08 C8 should be and is hereby **SUSTAINED.**

Appellant was also charged with a violation of AO 4:08 E1, Violation of a rule, regulation, policy, procedure order or administrative decision. The record reflects that on both dates in question appellant failed to make required checks and counts as specifically

required by Policy and Procedure 603 (R-2). Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of violating Administrative Order 4:08 E1 should be and is hereby **SUSTAINED.**

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year old's face was terminated, despite lack of any prior discipline):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

N.J.S.A. 11A:2-19 provides that the Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

The record reflects that the appellant's position involves the care and protection of members of one of this State's most vulnerable populations, and that the nature of his misconduct causes a risk of harm to this population. The patients and their families are entitled to expect that care, observation, and required checks on the patients' well-being, will be conducted in accordance with governing procedures, and appellant failed repeatedly to do so, and completed paperwork which purported that he had. Clearly this constitutes an act of severe misconduct, and a breach of trust required of his position, one which he has performed several times prior, and continues to repeat.

A copy of the Department of Human Services Disciplinary Action Program (R-9) was placed into evidence, and indicates recommended penalties for various violations. Although not binding on this tribunal, this document offers a reasonable basis for imposition of penalty which may be considered. For each of the Administrative Orders violated by appellant, a maximum penalty of removal is indicated for even a first offense. Considering the volume of infractions over multiple occasions, and in consideration of the foregoing, along with appellant's disciplinary records (R-10, R-11), I **CONCLUDE** that the respondent's action in removing the appellant was justified.

ORDER

I **ORDER** that the charge of N.J.A.C. 4A:2-2.3(a) 7 Neglect of duty; A.O. 4:08 B2 Neglect of duty, loafing or idleness or willful failure to devote attention of tasks which could result in danger to persons or property; A.O. 4:08 B3 2 Sleeping while on duty; A.O.

4:07E1 Violation of a rule, regulation, policy, procedure or Administrative decision; and A.O. 4:07 C8 Falsification: Intentional misstatement of fact in connection with work in any record or report, be **SUSTAINED**. I further **ORDER** that respondent's removal of employee also be **SUSTAINED**.

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.

February 10, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: February 13, 2017

Date Mailed to Parties: February 13, 2017

nd

APPENDIX

WITNESSES

For Appellant:

Ron McMullen

For Respondent:

Sandy Hereford

Thomas Savage

Rosita Kane

Sharon Herring

EXHIBITS

For Appellant:

A-1 State of NJ, Department of Human Services, Ann Klein Forensic Center-Employee Form, Rating Cycle March 1, 2011 to February 29, 2012

A-2 State of NJ, Department of Human Services, Ann Klein Forensic Center-Employee Form, Rating Cycle March 1, 2010 to February 28, 2011

A-3 State of NJ, Human Resources System, Discipline Reason/Infraction Listing By Reason Code, Between January 1, 2000 and May 13, 2013

A-4 State of NJ, Human Resources System, Discipline Reason/Infraction Listing By Reason Code, Between January 1, 2000 and May 13, 2013

A-5 State of NJ, Human Resources System, Discipline Reason/Infraction Listing By Reason Code, Between January 1, 2000 and May 13, 2013

A-6 State of NJ, Human Resources System, Discipline Reason/Infraction Listing By Reason Code, Between January 1, 2000 and May 12, 2013

For Respondent:

R-1 Preliminary and Final Notices of Disciplinary Action

R-2 Ann Klein Forensic Center Policy and Procedure - Counts

R-3 Ann Klein Forensic Center Officer Assignment

R-4 Ann Klein Forensic Center Policy and Procedure – Levels of Observation/ Precautions

R-5 Ann Klein Forensic Center Interview and Observation Data Sheet

R-6 Supervisor Hereford Memo – Neglect of Duty/Sleeping on Duty

R-7 Thomas Savage Memo to Mr. Staub, dated April 13, 2012

R-8 Sharon Herring Memo to Chuck Moore, date May 13, 2012

R-9 State of NJ, Department of Human Services, Disciplinary Action Program

R-10 State of NJ, Human Resources System, Employee Disciplinary History

R-11 State of NJ, Department of Human Services, Notice of Suspension from Duty Without Pay

R-12 Ann Klein Forensic Center Shift Assignment

R-13 Security Video, dated April 12 to 13, 2012

R-14 Security Video, dated April 19 to 20, 2012

3-22-17

STATE OF NEW JERSEY

In the Matter of Bruce Cornish,
City of Millville
Police Department

CSC DKT. NOs. 2017-854 and 2016-4328
OAL DKT. NOs. CSR 14308-16 and CSV 10040-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 22, 2017 BW

The Civil Service Commission, at its meeting of March 22, 2017, acknowledged the attached settlements, with clarification, in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 22, 2017

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 14308-16

AGENCY DKT. NO. n/a

IN THE MATTER OF BRUCE CORNISH,
CITY OF MILLVILLE POLICE DEPARTMENT.

Michael L. Testa, Esq., for appellant Bruce Cornish (Testa, Heck, Scrocca & Testa, P.A., attorneys)

Stephen D. Barse, Esq., for respondent City of Millville (Gruccio, Pepper, DeSanto and Ruth, attorneys)

Record Closed: February 13, 2017 Decided: February 23, 2017

BEFORE **JOHN S. KENNEDY,** ALJ:

This matter concerns the appeal of Bruce Cornish from the action of the respondent, City of Millville. The appeal was filed with the Office of Administrative Law (OAL) on September 20, 2016, pursuant to N.J.S.A. 40A:14-202(d). A hearing was scheduled for December 20, 2016, December 21, 2016, January 3, 2017, and January 17, 2017. Prior to the hearing, the parties agreed to a settlement and counsel for respondent submitted the attached Settlement Agreement indicating the terms of agreement between the parties.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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. 40A:14-204.

2/23/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 2/28/17

Date Mailed to Parties: 2/28/17

JSK/dm

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February 9, 2017

Honorable John S. Kennedy, ALJ
Office of Administrative Law
1601 Atlantic Avenue
Suite 601
Atlantic City, New Jersey 08401

Honorable Jeffrey R. Wilson, ALJ
Office of Administrative Law
1601 Atlantic Avenue
Suite 601
Atlantic City, New Jersey 08401

Re: Bruce Cornish – City of Millville
OAL Docket No. CSV 10040-2016 S and CSR 14308-2016

Dear Judge Kennedy and Judge Wilson:

Enclosed is a copy of the full executed Settlement Agreement and Release with regard to the above referenced matters. Upon approval of the Settlement Agreement and Release by the Civil Service Commission, Michael Testa, Esquire, on behalf of Office Cornish, will be submitting a withdrawal of the appeal currently pending on the matter before Judge Wilson. The matter before Judge Kennedy will be resolved in accordance with the terms of the Settlement Agreement.

If you should have any questions, please do not hesitate to contact me.

Respectfully submitted,

Stephen D. Barse

SDB/jl
Enclosure
Cc: Michael Testa, Sr., Esquire
Chief Jody Farabella
Detective Anthony Loteck

NOTICE: This is a very important legal document, and you should thoroughly review and understand the terms and effect of this document before signing it. By signing this Settlement Agreement and General Release, you will be completely releasing the City of Millville from all liability to you. Therefore, you should consult with an attorney before signing this Settlement Agreement and General Release. You have twenty-one (21) days from the date of distribution of these materials to consider this document. If you have not returned a signed copy of this Settlement Agreement and General Release by that time, we will assume that you have elected not to sign the Settlement Agreement and General Release. If you choose to sign the Settlement Agreement and General Release, you will have an additional seven (7) days following the date of your signature to revoke the Settlement Agreement and General Release, and the Settlement Agreement and General Release shall not become effective or enforceable until the revocation period has expired.

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement") is made as of the 16th day of December, 2016, by and between CITY OF MILLVILLE (hereinafter collectively referred to as the "City") and BRUCE CORNISH (hereinafter referred to as "Employee").

W I T N E S S E T H

WHEREAS, Employee is a police officer employed by the City of Millville Police Department; and

WHEREAS, Employee has been subject to discipline that resulted in a six (6) month suspension, which discipline is currently on appeal before the New Jersey Civil Service Commission and scheduled for a hearing before the New Jersey Office of Administrative Law under OAL Docket No. CSV 10040-2016 S; and

WHEREAS, Employee is also the subject of additional discipline that resulted in the termination of Employee's employment with the City of Millville, which additional discipline is also currently on appeal before the New Jersey Civil Service Commission with a hearing scheduled before the New Jersey Office of Administrative Law under Docket No. CSR 14308-2016; and

WHEREAS, the City is currently investigating additional matters related to Employee's performance of his job duties; and

WHEREAS, Employee has agreed to withdraw the appeal of his six (6) month suspension and to resign as a police officer with the City of Millville subject to the terms and conditions set forth herein; and

WHEREAS, the City and Employee have agreed to resolve all matters pending against Employee in accordance with the terms and conditions set forth in this Settlement Agreement

and Release ("Settlement Agreement"); and

WHEREAS, Employee acknowledges that Employee could have proceeded to a hearing in the matters under Docket No. CSV 10040-2016 S and Docket No. CSR 14308-2016, and would have had the right to appeal the results of either of those hearings if Employee was dissatisfied with the outcome of either of those hearings and has chosen waive his right to hearings in those cases.

NOW, THEREFORE, in consideration of the mutual promises and representations herein contained, and intending to be legally bound, the parties understand and agree as follows:

1. **Settlement**. The City and Employee agree that all pending matters between the City and Employee shall be resolved as follows:

   a. Employee will withdraw his pending appeal of his six (6) month suspension and the City will pay Employee back-pay from the date of the conclusion of his six (6) month suspension (December 16, 2015) and the date he was returned to duty (May 30, 3016), less the amount earned by him during his suspension (proof of which has previously been provided by Employee). All deductions required by law, including union dues, shall be deducted from the back-pay payment.

   b. Employee resigns his employment with the City, in good standing, effective as of the date of this Agreement. The City will dismiss all pending disciplinary charges, internal affairs investigations and any potential internal affairs investigations or charges, and agrees that it will not bring any further charges against Employee. None of the dismissed charges will appear in Employee's personnel file. Unless otherwise required by law or authorized by Employee, the City will state the dates of Employee's employment with the City and that he resigned in good standing to any persons inquiring about his employment. Other than as provided in subparagraph a above, Employee waives his rights to back-pay for any periods of suspension or other time out of work, including the current suspension; and including any back-pay that he might otherwise be entitled to receive as a result of the dismissal of the pending charges against him.

   c. Employee agrees that he will not apply for employment with the City of Millville Police Department at any time in the future.

   d. Employee will be paid for any unused vacation time, sick time, and compensatory time as provided in the PBA collective bargaining agreement.

2. **Waiver of Hearing**.

EMPLOYEE ACKNOWLEDGES THAT EMPLOYEE HAD THE RIGHT TO

HEARINGS BEFORE THE NEW JERSEY OFFICE OF ADMINISTRATIVE LAW AND A DETERMINATION BY THE NEW JERSEY CIVIL SERVICE COMMISSION ON THE CHARGES INCLUDED IN THE MATTER CURRENTLY DOCKETED UNDER OAL DOCKET NO. CSV 10040-2016 S AND UNDER DOCKET NO. CSR 14308-2016 AND THAT HE KNOWINGLY AND WILLFULLY AGREED TO WAIVE HIS RIGHT TO HEARINGS IN THOSE MATTERS, INCLUDING ANY ADDITIONAL RIGHTS TO APPEAL HE MIGHT HAVE HAD IF HE WAS DISSATISFIED WITH THE OUTCOME OF EITHER OR BOTH OF THOSE HEARINGS.

3. **Release of Claims**. Employee, for himself, his heirs, executors, administrators, successors, and assigns, hereby releases and forever discharges the City and its departments, political subdivisions, successors, and assigns, and their respective past, present and future representatives, council members, officers, agents, employees, citizens, insurance carriers, successors, and assigns, and the estate(s) of his from any and all action, causes of action, lawsuits, claims, charges, debts, sums of money, accounts, covenants, contracts, controversies, agreements, promises, trespasses, damages, liabilities, judgments, executions, and/or demands of any nature whatsoever, whether in law or in equity, or with any individual, agency, organization, or governmental body, whether known or unknown, which Employee ever had, now has, or can, shall, or may have under any collective bargaining agreement or under any contract, tort or common law theory, and/or under any Federal, State, local statute, including but not limited to: the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., as amended by the Older Worker's Benefit Protection Act, specifically §626; Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. §1981, et seq.; the Civil Rights Statues contained in 42 U.S.C. §1983, 1985 and 1986 and any related laws; the Americans with Disabilities Act (ADA), 42 U.S.C. §12101, et seq.; the Federal Family and Medical Leave Act, 29 U.S.C. §2601, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. §1001, et seq.; the Rehabilitation Act of 1973, 29 U.S.C. §791, et seq.; the Equal Pay Act, 29 U.S.C. §206(d); the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq.; the New Jersey Family Leave Act, N.J.S.A. 34:11b-1, et seq.; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, et seq.; the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq.; the New Jersey Law against Discrimination N.J.S.A. §10:5-1; and any other Federal, State or local equal employment opportunity laws, regulations, or ordinances; or under a theory of negligence; interference with contract/business advantage, fraud; intentional infliction of emotional distress; and/or any other duty or obligation of any kind or description. This release shall apply to all known, unknown, unsuspected, and anticipated claims, liens, injuries, and damages up to and including the day of the date of this Agreement. Employee represents that he is currently unaware of any facts that would entitle him to benefits under New Jersey's Workers' Compensation statute.

4. **No Legal Action**. Employee represents that he has not filed any complaint, claim or charge against any other party with any local, state or federal agency or court, other than the appeals with the New Jersey Civil Service Commission which will be dismissed pursuant to the terms of this Settlement Agreement, will not do so at any time hereafter, and that if any agency or court assumes jurisdiction of any complaint, claim or charge against the City by or on behalf of Employee, Employee will request such agency or court to withdraw from the matter.

5. **Integration; Representation By Counsel**. It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all parties.

6. **Who is Bound**. The City and Employee are bound by this Settlement Agreement and those who legally succeed to their rights and responsibilities are also bound. This Settlement Agreement is made for the benefit of the City and Employee and all who succeed to their rights and responsibilities, such as any successors and/or assigns.

7. **Governing Law; Litigation/Jurisdiction/Venue**. The parties agree that laws of the United States of America, as applicable, and the laws of the State of New Jersey shall govern the interpretation and application of this Agreement. In the event either party to this Agreement institutes litigation to enforce its terms or with respect to any matter related to Employee's employment with the City, the parties agree that the New Jersey Civil Service Commission and the Superior Court of New Jersey, as applicable. shall have exclusive jurisdiction of any such claim and that venue for any Superior Court action shall be in Cumberland County, New Jersey.

8. **Severability**. If any provision of this Agreement is found by competent judicial authority to be invalid or unenforceable, the other provisions of this Agreement that can be carried out without the invalid or unenforceable provision will not be affected, and such invalid or unenforceable provision will be ineffective only to the extent of such invalidity or unenforceability and otherwise construed to the greatest extent possible to accomplish fairly the purposes and intentions of the parties hereto.

9. **Counterparts**. This Agreement may be signed in counterparts.

10. **Signature of Employee.**

BY SIGNING THIS SETTLEMENT AGREEMENT, EMPLOYEE STATES THAT:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS THAT HE IS GIVING UP IMPORTANT RIGHTS INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO APPEAL THE DISCIPLINE IMPOSED IN THIS AGREEMENT AND TO A HEARING ON THOSE CHARGES;

C. HE HAS REVIEWED THIS AGREEMENT WITH HIS ATTORNEY, MICHAEL TESTA, SR., ESQUIRE, AND HAS HAD TO OPPORTUNITY TO HAVE THE TERMS OF THIS

AGREEMENT EXPLAINED TO HIM AND TO HAVE ANSWERED ANY QUESTIONS HE HAS ABOUT THIS AGREEMENT;

D. HE AGREES WITH EVERYTHING IN IT;

E. HE HAS SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY AND WITH A FULL UNDERSTANDING OF THE EFFECT OF THIS AGREEMENT ON HIS LEGAL RIGHTS;

F. HE IS COMPETENT TO EXECUTE THIS AGREEMENT.

IN WITNESS WHEREOF, the parties hereto have caused this Settlement Agreement to be executed and signed the day and year first written above.

ATTEST:

BY: _____
BRUCE CORNISH, Employee

WITNESS:

CITY OF MILLVILLE

_____
MICHAEL SANTIAGO, Mayor

BY: _____
JODY FARABELLA, Chief of Police

BY: _____
REGINA BURKE, ~~Clerk~~ ADMINISTRATOR

Angiulo, Nicholas

From: Michael Testa <mtesta@testalawyers.com>
Sent: Wednesday, March 8, 2017 2:58 PM
To: Angiulo, Nicholas
Cc: 'Steve BARSE'; 'Karla Harris'; brucecornish08@comcast.net
Subject: Bruce Cornish OAL Docket #s CSV 10040-16 and CSR 14308-16

Mr. Angiulo: As you are aware I am counsel for Mr. Cornish. Mr. Barse and I have conferred in reference to your inquiry regarding the above captioned matters. Mr. Cornish has already applied for retirement benefits as contemplated by the settlement . The period of time you reference is to be treated as " approved leave of absence without pay ". If you have any further questions please do not hesitate to contact me.

Sincerely,

Michael L. Testa
424 Landis Avenue
Vineland, NJ 08360
856-691-2300
Fax 856-691-5655

www.testalawyers.com
email: mtesta@testalawyers.com

3-22-17

STATE OF NEW JERSEY

In the Matter of Toronda Matthews Union County, Department of Human Services	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2017-418 OAL DKT. NO. CSV 12602-16	:	
CSC DKT. NO. 2016-939 OAL DKT. NO. CSV 15158-15 **(CONSOLIDATED)**	:	

ISSUED: MARCH 23, 2017 BW

The appeal of Toronda Matthews, Keyboarding Clerk 1, Union County, Department of Human Services, 45 working day suspension and removal, effective July 5, 2016, on charges, was heard by Administrative Law Judge Ellen S. Bass, who rendered her initial decision on February 23, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission dismisses the above appeals based on appellant's failure to appear.

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

Re: Toronda Matthews

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 22,2 017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
44 S. Clinton Ave.
P. O. Box 312
Trenton, New Jersey 08625-0312

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL FOR FAILURE TO APPEAR

OAL DKT. NO. CSV 12602-16
AGENCY DKT. NO. CSC 2017-418

TORONDA MATTHEWS

Appellant,

v.

UNION COUNTY DEPARTMENT OF HUMAN SERVICES,

OAL DKT NO. CSV 15158-15
AGENCY DKT. NO. CSC 2016-939

TORONDA MATTHEWS

Appellant,

v.

UNION COUNTY DEPARTMENT OF HUMAN SERVICES,

Toronda Matthews, pro se

Rachel M. Caruso, Esq., for respondent, (Roth D'Aquanni, attorneys)

Record Closed: February 21, 2017

Decided: February 23, 2017

BEFORE **ELLEN S. BASS**, ALJ:

These are two consolidated petitions of appeal filed by Toronda Matthews, a former employee of the Union County Department of Human Services. Her first appeal (CSV 15158-15) challenged a 45-day suspension, and was transmitted to the Office of Administrative Law (OAL) as a contested case on September 25, 2015. A second appeal challenged her removal, effective July 5, 2016, and was transmitted to the OAL on August 19, 2016 (CSV 12601-16). The two matters were consolidated at the request of the parties via order dated August 29, 2016. See: N.J.A.C. 1:1-17.1. At the time, Ms. Matthews was represented by her union, the Communication Workers of America (CWA); although the representative assigned to assist her changed during the course of the litigation, and most recently was Julia Barocas.

The consolidated matters were scheduled for hearing on January 4, 2017.[1] By letter dated December 28, 2016, Ms. Barocas asked for an adjournment of the hearing. As she cited no reason for her request, I inquired further. She followed with a letter of the same date advising that the CWA was no longer representing Ms. Matthews. That day, I wrote to Ms. Matthews and counsel for Union County, and advised that I would like to schedule a telephone conference to discuss next steps. I confirmed that the CWA had withdrawn its representation; suggested three dates for a telephone conference; and asked the parties to contact my assistant with their availability.

I received no reply from Ms. Matthews and accordingly, issued a notice for a telephone conference for January 30, 2017. That afternoon, my assistant unsuccessfully tried to contact Ms. Matthews via telephone; the numbers we had on record were disconnected. By letter dated January 30, 2017, I alerted Ms. Matthews that we had been unable to reach her. I gave her until February 21, 2017, to contact my assistant and advise where she could be reached by telephone. I indicated that if I did not hear from her I would dismiss her case. I again received no reply.

None of the letters or notices sent to Ms. Matthews were returned to the OAL as undeliverable. They were all sent to the address on record and included in the agency transmittal documents.

[1] The suspension appeal had previously been scheduled for hearing in January 2016, but that hearing was adjourned at the request of the parties, and in anticipation of the filing of the appeal on the removal action.

I **CONCLUDE** that Ms. Matthews' appeal should be dismissed for failure to prosecute; repeated failure to be responsive to correspondence from this tribunal; and for failure to appear at the scheduled status conference. N.J.A.C. 1:1-14.4 provides that, if, after appropriate notice, neither a party nor a representative appears at any proceeding, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall direct the Clerk to return the matter to the transmitting agency for appropriate disposition. I have received no explanation for Ms. Matthews' nonappearance.

ORDER

I **ORDER** that the consolidated appeals filed by Ms. Matthews be **DISMISSED,** and I direct the Clerk of the OAL to return the appeals to the transmitting agency per N.J.A.C. 1:1-14.4.

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.

February 23, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: February 23, 2017

Date Mailed to Parties: FEB 24 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

3-22-17

STATE OF NEW JERSEY

In the Matter of Paul Pereira
Woodbridge Township, Department
of Public Works

CSC DKT. NO. 2016-3197
OAL DKT. NO. CSV 06152-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MARCH 23, 2017 BW

The appeal of Paul Pereira, Heavy Equipment Operator, Woodbridge Township, Department of Public Works, removal effective March 11, 2016, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on February 13, 2017. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on March 22, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Paul Pereira.

Re: Paul Pereira

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MARCH 22, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 06152-16
AGENCY REF. NO. 2016-3197

IN THE MATTER OF PAUL PEREIRA, TOWNSHIP OF WOODBRIDGE, DEPARTMENT OF PUBLIC WORKS.

Arnold Shep Cohen, Esq., for appellant Paul Pereira (Oxfeld Cohen, attorneys)

Brett M. Pugach, Esq., for respondent Township of Woodbridge Department of Public Works (Genova Burns, attorneys)

Record Closed: October 7, 2016 Decided: February 13, 2017

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Township of Woodbridge (Township) Department of Public Works (DPW) terminated heavy-equipment operator Paul Pereira after he was observed in a local bar drinking while on duty, for the following: incompetency, inefficiency, or failure to perform duties; insubordination; conduct unbecoming a public employee; misuse of public

property, including motor vehicles; violation of federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operations of commercial motor vehicles, and State and local policies issued thereunder; violation of the Township's drug/alcohol policy; and violation of the Township's handbook policies and procedures.

PROCEDURAL HISTORY

Pereira was served with a Preliminary Notice of Disciplinary Action (PNDA) on February 16, 2016. The Township held a hearing on March 11, 2016, after which it issued a Final Notice of Disciplinary Action (FNDA) sustaining all charges and removing Pereira effective March 11, 2016.

Pereira appealed and the Civil Service Commission (Commission) transmitted the contested case to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on April 21, 2016. The hearing was held on August 1, 2016, and September 7, 2016. The record closed on October 7, 2016, upon receipt of post-hearing closing submissions from the parties.

EVIDENCE AND FINDINGS OF FACT

Background

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Paul Pereira had been employed by the Township as a heavy-equipment operator (HEO) in the DPW since June 18, 2012. Pereira operated many types of heavy equipment, including backhoes, excavators, bulldozers, front loaders, and track loaders. A Class "A" commercial driver license (CDL) is required for an HEO position, because an HEO must be able to drive a tractor-trailer to transport heavy equipment to a job site. A Class "B" CDL is required for a truck driver. HEO is a "safety sensitive" position.

On or about January 23, 2016, and January 24, 2016, a winter storm had left close to thirty inches of snow in the Township. In order to perform the snow-removal operations for the Main Street business area, Main Street and its intersections had been closed from Route 35 all the way down to the Township Hall on January 27, 2016, into January 28, 2016. The Parks Division and Roads Division were on site operating equipment and had basically split the road. Some employees drove front loaders to scoop up the snow on the road or heavier piles and dump the snow into the tandems to be trucked out. Some employees used a backhoe to pull snow off the sidewalks by back-dragging it and removing it. There was also manpower on the sidewalks shoveling snow from areas that the equipment could not reach, like under benches and around street signs.

On January 27, 2016, Pereira had worked his regular shift, which ended at 3:30 p.m. He returned to work at 8:00 p.m. for overtime snow removal. The snow-removal job was not mandatory. Pereira was operating a backhoe on Main Street, back-dragging the snow off the sidewalks and then picking it up and loading it into trucks to be hauled away. The backhoe had the Township logo on each side. That evening (January 27, 2016, into January 28, 2016), while on duty and receiving double-time pay, Pereira entered the Main Tavern, a local bar on Main Street, and left his backhoe parked outside for at least ten minutes.

Some of the other employees performing snow removal complained to Joseph Gregus that Pereira had been in the Main Tavern. Gregus has been employed by the Township DPW as the safety officer since September 2012. Gregus interacts with and oversees DPW employees, but is not their direct supervisor. Gregus is on the road daily with the employees in various divisions.

Later that evening, Pereira again entered the Main Tavern and left his backhoe parked outside for at least ten to fifteen minutes. That time, through the glass window in the Main Tavern door, Gregus observed Pereira inside with a rocks glass in his hand. Gregus contacted Carmine Barbato and advised Barbato that Pereira had been in the Main Tavern. Barbato has been employed by the DPW for forty-one years, and has been the superintendent of Public Works, Division of Streets and Sewers, since 2010. He oversees various projects and crews of the DPW, including HEOs. Barbato was Pereira's

supervisor. Barbato had already left the snow-removal site, and by the time he returned several minutes later, Pereira was again operating his backhoe. Barbato confronted Pereira about being in the bar and removed him from the job site at approximately 12:30 a.m. on January 28, 2016.

Dennis Henry has been employed by the Township for forty-three years, and has been the DPW director for more than ten years. As DPW director, he oversees the operations of the entire DPW, which consists of approximately seven divisions, including Parks and Roads, and he supervises the DPW employees. Henry asked Gregus and Barbato to each provide him with a report of the incident.

Robert Landolfi has been employed by the Township for twelve years as the business administrator. In that capacity, he oversees the day-to-day operations of all the Township's departments, and all department heads report to him. Landolfi prepared the PNDA. A Loudermill hearing was held, at which hearing Pereira admitted he had been drinking on the job.

Pereira received and signed for the Township of Woodbridge Employee Handbook (Employee Handbook) and the DPW's Alcohol and Drug-Free Workplace Policy (DPW Alcohol/Drug Policy) upon being hired in 2012. (R-4; R-5.) Both the Employee Handbook and the DPW Alcohol/Drug Policy remained in effect at the time of the January 2016 incident.

Pereira has no prior disciplinary history with the Township.

Testimony

Paul Pereira testified on his own behalf. Dennis Henry, Carmine Barbato, Joseph Gregus, Robert Landolfi, and David Valguarnera testified on behalf of the Township.

Joseph Gregus

On the night of the January 2016 incident, Gregus was told by other Township employees that Pereira had entered a bar to use the bathroom. The Main Tavern is almost dead center between Route 35 and the other end of Main Street. Gregus saw Pereira come out of the Main Tavern. During the course of the evening, he noticed Pereira was operating the backhoe. Gregus spoke with quite a few employees, and several asked Gregus if he were going to let that go on all evening. One employee told Gregus he suspected Pereira had been drinking, and other employees also felt that Pereira may not have been in the bar for the bathroom.

Gregus later observed the backhoe parked in front of the Main Tavern, running. It struck Gregus as not being right. Gregus waited a few minutes, and then walked up to the Main Tavern door. He looked through the door's glass window and saw Pereira inside. Pereira was with several patrons, having a good time, drinking with a rocks glass in his hand. Gregus was devastated, angry, and could not believe what was happening. In his tenure as safety director, Gregus had never observed another employee in a bar drinking while on duty.

Gregus contacted Barbato, who was in charge of the entire snow-removal operation, and told Barbato what was going on and that he needed him there as fast as he could get there. Gregus observed Pereira leave the bar and get back into the Township backhoe. By the time Barbato arrived, Pereira had driven the backhoe up Main Street toward Route 35 near a hair salon to work on that operation. Barbato and Pereira seemed to have some words in the street. Pereira was removed from the job site. Pereira started to walk back to the DPW, but then Barbato picked him up and took him to the DPW. Gregus remained at the job site.

Barbato returned to the job site and Gregus told Barbato that he had seen Pereira inside the Main Tavern drinking with a rocks glass in his hand. Barbato asked Gregus to go back into the bar and talk to the bartender to verify that Pereira had been in there and that he had been drinking. Gregus went into the bar and introduced himself to the bartender, Tom Sullivan. Sullivan advised that Pereira had been in the Main

Tavern on two separate occasions that evening, and on both occasions had consumed alcohol.

Gregus spoke later with Barbato. They talked about what had happened and what Sullivan had said. Barbato and Gregus both entered the Main Tavern and had the same conversation with Sullivan, but Barbato took the lead. Sullivan again advised that Pereira had come into the Main Tavern on two separate occasions that evening and consumed alcohol.

Gregus did not speak to Pereira at all. Gregus did not stop Pereira from using the backhoe, and he testified that an alcohol test would have been Barbato's decision. Gregus thought Pereira was driving a little erratically—quickly going forward and backward, faster than it should have been done, multiple times. Gregus did not know why he omitted from his statement that Pereira had been driving erratically. Gregus had the authority to remove Pereira from the backhoe, but did not do so because it was such a sensitive issue and he thought it best that Barbato handle it. He did not call Barbato the first time Pereira went into the Main Tavern, because Pereira allegedly had gone in to use the bathroom.

At the request of Henry, Gregus returned to the Main Tavern on January 29, 2016, and asked Sullivan if he would be willing to provide a written statement of what he had told Gregus and Barbato. Sullivan provided Gregus with a written statement, which Gregus provided to Henry.

Gregus testified that the Main Tavern is not the place that you would want to go into even if it were just to use the bathroom, because other people were around and the perception would not have been good. Other places were open at the time, like the Rio Diner, the QuickChek, Township Hall, and the police department basement. The Rio Diner would have been, with the street closed, a thirty- to forty-second drive right to the top of the street, and QuickChek or Township Hall would have been a minute, because it would have been necessary to go around people and vehicles. All those establishments had restrooms and were within walking distance.

Paul Pereira

Pereira testified that the Main Tavern was located right where he had been clearing the snow, and that both times he had gone into the bar he used the bathroom. Pereira first went into the Main Tavern around 11:30/11:45 p.m. to use the bathroom. He testified that he saw a couple people he knew, said "hi" and "bye," and walked out. He also testified that he used the bathroom and was in and out in ten minutes, and also testified that he bought a beer and a shot for someone and walked out. Pereira clarified that after he came out of the bathroom the first time, he saw his two "friends." He later identified them as "Louie" and "Harry." He initially stated that he could not reveal their last names, but thereafter testified that he did not know their last names. Pereira asked them both if they wanted drinks, but Harry declined, so Pereira bought a beer and the shot for Louie.

The second time Pereira went inside was approximately fifteen to twenty minutes later, around midnight. He went inside because he had to use the bathroom again. He used the bathroom and then he bought a beer and a shot of Jack Daniels. He walked out of the bar and went back to his duties. He continued working for thirty to forty-five minutes before Barbato pulled up and called him out of the backhoe. He went to Barbato's truck. Barbato asked him if he was drinking. Pereira was scared and panicked and said "No." Barbato asked Pereira if he could call the police to get a breathalyzer and Pereira said, "Sure, no problem." After Barbato talked to Pereira, two supervisors, Ed Doering and Jim Mulrooney, came over and talked to Pereira. They were right in front of Pereira's face, having a conversation to try to detect the smell of alcohol.

Pereira testified that Barbato told him that Gregus had seen him drinking. Pereira panicked and said he was not drinking. Pereira did not deny going into the bar, because he had used the bar's bathroom. After the conversation with Barbato, Pereira was not permitted to continue working. Barbato took Pereira back to the DPW. Pereira punched out, drove his own vehicle home, and went to sleep. If Barbato had not made him leave, Pereira would have continued to work at the job site. Pereira was upset

because they accused him of being drunk and saying they were going to call for a breathalyzer, but he was not drunk and he thought he deserved to remain on duty.

Pereira knows it was inappropriate to leave his job site and drink alcohol while on duty. He had diarrhea and had to go to the bathroom "real bad," and the Main Tavern was a lot closer than QuickChek. He was clearing snow two stores away from the Main Tavern. QuickChek was two blocks away, and the Rio Diner was around the corner, one block away. He has had to go to the bathroom plenty of times while on duty, and goes to the closest store he can find. He testified that when you have to go to the bathroom, you go to the closest place, but he made a big mistake going into the bar.

According to Pereira, the time difference between going to the Main Tavern and going to the Rio Diner in his backhoe, with all the vehicles and salt spreaders and the road blocked, would have been maybe ten or fifteen minutes. It would have taken him about seven minutes to drive to Township Hall and fifteen minutes to walk there. The QuickChek is just before Township Hall, so maybe a minute less to go there.

On the morning of January 28, 2016, Pereira was scheduled to work at 7:00 a.m. He was exhausted and overslept. A phone call from a coworker woke him up at 9:00 a.m., and Pereira got to work at approximately 10:30 a.m. When he arrived, he went to Barbato's office, but was told to go to Henry's office. Henry asked what happened, and Pereira told him that he went into the Main Tavern to use the bathroom, and he had a beer and a shot. Henry told Pereira that he was suspended and to go home and he would call him tomorrow. Pereira received a call the next day at 10:00 a.m. to take a drug-and-alcohol test at 11:00 a.m. The results were negative. Henry recommended that Pereira talk to a drug-and-alcohol counselor. Pereira did so and paid out of pocket. Pereira also completed an education and rehabilitation program, but they did not find anything wrong with him.

Pereira does not know what caused him to do what he did that evening. He was working overtime, and had been working nonstop. Pereira was not required to work overtime, but when it snows he never says no to money like that. He was exhausted, not thinking, and not in the right frame of mind. He is also diabetic. He has never been

in trouble, has had no problems, and anything they wanted him to do, he did. Pereira was not erratic. He lied to his supervisor because he was scared and wanted to protect his job.

Carmine Barbato

Barbato was unsure of what time he left the job site on the night of the January 2016 incident. Shortly after he left, Gregus called and texted him to tell him that he needed to return as soon as possible because men were complaining that Pereira had come out of the Main Tavern. Barbato returned to the job site within six to eight minutes. When he arrived, Pereira was operating the backhoe like he was supposed to be, but the guys were complaining that Pereira had come out of the Main Tavern. Barbato did not witness anything unusual or erratic about Pereira's driving, and no one told Barbato that night that Pereira's driving was unusual or erratic. Barbato pulled Pereira out of the backhoe and asked him if he had been in the Main Tavern. Pereira admitted that he had been in the Main Tavern, and when Barbato asked what he had been doing in there, Pereira told Barbato that he "went in to take a shit." Barbato asked Pereira if he had been drinking, but Pereira denied that he had been drinking. Barbato did tell Pereira that he would call for a breathalyzer, and Pereira told him that was not a problem. Barbato did not call for the breathalyzer because Pereira told him he "took a shit." Barbato had two supervisors on site, Jim Mulrooney and Ed Doering, get right in front of Pereira to determine if they detected an odor of alcohol, but reasonable suspicion was not established. Barbato thought the two had been trained in reasonable suspicion, but thereafter learned that they had not.

Barbato took Pereira back to the DPW and made him punch out and leave the premises. After Pereira punched out, Barbato returned to the job site. That is when Barbato found out that Gregus had observed Pereira in the Main Tavern with a rocks glass in his hand.

Barbato and Gregus went into the Main Tavern so Barbato could interview the bartender. The bartender told them he had served Pereira drinks. If Barbato had known earlier that Gregus had observed Pereira with a rocks glass or if Pereira had

admitted to drinking alcohol, he probably would have called the police and had the police administer a breathalyzer.

In a town of 100,000 people, Barbato cannot have an employee coming out of a bar while working. Pereira was operating a backhoe, pulling the snow off Main Street, which is very much considered a safety-sensitive function.

David Valguarnera

David Valguarnera has been employed by the Township for approximately ten years, and has been a truck driver for approximately the past four or five years. As a truck driver, he interacted with other DPW employees, including Pereira. Valguarnera was working with Pereira on the night of January 27, 2016, into January 28, 2016, cleaning snow from Main Street. Valguarnera was hauling snow from Main Street to the Community Center, where the ice melter was. The snow was getting loaded into Valguarnera's truck by an operator. Pereira was in a backhoe cleaning the street and sidewalks, getting ready to load the trucks.

Valguarnera saw Pereira's backhoe parked outside the Main Tavern, farther down from where they were working. Valguarnera was surprised to see it there and spoke to Craig Mackenzie and Gregus about it. It was a general conversation about whether Pereira perhaps had broken down, or there was something wrong with the machine, or if Pereira was on his cell phone, because they were waiting to get loaded up. It was weird that, out of the blue when they were working on upper Main Street, the backhoe was down at the Main Tavern.

Valguarnera later saw Pereira operating his backhoe, scraping down the sidewalk and dumping the snow into the truck. Pereira was operating his vehicle somewhat "erratic" based on just the speed on a closed road at night, forward and reverse, when there were people standing around shoveling the sidewalks and Valguarnera was standing outside his truck watching it get loaded. Valguarnera felt that something was not right and that other operators do not act in that manner with the backhoe. Valguarnera was concerned because he did not want to get hit, and he is

responsible for his truck, so he did not want the backhoe to crash into his truck. Valguarnera spoke to Gregus about it that night because Gregus was the safety officer on duty.

Valguarnera explained that by "erratic" he meant moving faster than normal on a closed street. He did not recall anything else about Pereira's driving.

Dennis Henry

Rules regarding drugs and alcohol for a CDL holder are governed by federal regulations. Drinking on the job and operating a vehicle is a violation of Township policies and federal Department of Transportation (DOT) policies. Drinking before or while operating heavy equipment or performing safety-sensitive functions at work is prohibited. Drinking while on the job is prohibited even if not operating a vehicle. The Township has an Employee Handbook and a DPW Alcohol/Drug Policy. The purpose of the DPW Alcohol/Drug Policy is to keep employees, coworkers, and residents safe when the DPW is working. If the DPW Alcohol/Drug Policy is not followed, employees could damage equipment or injure themselves, coworkers, or residents.

Henry was not present for the January 2016 incident. He was advised of it by Barbato and Gregus the following morning. Henry asked them if Pereira were in, but he was not and had not called in for his 7:00-a.m. scheduled shift as required. Henry asked Barbato and Gregus each to provide him with a report, and to obtain a written statement from Sullivan. Henry received the reports and written statement.

Henry understood that Pereira had denied drinking when asked by Barbato, but later testified at the Loudermill hearing that he had been drinking. Pereira was on duty that night and being paid to work at the snow rate, which was double time, and he was operating a backhoe, performing safety-sensitive functions. Henry was also told by the safety officer that employees had concerns about the way he was operating the equipment on site.

Pereira's discipline was not based on a random drug or alcohol test. Per the DOT, the window of opportunity for an alcohol test is within two hours, and cannot exceed eight hours. Pereira did not show up for his scheduled shift, so he could not be tested. Henry did not attempt to contact Pereira. When Pereira was a no call/no show, Henry was not sure what was going on, and he was not going to be able to get a DOT alcohol test. If Pereira had worked his scheduled shift, the Township would have been within the required eight hours, and he would have been tested.

After a meeting with Barbato and Henry, Pereira volunteered to take a test, so he was given a test on January 29, 2016. Henry felt that there would have been reasonable suspicion to have tested Pereira on site because Gregus had seen Pereira in the tavern with a glass in his hand. However, Gregus did not have the authority to have Pereira tested. The authority would lie with Barbato, but Barbato's report stated that he was not aware that Gregus had seen Pereira with a drink in his hand until after he had escorted Pereira to the DPW to punch out and returned to the job site. An alcohol test was not administered on site because Pereira denied drinking and Barbato did not feel he had reasonable suspicion at that time. If Barbato had known Pereira was seen with a drink he would have felt he had reasonable suspicion.

Robert Landolfi

Landolfi signs all major discipline notices and served as the hearing officer for Pereira's Loudermill hearing and departmental hearing. Charges were brought against Pereira because his actions violated several policies and levels of decorum expected of a municipal employee, and removal was sought because of the setting. The Township was performing snow-plowing and snow-removal operations for the worst storm in Township history—over thirty inches. While on duty, receiving double pay, Pereira abandoned his safety-sensitive job and twice entered a local tavern, consumed alcohol, and fraternized with patrons. He returned to a clearly marked Township vehicle, and continued to perform his job in a manner that caused fellow employees to be concerned. He was asked by a supervisor if he had been drinking, but denied drinking. He was sent home and therefore was no longer able to aid Township efforts.

Pereira was insubordinate because he was asked a direct question by a supervisor and was purposefully deceitful when he denied drinking. He was expected to be truthful, and his lie impacted decisions that were made. Pereira misused municipal equipment, because he took a clearly marked municipal vehicle to a local tavern, consumed alcohol, and returned to and operated the equipment in an inappropriate manner, causing coworkers to be concerned for their equipment and safety. Pereira also violated federal CDL regulations and Township regulations by drinking and driving while on duty.

Pereira impeded the Township's obligation to its citizens and did so in a manner that reflected very poorly on the Township and his department. Anything less than termination would send the wrong message to coworkers and the public, who have a right to expect better of public employees and government in general.

Factual Discussion

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Pereira's testimony was contradicted by a number of witnesses, and at times was not probable under the circumstances. His testimony about the two patrons in the bar was stilted and inconsistent. He testified that the patrons who had purchased the alcohol for him, and for whom he had purchased alcohol, were friends, but then he was hesitant about their names and testified that he had only seen them around town while

he was plowing. Additionally, Pereira's testimony was that he had only gone into the Main Tavern rather than another establishment with a bathroom because that was the closest place and he had diarrhea. However, if that were true it seems unlikely that he would be inclined to consume alcohol.

Gregus testified that he saw Pereira's backhoe parked outside the Main Tavern, and he walked down and looked inside the bar and saw Pereira. His written report reflects that at 12:08 a.m. he saw Pereira enter the Main Tavern, and was then approached by several employees who asked how long he was going to allow that to go on. (R-1.) Given the difference, it is not entirely clear whether Gregus saw Pereira enter the Main Tavern or at what time he entered, but his testimony and statement, as well as the statements of others who spoke to Gregus, were consistent in that Gregus had observed Pereira with a rocks glass in his hand inside the bar. Additionally, the bartender's statement reflects that on two occasions that evening he served a Township employee beer and shots, and Pereira testified that he had a beer and a shot. (R-2.)

With respect to Pereira's driving, the testimony of Gregus and Valguarnera was almost identical in that Pereira's forward and reverse speed was "erratic," because it was too fast. Normally, consistency would bolster the reliability of the testimony, but in this case, the significant similarity in the terminology used, coupled with a general lack of specificity other than that Pereira was driving too quickly in forward and reverse, appeared contrived. Faster is not a manner generally expected or consistent with use of the term "erratic," and there was not a single incident report that referenced erratic driving or that Pereira's speed was too fast. The testimony that Pereira's driving was erratic or unsafe is further undermined by the failure of a single person, including supervisors on site, to instruct Pereira to drive slower or to remove him from his backhoe, and by Barbato's testimony that he did not observe Pereira driving erratically. Further, although Barbato had not had the opportunity to observe Pereira's driving for as long as some of the others, it is significant that no one told him that night that there was anything unusual about Pereira's driving. Accordingly, I ascribe greater reliability to Barbato's testimony, and credit Barbato's testimony that he was not aware that Gregus had seen Pereira with a rocks glass in his hand until after Pereira had punched out and gone home. Additionally, although Pereira testified that he told Barbato and Henry that

he had a beer and a shot later on January 28, 2016, I credit Barbato's and Henry's testimony that Pereira never admitted to them that he consumed alcohol. Rather, it was not until the Loudermill hearing on February 3, 2016, that Pereira admitted to having consumed alcohol.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional material **FACTS** in this case:

After Pereira had entered the Main Tavern the second time, he was observed by Gregus with a rocks glass in his hand. Other patrons were inside the Main Tavern. Gregus contacted Barbato, who had left the site, and Barbato returned and briefly observed Pereira operating the backhoe. Barbato did not observe anything unusual or erratic about Pereira's driving and no employee advised Barbato that Pereira's driving had been unusual or erratic. Barbato escorted Pereira back to the DPW and Pereira punched out. Barbato returned to the job site, at which time Gregus advised him that he had observed Pereira with a rocks glass in his hand inside the bar. At the request of Barbato, Gregus went into the Main Tavern to confirm that Pereira had been inside drinking. Sullivan confirmed that he had on two separate occasions that evening served Pereira alcohol. Gregus informed Barbato of what Sullivan had said, and both Gregus and Barbato went into the Main Tavern to again speak to Sullivan, who again confirmed what he had told Gregus.

Pereira consumed at least one beer and at least one shot of whiskey while on duty that night.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities

against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for a number of reasons enumerated in N.J.A.C. 4A:2-2.3(a), including incompetency, inefficiency or failure to perform duties (N.J.A.C. 4A:2-2.3(a)(1)); insubordination (N.J.A.C. 4A:2-2.3(a)(2)); conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)); misuse of public property, including motor vehicles (N.J.A.C. 4A:2-2.3(a)(8)); violation of federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder (N.J.A.C. 4A:2-2.3(a)(10)); and other sufficient cause (N.J.A.C. 4A:2-2.3(a)(12)). In appeals concerning such major disciplinary actions, the burden of proof shall be on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

The Employee Handbook and the DPW Alcohol/Drug Policy state that "the abuse of alcohol and/or drugs by Township employees is incompatible with the Township's obligation to seek to provide a safe and productive work environment and its responsibility to the public to insure their safety and trust in the Township." (R-4; R-5.) The Employee Handbook and the DPW Alcohol/Drug Policy also state:

> Any Township employee reporting for work and found to be under the influence of alcohol or drugs or using drugs or alcohol while at work . . . will be subject to disciplinary action up to and including termination. This policy is in effect for all employees while on Township property, to include the parking lots, or while engaged in Township business.
>
> [R-4; R-5.]

Both provide for a drug-testing program, but the DPW Alcohol/Drug Policy is more extensive and includes random testing. The DPW Alcohol/Drug Policy additionally reflects that the drug-testing program would also be to comply with the Department of Transportation regulations that it would be in effect for all CDL holders. (R-5.)

Citing the "Return to Duty Testing," appellant argues that removal is inappropriate and that at most a thirty-day suspension should apply. The Return to Duty Testing states, in pertinent part:

> Notwithstanding the above, the Township reserves the right to take disciplinary action against an employee for a positive drug or alcohol test. An employee who tests positive on a **random drug/alcohol test** may be subject to disciplinary action, but will not be terminated for testing positive on the first random drug/alcohol test. A first offense under a **random drug/alcohol test** shall result in a minimum of a thirty (30) day suspension. A first offense shall remain on an employee's record for a ten (10) year period. An employee shall be subjected to immediate termination for a second offense during the ten (10) year period. Employees who test positive to other types of drug and alcohol screening conducted in accordance with this policy may be subject to disciplinary action up to and including termination.
>
> [R-5.]

From the emphasis, it is evident that the thirty-day suspension applies specifically to a "random" test, and a random test is not implicated in this matter. Further, it is noted that "SUBSTANCE ABUSE REALTED [SIC] BEHAVIOR" reflects that "[a]ny employee engaging in the manufacture, distribution, dispending [sic], possession or use of prohibited substances on Township premises, in Township vehicles, or while on Township business may face disciplinary action, up to and including termination." (Ibid.)

Appellant argues that the Township failed to prove Pereira was under the influence of alcohol or that he was operating the backhoe unsafely, and that "he was merely taking an unauthorized break." While there is no dispute that Pereira consumed alcohol, I concur that there was no proof that Pereira was impaired. However, it is noted that there was no

test to establish Pereira's blood-alcohol concentration, in part because Pereira had denied consumption of alcohol when asked at the site by his supervisor. Additionally, while I concur that the evidence fell short of establishing that the backhoe was being operated "erratically," it likewise fell short of establishing that it was safe for Pereira to have been operating the backhoe. Further, had Pereira's conduct been merely an "unauthorized break," violations of State and federal law would not have been implicated.

The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Board must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Since West New York v. Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30–33 (2007). However, in an instance where an employee commits an act sufficiently egregious, removal may be appropriate notwithstanding the lack of prior history of infractions. See, e.g., In re Herrmann, supra, 192 N.J. 19.

According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

> Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the

> employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306, 633 A.2d 577 (App.Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).
>
> [Id. at 33–34.]

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that "the question for the courts is whether the punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Ibid. (citing In re Polk License Revocation, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. In re Carter, supra, 191 N.J. at 485.

Pereira's arguments for a suspension are unpersuasive in view of the totality of the circumstances. While on snow-removal duty receiving double-time pay, and in view of the general public, Pereira twice left his Township backhoe parked outside of the Main Tavern and entered the Main Tavern. He was inside at least ten minutes each time, and on at least one occasion he consumed beer and whiskey and fraternized with other patrons. Then, after consuming the alcohol, he returned to his Class-"A"-CDL-required HEO safety-sensitive job operating a backhoe in the vicinity of other heavy equipment and Township employees. Although there is no dispute that Pereira had no prior disciplinary history in his approximately three and a half years of employment with the DPW, his conduct was sufficiently egregious to warrant removal in the absence of prior disciplinary history, and I

CONCLUDE that sufficient cause was established by the Township to warrant Pereira's removal from his position as a heavy-equipment operator.

ORDER

I **ORDER** that the charges against Pereira are **SUSTAINED** and that the Township's removal of Pereira from his position of heavy-equipment operator, effective March 11, 2016, is hereby **AFFIRMED**.

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.

2/13/17
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 2/14/17

Date Mailed to Parties: 2/14/17

dlc

APPENDIX

WITNESSES

For Appellant:

Paul Pereira

For Respondent:

Joseph Gregus
David Valguarnera
Carmine Barbato
Dennis Henry
Robert Landolfi

EXHIBITS IN EVIDENCE

Joint

J-1 PNDA
J-2 FNDA

For Appellant:

None

For Respondent:

R-1 Incident Report of Gregus, dated January 29, 2016
R-2 Statement of Sullivan, dated January 29, 2016
R-3 Incident Report of Barbato, dated January 28, 2016
R-4 Employee Handbook
R-5 Alcohol and Drug-Free Workplace Policy
R-6 Employee Handbook Acknowledgment
R-7 Appendix A

3-22-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

April 12, 2017

Kevin Weatherbee
3452 New Moon Street
Browns Mills, New Jersey 08015

Tamara Rudow, Legal Specialist
Department of Corrections
P.O. Box 863
Trenton, New Jersey 08625-0863

Re: *Kevin Weatherbee v. Department of Corrections* (CSC Docket No. 2017-1162; OAL Docket No. CSV 16083-16) - **SETTLEMENT**

Dear Mr. Weatherbee and Ms. Rudow:

The appeal of Kevin Weatherbee, a Senior Repairer with the Department of Corrections, of his removal, on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on March 22, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on March 28, 2017. Accordingly, the time frame for the Commission to make its final decision expires on May 12, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective May 13, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16083-16

AGENCY DKT. NO. 2017-1162

IN THE MATTER OF
KEVIN WEATHERBEE,
NJ DEPARTMENT OF CORRECTIONS.

Kevin Weatherbee, petitioner, pro se

Tamara Rudow, Legal Specialist, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: March 21, 2017 Decided: March 22, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter was transmitted to the Office of Administrative Law on June 2, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 22, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 3/28/17

Date Mailed to Parties: 3/28/17

cmo

IN THE MATTER OF

WEATHERBEE, KEVIN,

APPELLANT

AND

NJ DEPARTMENT OF CORRECTIONS,

RESPONDENT

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSV 16083-2016S
AGENCY DOCKET NO. 2017-1162

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Notice of Final Disciplinary Action, dated September 19, 2016, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	Removal	9/19/16
2. HRB 84-17, as amended A1 Chronic or excessive Absenteeism	Same	Same
3. HRB 84-17, as amended E1 violation of rule, regulation, policy procedure, order or administrative decision	Same	Same

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3 (a) 12 Other Sufficient Cause	General Resignation
2. HRB 84-17, as amended A1 Chronic or excessive Absenteeism	Same
3. HRB 84-17, as amended E1 violation of rule, regulation, policy procedure, order or administrative decision	Same

C. The parties have agreed to the following:

1. To date, Appellant has not served any suspension without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Approved leave without pay.
4. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
5. As set forth in paragraph B(1), the Appellant shall not serve any working days suspension. The Appellant shall not receive any back pay, counsel fees or any other monetary relief.
6. Appellant agrees not to seek or accept employment with the Department of Corrections at any time.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as

amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(2).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully

CERTIFICATION

I, Kevin Weatherbee, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 03/20/2012

Kevin Weatherbee

3-28-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

June 20, 2017

Arnold S. Cohen, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Nicole Castiglione, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625-0114

Re: *David Clark v. New Jersey City University* (CSC Docket No. 2017-229 and OAL Docket No. CSV 11605-16)

Dear Mr. Cohen and DAG Castiglione:

The appeal of David Clark, a Senior Building Maintenance Worker with New Jersey City University, of his removal, effective June 27, 2016, on charges, was before Administrative Law Judge Kelly J. Kirk (ALJ), who rendered her initial decision on March 28, 2017, recommending modifying the removal to a 60 working day suspension. Exceptions were filed on behalf of the appellant and on behalf of the appointing authority.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on May 12, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date the Commission secured a 45-day extension of time to render its final decision no later than June 26, 2017. *See N.J.A.C.* 1:1-18.8. However, since one of the three Commission members must be recused from participating on this particular matter, there is not a quorum of members available to vote. Accordingly, the Commission sought consent from the parties, as required, to secure a second 45-day extension. However, the appellant did not provide consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective June 27, 2017.

Since the appellant's removal has been modified, he is entitled to back pay, benefits and seniority for the period 60 working days from the onset of his separation until he is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. However, pursuant to *N.J.A.C.* 4A:2-2.12, as charges have been upheld and major discipline imposed, the appellant is not entitled to counsel fees. Proof of income earned and an affidavit of mitigation should be submitted to the appointing authority within 30 days of said

reinstatement. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Kelly J. Kirk, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11605-16
AGENCY DKT. NO. 2017-229

IN THE MATTER OF DAVID CLARK,
NEW JERSEY CITY UNIVERSITY.

Arnold Cohen, Esq., for appellant David Clark (Oxfeld Cohen, attorneys)

Kristen L. Settlemire, Deputy Attorney General, for respondent New Jersey City University (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 10, 2017 Decided: March 28, 2017

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

New Jersey City University terminated senior building maintenance worker David Clark for conduct unbecoming a state employee, use of obscene language/threats, and inappropriate physical contact with a coworker.[1]

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[1] The Preliminary Notice of Disciplinary Action and Final Notice of Disciplinary Action do not reference N.J.A.C. 4A:2-2.3.

PROCEDURAL HISTORY

On or about June 14, 2016, New Jersey City University served David Clark with a Preliminary Notice of Disciplinary Action (PNDA). (P-4.) A departmental hearing was held on June 27, 2016, and the charges of conduct unbecoming a state employee, use of obscene language/threats, and inappropriate physical contact with a coworker were sustained. (P-5.) On or about June 28, 2016, New Jersey City University served Clark with a Final Notice of Disciplinary Action (FNDA), removing him effective June 27, 2016. (P-5.)

Clark appealed and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on August 1, 2016. The hearing was held on November 10, 2016, and December 9, 2016, and the record remained open for post-hearing submissions. The record closed on February 10, 2017.

FACTUAL DISCUSSION

Quashanna Smith, Donald Dantzler, Sumintra Perry, Robert Piaskowsky and Leon Sanders testified on behalf of New Jersey City University. David Clark testified on his own behalf.

Background

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

David Clark has been employed by New Jersey City University (NJCU) as a senior building maintenance worker since December 12, 2015. Quashanna Smith has been employed by NJCU as a building maintenance worker since January 25, 2015. Leon Sanders has been employed by NJCU in the housekeeping department for approximately five years, and Donald Dantzler has been employed by NJCU in the

housekeeping department for thirteen years. Sanders and Dantzler know Clark and Smith from working at NJCU. Sumintra Perry has been employed by NJCU for almost twenty-three years. Perry started as a building maintenance worker, but she has been night supervisor for the past fifteen years. Building maintenance workers are responsible for cleaning the buildings, including offices, classrooms, bathrooms, hallways and floors.

On June 9, 2016, Clark was working at "K" building. After Smith completed her work at another building, Perry instructed Smith to go to "K" building to complete the cleaning of the building. Smith went to "K" building at approximately 10:30/10:45 p.m. At "K" building, Smith and Clark engaged in a verbal altercation over work duties. After the verbal altercation, Clark and Smith resumed working.

Later, at approximately 11:15 p.m., as Clark, Smith, Sanders and Dantzler were walking to another building to clock out, another incident occurred between Clark and Smith, during which Clark made physical contact with Smith. After the incident, Clark and Smith each clocked out. While clocking out, Smith told Jay Smalls, the shop steward, about the incident. While in the parking lot, Clark made a verbal complaint about Smith to Perry.

In the morning on June 10, 2016, Perry spoke to Smith about the incident. Perry reported the incident to her supervisor, Gary Klaus, and Klaus thereafter reported the incident to Robert Piaskowsky. Piaskowsky has been employed by NJCU since September 1996 and he has been the director of Human Resources since June 1999.

Testimony

Quashanna Smith

When Smith arrived at "K" building she started on the top floor and worked her way down. When she got to the third floor, Clark and a few other men were there doing floor work. Smith was walking with a garbage can toward the restroom, but Clark blocked her. Clark is a big guy and the workers called him "Big Dave." Smith later

testified that when she got to the third floor there were chairs in the middle of the aisle. Smith told Clark to move out of the way, and he told her to "f-cking wait." Smith said, "Get the f-ck out of my way." Clark replied, "Don't get f-cking mad at me because you got to come in here and do our job." Smith told Clark she was not in the mood and to leave her alone. Clark replied, "Well, don't get mad at me because you've got to come clean up the building." Smith said, "If you all would have did y'all job, I wouldn't have to clean up the building."

Smith also testified that when Clark blocked her she said, "Watch out, Dave—Big Dave." He said, "Are you f-cking mad?" Smith was trying not to curse and said, "Then get out of here." Clark said, "Are you mad because you got to come in here and do our job?" She said, "Nobody ain't mad. Maybe if you all would have did your jobs, I wouldn't have to come in here to do your job." Smith then proceeded to the restroom and continued to work.

Later, at approximately 11:15 p.m., the maintenance workers were walking to clock out. Smith was walking and talking with Dantzler and Sanders, and another coworker was walking behind them. Clark was sitting on the bench on his phone waiting to clock out. Smith had pizza in her hand, and Clark said to her out of nowhere, "I should f-cking rob you." Smith looked at him and Clark repeated his statement and stood up in front of her. Smith said, "Whatever, you know, Big Dave." Smith also testified that she said "Dave, if you don't get out of my face---." Clark said, "What, you going to go get your baby father?" Smith replied, "What? You don't even know my baby father. You don't know nothing about him." Clark replied, "Oh, I know about him. I know a lot about him." Smith said, "Whatever, Dave. You know, whatever." Smith also testified that she said, "You don't know sh-t about him. You know nothing." Clark then proceeded to put his hands on Smith, and she said to Clark "don't f-cking touch me." Clark did it a second time, and again Smith said, "Don't f-ing touch me." Clark did it a third time and said to Smith, "What, you gonna pick up the brick?," referring to a nearby brick. Smith responded, "If you f-cking touch me again, yes, I'm going to pick up the brick and I'm going to bust you with it." Clark touched Smith again and she went to pick up the brick, but two coworkers said to Clark, "Stop putting your hands on her. She asked you not to touch her. Why you touching her?" Clark replied, "You all get on my

nerves at this job. It's always something. You all come here one day, you're all jolly. The next day, you're all, you know, hard up." Smith said, "Don't put your hands on me, like I said." Clark called Smith a "f-cking fat b-tch." Smith said, "I'm not your b-tch." Your girl is a b-tch.'" Clark said, "No, I don't disrespect my girl." Smith said, "Well, you're not going to disrespect me." Clark replied, "Yeah, you're right." Smith kept walking. Smith saw Smalls, the shop steward, and she approached him and asked Smalls to tell Clark not to put his hands on her or say anything to her. Smalls pulled Clark aside and talked to him. Then Smalls returned to Smith and asked her if she was okay. Smith said, "Yeah, I'm good. Just talk to him." Smith did not say anything about the incident to anyone but Smalls. Smith left work and went about her business, and she thought Clark went about his.

On June 10, 2017, Smith was scheduled to work from 11:00 a.m. to 7:30 p.m. When she arrived at approximately 10:30 a.m., she was pulled aside by Perry. Smith thought Perry wanted to talk to her about a work project, but the supervisor said, "Well, while nobody's here, let me talk to you now. What is going on with you and this guy?" Smith responded, "What guy?" and Perry said, "Dave." Smith said, "Nothing—nothing going on." Perry told Smith that Clark had flagged her down the night before as she was leaving and made a complaint about Smith. Smith laughed it off because at that point she thought it was funny that Clark had made a complaint about her. Perry said that Clark told her Smith had come to "K" building and was harassing him, and calling out his name. Smith denied that she had done so, and told Perry, "No. What it was, was Mr. Clark put his hands on me and I told him not to f-cking touch me." At that point, Smalls entered and Perry told Smalls that she would need to take Smith's statement and get Clark's statement.

Smith testified that she could have told Perry the night before what had happened, but after Smith talked to Smalls, she left it alone. Smith thought that maybe Clark was going through a rough day, and that was why he took it upon himself to make a complaint that she did something to him.

Smith testified that Clark did not touch her, he hit her. "He didn't touch me. He hit me, like, hit me. Hit me to the point when I went over and I was like, 'Don't touch

me.' About the third time he did it, I said, 'Don't f-cking touch me. Don't put your hands on me.' And he said, 'What? You gonna pick up the brick?'" Picking up a brick was not even on her mind, but she said, "You f-cking touch me again, yeah, I'm gonna pick up the brick and I'm gonna bust you with it." He touched her again and she was going to pick up the brick, but her coworkers told Clark to stop touching Smith because she asked him not to touch her.

Smith also testified that "hit" and "touched" are the same thing.

A. Hit and touched—not the same thing?
Q. Oh, so hit and touch are the same thing.
A. Well, to me, it is. Well, he hit me. He put his hands on me. He should not put his hands on me.
Q. So he touched you.
A. He hit me.
Q. I thought you said hit and touch were the same thing.
A. He hit me. He touched me. Like, what do you want me to say? He should not put his hands on me, point blank. I'm not his child. I'm not his friend. I was a coworker, so—

Smith further explained how Clark touched her, "He put his hands—like, I'm standing here, I'm walking. He hit me and I "linked" over. Like, he kept hitting me on my right shoulder." Clark hit her with one hand, open fist. His hand was open, like when pushing someone, but he was hitting her, which caused her to move. Smith explained that Clark had put his hands on her right shoulder. She did go back and forth verbally with Clark, but she never touched him. The incident made her feel upset at the time. She was angry because they were at work and no one should put their hands on anyone, and if there is nothing nice to say, nothing should be said.

The other witnesses to the earlier verbal exchange inside the building were Sanders and "Martin," another coworker. Dantzler was down the hallway. Smith had no exchange with Clark that day outside the presence of witnesses.

With respect to the Voluntary Statement reflecting "sexual harassment," Smith testified, "Sexual harassment. Like I told them, it was harassment and assault. Sexual

harassment, I guess, at NJCU—I don't know if they took it as, because he put his hands on me . . . ."

David Clark

Clark knows Smith from work, and she was called to "K" building to complete the work. Smith got off the elevator on the fourth floor "talking garbage" and cursing at Clark, saying, "you motherf-ckers need to learn how to do your job and do it right so nobody have to come over here and clean it up." Clark did not say anything to her until she approached him and pushed him. There were only three classrooms left, and Smith did not have to do anything else. Clark asked Smith why she was speaking to him like that and he said it was not his fault, and that anything Smith had to say she should have said to her supervisor and not to Clark. Smith said, "You need to do your f-cking job." Clark was pulling and trying to tie the wax bucket and mop up so that it would not spill and trying to move chairs out of Smith's way so she could get by, and Smith said, "Get the heck out of my way." Clark said, "Wait, your fat ass needs to wait." Smith said, "Just get the f-ck out my way," and Clark moved out of the way and let Smith proceed. She was cursing and being disrespectful so he did not say anything further and went back to what he was doing. He did not want to go back and forth with anyone. He was just going to wait until he got back to the office and tell the supervisor, because he did not want anyone to say that he started the situation when he did not and was just there doing his job.

Later, when they were leaving, Sanders was in front and Smith was on Clark's right. Dantzler was walking behind them after coming out of another building. Dantzler heard everything that was going on. Clark took his four fingers and laid them on Smith's shoulder. He tapped her on her shoulder and said "Relax, the day is over with, there is no sense in you being hostile, the day is over with." Smith was cursing at him outside and he was not taking that. She was saying, "Motherf-cker, don't touch me." He touched her shoulder and said, "Relax the day is over with." She said, "Don't f-cking touch me." Clark said, "All right, no problem." Clark also testified that Smith said, "Don't f-cking touch me or I will bust you in the head with this brick." Smith kept talking and being disrespectful, and Clark just kept walking. Smith went over to Smalls and told him

about it, and Smalls told Clark not to say anything to Smith. Clark replied, "I don't say nothing to her, I never did say anything to her but I think she needs to be approached because she was called over to the building to do her job and she was cursing at me." Clark also testified that he touched Smith twice. After the second time he touched her she said, "Don't touch me no f-cking more." He said, "Relax, why are you cursing at me?" He just moved away from there, and that is when she ran over to Smalls.

Later, Clark saw Perry in the parking lot and told Perry that Smith came to the building being very disrespectful, cursing at Clark as she got off the elevator as though he had been the one calling her to come do his job. Perry left, and Clark did not say anything to anyone else about the incident.

On Friday, Piaskowsky approached Clark and said that he needed to speak to Clark in his office about a matter. Clark was given a letter and told that he cannot work and was being removed from the premises because of the incident. Clark asked why he was being removed if he had not started the situation, and was told that it was their understanding he had started it. Clark gave a statement and left.

Clark denied telling Smith he was going to rob her. He testified that he is fifty years old, a grown man, and does not talk to people like that. He did not say that he would "f-ck up her baby's father." He does not know Smith; does not talk, socialize, or eat lunch with her; knows nothing about her; and does not live in the same area. Other than a period of time when both Clark and Smith were driven home by the same person, Clark did not speak to Smith.

Donald Dantzler

Dantzler, Smith, Clark, Sanders, and Smalls left the buildings where they had been working and were all walking together to the shop to sign out and go home. They started walking at approximately 11:00, but they were walking slowly and talking, and stopping occasionally because they are not supposed to go into the office until 11:15 p.m. Everyone was glad to be getting off work. Sometimes people laugh and play around because they are happy to be leaving. Clark and Smith were walking and Clark

"touched her on the shoulder," and she said, "David. Stop. You know, I'm not playing." Dantzler did not see any animosity and thought Clark and Smith were playing. Clark touched Smith again, and she said, "Dave, I'm not playing." Dantzler was still walking and talking to Sanders and not paying it any attention, but when Clark touched Smith a third time, Smith cursed at Clark and Dantzler realized Smith was not playing. That was the end of it, and Clark walked off to the side and did not touch Smith again.

Dantzler saw Clark touch Smith's shoulder two or three times. There was no real force. It was nothing more than just touching. But as far as Dantzler was concerned, if a woman says to stop, it should stop. Dantzler did not hear any other verbal exchange between Clark and Smith. Dantzler did not hear Clark say anything about robbing Smith or about her baby's father.

Sumintra Perry

That night, as they were all leaving work, Clark staring cursing, going up and down the street, and he came to Perry's car, so Perry asked him what happened. Clark said, "Don't ever put that fat mother-cker back in this building to work with me anymore." Perry asked why, and Clark told her it was because Smith kept complaining about everything in the building. Clark was very upset. Perry told Clark she would deal with it the following day. Perry did not speak to Smith that night. Perry spoke to Smith the following day about what had happened, and Smith told Perry that "David pushed on her." Smith also told Perry that she had already talked to Gary Klaus that morning about what happened, so Perry left it alone after that. Other than speaking to Clark the night of the incident and Smith the following day, Perry spoke to no one else about the incident.

Robert Piaskowsky

Robert Piaskowsky is responsible for employee relations, benefits, staffing and personnel records. Employees are not permitted to use profanity or obscene language on the job. NJCU has such a policy because they are a higher-education institution with students throughout the campus, and therefore employees are required to have a level

of professionalism. Employees are also not permitted to make unwanted physical contact with coworkers, or engage in physical violence, harassment, sexual harassment, or threats against other employees. Clark would have been aware of the policies prohibiting such conduct because Clark would have signed the policies when he was hired.

Piaskowsky became aware of the incident from Klaus, the day after it occurred. His understanding was that there had been an altercation between Clark and Smith, Clark allegedly touched Smith, and touched her two more times after she told him to stop. Piaskowsky received a report from public safety on the investigation and witness statements from Dantzler and Sanders. Based upon the allegations, Clark was suspended because it was not appropriate to have him on campus until there was an adjudication of the matter. In a situation involving the use of obscene language, threats, and inappropriate physical contact with a coworker, the penalty sought would be removal because that cannot be tolerated, especially not at a college. People in certain positions have access to the campus, as do students, and minors.

Leon Sanders

Sanders witnessed the incident between Clark and Smith. At approximately 11:00 p.m., Sanders, Smith, and Dantzler were walking. Clark was already outside. Clark and Smith "were jokingly playing or whatever," and Clark touched Smith's shoulder area. Smith asked Clark to keep his hands to himself. Clark touched her again, and she again asked him not to touch her. Clark touched her again, and Smith yelled at Clark to "keep his f-cking hands off of her." Sanders kept walking. After Smith yelled at him, Sanders knew it was not joking.

Sanders thought they were jokingly playing because he has seen them talk before and it did not look serious, because they were both smiling. Sanders did not know if Clark took it seriously when Smith first told him to stop, or if he thought she was playing, because he touched her again. Sanders did not recall Clark saying anything about robbing Smith or about him "f-cking up her baby's father." Clark did make a

statement, which Sanders took to be joking, that he will go to jail and beat her baby's father, because he is incarcerated. She replied, "I doubt if that will happen."

Additional Findings of Fact

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

The testimony and incident reports of Clark and Smith vastly differed as to what actually occurred on June 9, 2016, and the testimony of both was inconsistent with their own incident reports and with the other witnesses' testimony. Additionally, much of their testimony about their conduct was not probable under the circumstances. For the reasons hereinafter detailed, I credit the testimony of Dantzler and Sanders to establish what occurred on June 9, 2016, rather than the testimony of Clark or Smith.

Dantzler's testimony was concise and consistent with his statement that he saw Clark touch Smith on the shoulder three times, and that Smith told him to stop each time before she used profanity. Likewise, Sanders' testimony was concise and consistent with his statement that Clark touched Smith three times, twice after she told him to keep his hands off her.

Clark's testimony that he only touched Smith twice, and that she did not instruct him to stop until the second time he touched her, was overborne by the testimony of Dantzler and Sanders. Additionally, Clark's testimony, whereby he attempted to portray

his exchanges with Smith as polite and mannerly, was improbable under the circumstances. Clark also testified that Smith had pushed him, but Clark failed to note that Smith had pushed him in his Voluntary Statement and there was no evidence that Smith had pushed him.

With respect to Smith's testimony, if she had been threatened or harassed it makes no sense that when she was asked by Perry the following morning what was going on with Clark, Smith would have said nothing was going on. Likewise, Smith did not mention to Perry that Clark threatened to rob her or to "fuck up her baby's father." Additionally, Smith's Voluntary Statement, completed five days later, reflects that the incident was "sexual harassment," but there is nothing in the record to corroborate any sexual harassment. Further, although Smith's statement reflects that Clark said, "I should rob you" about three times, Dantzler and Sanders denied hearing Clark say that to Smith even one time. Likewise, although Smith's statement reflects that Clark "hit me and my left[2] arm shoulder part about five times," the credible testimony of Sanders and Dantzler was that Clark touched her shoulder three times.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

Smith and Clark both used profanity while engaged in a verbal altercation over job duties while in "K" building. Later, when Smith, Clark, Dantzler and Sanders were walking toward the office to punch out for the night, Clark touched Smith's shoulder with his fingers, and she responded by instructing him not to touch her. Clark touched Smith's shoulder a second time, and Smith again instructed him not to touch her. Clark touched Smith's shoulder a third time, and Smith yelled at him not to "f-cking" touch her. Dantzler and Sanders did not realize there was any animosity or that Smith and Clark were not playing around until Smith's use of profanity after the third time Clark touched her. Clark did not "strike" Smith.

[2] Smith testified that it was her right shoulder.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(6) and (12). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Clark is charged with conduct unbecoming a state employee, use of obscene language/threats, and inappropriate physical contact with a coworker. The burden of proof is on New Jersey City University to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Appellate Division also held that conduct unbecoming is "any conduct

which adversely affects the morale or efficiency of the bureau." Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

The FNDA alleges that Clark "struck a female employee several times on the shoulder after being told to stop and used obscene language." There did not appear to be a dispute that NJCU has written policies prohibiting profanity, threats, harassment, and assault in the workplace, for which Clark would have signed, but no such policies were presented. Nevertheless, common sense would dictate that whether there exist written policies or not, such conduct is not appropriate or acceptable. From the testimony it did not appear that the use of obscene language by the maintenance workers was uncommon, and the evidence reflects that Clark and Smith both used obscene language that evening. Accordingly, I **CONCLUDE** that the charge of use of obscene language is sustained. However, while such language is certainly not appropriate or acceptable at work, it is noted that Clark and Smith were in the presence only of other maintenance workers, and not any students, faculty, or others.

It is noted that while the PNDA alleges that Clark made "remarks about [Smith's] baby's father and robbing her," the FNDA did not include this allegation, but both charge Clark with use of threats. The testimony of Clark and Smith was unreliable, and neither Sanders nor Dantzler heard Clark say anything about him robbing Smith. Additionally, with respect to the remarks about her child's father, Sanders heard Clark say that he would go to jail and beat her baby's father, to which Smith responded that she doubted that would happen. Sanders thought the two were kidding around with each other, as he did not think anyone would deliberately go to jail just to fight someone. In view of the foregoing, the evidence falls short of establishing that Clark threatened to rob Smith, and given the attenuated nature of the comment regarding going to jail and beating her child's father, coupled with Sanders's belief that Clark was kidding, I **CONCLUDE** that the charge of use of threats is not sustained.

Notwithstanding the foregoing, the evidence reflects that Clark made physical contact with Smith three times, including twice after being told by Smith to stop. Contrary to the allegation in the FNDA, the evidence fell short of establishing that Clark

"struck" Smith, as opposed to "touched" Smith. Moreover, while inappropriate and unacceptable, it is noted that the touch was neither forceful nor sexual in nature. Nevertheless, there is no justification or excuse for Clark's having "touched" or made physical contact with a coworker, especially after Smith instructed Clark not to touch her. Accordingly, I **CONCLUDE** that the charge of inappropriate physical contact with a coworker is sustained.

In view of the totality of the facts and circumstances of this case, I **CONCLUDE** that Clark's conduct was unbecoming a public employee.

The penalty imposed by NJCU was removal. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. However, in an instance where an employee commits an act sufficiently egregious, removal may be appropriate notwithstanding the lack of a prior history of infractions. See, e.g., In re Herrmann, 192 N.J. 19 (2007). According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

> Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).
>
> [Herrmann, supra, 192 N.J. at 33–34.]

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that "the question for the courts is 'whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" Ibid. (quoting In re Polk, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle, where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. Carter, supra, 191 N.J. at 485.

Clark has no prior disciplinary history, but it is noted that his employment with NJCU was of short duration. The credible evidence reflects that Clark and Smith had a verbal altercation at work and Clark later touched Smith on her shoulder three times, despite her instructions that he not touch her. Although the touch was neither forceful nor sexual in nature, such conduct cannot be countenanced. However, Clark's conduct does not warrant his termination. Rather, I **CONCLUDE** that a sixty-day suspension is an appropriate penalty in this matter.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, use of obscene language, and inappropriate physical contact with a coworker are **SUSTAINED**, and that the penalty of removal shall be **MODIFIED** to a sixty-day suspension, and that Clark shall be 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, P.O. 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.

3/28/17
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 3/28/17

Date Mailed to Parties: 3/28/17

dlc

APPENDIX

WITNESSES

For Appellant:

David Clark

For Respondent:

Quashanna Smith
Donald Dantzler
Sumintra Perry
Robert Piaskowsky
Leon Sanders

EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:[3]

P-1 Voluntary Statement of Quashanna Smith
P-2 Voluntary Statement of Donald Dantzler
P-3 (Not in Evidence)
P-4 PNDA
P-5 FNDA
P-6 Correspondent Receipt
P-7 (Not in Evidence)
P-8 Voluntary Statement of Leon Sanders
P-9 (Not in Evidence)
P-10 Voluntary Statement of David Clark

[3] Respondent's exhibits were pre-marked with "P."

4/5/17

STATE OF NEW JERSEY

In the Matter of Robert Americk
Union County, Department of Engineering
Public Works Facilities

CSC DKT. NO. 2017-1750
OAL DKT. NO. CSV 18513-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 18513-16
AGENCY REF. NO. 2017-1750

IN THE MATTER OF ROBERT AMERICK, UNION COUNTY, DEPARTMENT OF ENGINEERING PUBLIC WORKS FACILITIES.

Eric D. Brophy, Esq., for Appellant Robert Americk (Diegnan & Brophy, attorneys)

Rachel M. Caruso, Esq., for respondent Union County Department of Engineering

Record Closed: February 23, 2017 Decided: February 23, 2017

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on December 8, 2016, for hearing as a contested case, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties reached an amicable resolution of the matter, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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.

February 23, 2017
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Date Mailed to Parties: JAN 28 2017
dlc

1-28-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ROTH D'AQUANNI, LLC
COUNSELLORS AT LAW
150 Morris Avenue, Suite 303 ♦ Springfield, New Jersey 07081
TEL 973.258.1288 ♦ FAX 973.258.1171

RACHEL M. CARUSO, ESQ.
New Jersey

February 23, 2017

VIA FAX (973-648-6124) ONLY
Honorable Jude Tiscornia, ALJ
N.J. Office of Administrative Law
33 Washington Street, 7th floor
Newark, New Jersey 07102

RE: Americk v. Union County
OAL Docket No.: CSV 18513-2016N

Dear Judge Tiscornia:

As you are aware, this office represents the County of Union in the above captioned matter. I am happy to provide the Court with a fully executed copy of the Stipulation of Settlement, fully disposing of all issues in this matter.

Based on the settlement, it is the parties' request that today's telephone status conference, scheduled for 3:30 p.m. be cancelled as same is now moot. The parties thank the Court for its assistance in amicably settling this matter.

Should the Court require further information, please do not hesitate to contact the undersigned.

Very truly yours,
ROTH D'AQUANNI, LLC

By: RMCaruso
Rachel M. Caruso, Esq.
rcaruso@rdlegal.com

Enclosure
C: Eric D. Brophy, Esq. (via email w/encl.)
Joe Graziano, Director (via email w/encl.)

C:\ACR\Union County\Americk, Robert\August 2016\OAL\Judge Tiscornia-ltr forwarding settlement 2.23.17.docx

ROTH D'AQUANNI, LLC
150 Morris Avenue, Suite 303
Springfield, NJ 07081
973-258-1288

IN THE MATTER OF

ROBERT AMERICK

COUNTY OF UNION
PUBLIC WORKS & FACILITIES MGMT.
OAL DOCKET NO.: CSV 18513-2016N

UNION COUNTY, NEW JERSEY
STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Robert Americk ("Employee") and Union County ("County"), hereto that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. Employee's pending OAL appeal, docket number CSV 18513-2016N shall be considered settled, without the need for a hearing.

2. The penalty for the Preliminary Notice of Disciplinary Action dated September 23, 2016 shall be amended to a six (6) month suspension without pay, effective December 1, 2016, via an amended Final Notice of Disciplinary Action to be issued by the County, provided that Employee fulfills the conditions as set forth hereinbelow.

3. Employee shall obtain his CDL Class A license as a condition of returning to employment with the County. If Employee fails to obtain his CDL Class A license before June 1, 2017, he will not be permitted to return to his County employment and he will be considered terminated from the County, effective June 1, 2017.

4. If Employee successfully obtains his CDL Class A license, he will be returned to his position as a Tree Maintenance Worker 2 effective June 1, 2017, less six (6) months of seniority, at the salary negotiated for 2017 between the County and the Park Maintenance Union. If no new salary has been negotiated for 2017, Employee shall return to work at the salary existing for the Tree Maintenance Worker 2 as of the date of suspension. Employee shall receive sick, vacation and personal time, prorated for calendar year 2017, based on his return to work date.

5. Employee shall execute a Last Chance Agreement simultaneous with this Agreement, the terms of which are incorporated herein as if set forth at length

and to be in effect for two (2) years from the date of his return to work, until June 1, 2019.

6. Employee voluntarily enters into this Stipulation and Settlement.

7. Employee voluntarily and in consideration of the above, hereby waives and releases the County, its employees, officials, agents and assigns from all claims, stemming from the instant charges or the basis of these charges, that s/he may have or have had as of the date of this Agreement, against the County, its employees, officials, agents and assigns, including but not limited to all discrimination claims, liabilities, costs, and attorney fees under federal, state and local statutory and or common law, including Title VII of the Civil Rights Act ("Title VII," 42 U.S.C. 2000(e) et seq.), the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act (the "ADEA," 29 U.S.C. 621 et seq.), the Equal Pay Act ("EPA"), the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.) and the New Jersey Civil Rights Act.

a. This Waiver and Release specifically does not in any way waive or limit Employee's right to file a charge with or testify, assist or participate in an investigation, hearing or proceeding conducted by the U.S. Equal Employment Opportunity Commission ("EEOC") under the ADEA, Title VII, the ADA or the EPA.

b. Employee hereby agrees to waive his/her right to any monetary or equitable recovery should s/he or any federal, state or local administrative agency pursue any claims on his/her behalf arising out of or related to his/her employment with the County and/or separation from such employment stemming from the instant charges that form the basis for this Agreement and promises not to seek or accept any award, settlement or other monetary or equitable relief from any source or proceeding brought by any person or governmental entity or agency on his/her behalf or on behalf of any class of which s/he is a member with respect to any of the claims s/he has herein waived.

c. By agreeing to the foregoing terms Employee does not provide a blanket, General Release to Employer. It is therefore agreed and understood that Employee shall retain all rights, claims, defenses, causes of action or the like that may arise in the future and those that do not stem from the instant charges and Employee shall retain the right to assert any claim that may arise in the future against the County, its employees, officials, agents and assigns under federal, state and local statutory and or common law.

8. Employee agrees that the County has advised her/him to consult an attorney and/or Union Representative before accepting and executing this agreement and that s/he has been afforded the opportunity to consider the terms of this Agreement with advice of counsel.

9. Employee understands that s/he may revoke this Agreement for a period of seven (7) calendar days following the day s/he signs this Agreement. Any revocation within this period must be submitted, in writing, to Robert Barry, Esq., County Counsel, Administration Building, Elizabethtown Plaza, Elizabeth, New Jersey 07207, and state "I hereby revoke my acceptance of our negotiated settlement agreement and general release." Said revocation must be postmarked within seven (7) calendar days after Employee signs this Agreement and General Release. This seven (7) day period cannot be changed or waived by Employee or the County.

10. Each party shall bear the costs of their own legal fees.

11. Employee shall not institute any appeal or any other action with respect to this matter.

12. This settlement agreement is not intended to establish precedent in any future disciplinary matters.

EMPLOYEE

DATED: 2-10-17

Robert Americk

EMPLOYEE REPRESENTATIVE

DATED: 2/14/17

Eric D. Brophy, Esq.

COUNTY OF UNION

DATED: 2/23/17

RACHEL M. CARUSO, ESQ.
SPECIAL COUNSEL FOR COUNTY

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4-5-17

STATE OF NEW JERSEY

In the Matter of Hugh Ames
Township of South Orange,
Department of Public Safety

CSC DKT. NOS. 2015-121 & 2015-884
OAL DKT. NOS. CSV 09157-14 & 12669-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
(CONSOLIDATED)
OAL DKT. NOS. CSV 09157-14
and CSV 12669-14
AGENCY DKT. NOS. 2015-121
and 2015-884

IN THE MATTER OF HUGH AMES,
TOWNSHIP OF SOUTH ORANGE
DEPARTMENT OF PUBLIC SAFETY.

Todd J. Gelfand, Esq., for appellant Hugh Ames (Barker, Gelfand & James, attorneys)

David L. Epstein, Esq., for respondent Township of South Orange (Post, Polak, Goodsell & Strauchler, attorneys)

Record Closed: February 17, 2017 Decided: February 24, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

Appellant Hugh Ames filed an appeal from a Final Notice of Disciplinary Action dated July 2, 2014, issued by respondent Township of South Orange Department of

Public Safety (Department) providing for his fifty-day suspension and demotion to police sergeant effective July 10, 2014. The Civil Service Commission (Commission) transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 18, 2014, for determination as a contested case under OAL Dkt. No. CSV 09157-14. Subsequently, appellant filed a separate appeal from a Final Notice of Disciplinary Action dated September 10, 2014, providing for his suspension for a fifty-day suspension and demotion to police officer effective October 16, 2014, which was transmitted to and filed with the OAL on September 30, 2014, under OAL Dkt. No. CSV 12669-14.

On June 2, 2015, I issued an order consolidating the matters. Prior to the commencement of a scheduled hearing, the parties engaged in discussions toward an amicable resolution of the matter. Under letter dated February 17, 2017, counsel for respondent forwarded the attached Confidential Settlement Agreement and Release, indicating the terms of agreement between the parties.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 24, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 3-1-17

Date Mailed to Parties: MAR 1 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT ("Agreement") is reached by and between the Township of South Orange Village, the Township of South Orange Village Police Department (collectively "Township") and Hugh Ames (hereinafter "Ames", "you", or "your") who is currently employed by the Township as a Police Officer:

RECITALS:

A. As of October 27, 2012, Ames had been employed by the Township as a Police Officer for approximately 30 years and held the position and rank of a Step 2 (top) Lieutenant on the Township's Police Force;

B. On or about October 27, 2012 a Preliminary Notice of Disciplinary Action (hereinafter "PNDA 1") was issued and served by the Township upon Ames, asserting violations allegedly having occurred on or about June 30, 2012 (hereinafter referred to as the "McKendall Incident");

C. On or about March 27, 2013 a second Preliminary Notice of Disciplinary Action (hereinafter "PNDA 2") was issued and served upon Ames asserting violations allegedly having occurred on or about January 15, 2013 (hereinafter referred to as the "Wald Incident") proposing termination of Ames' employment for said alleged violations;

D. On or about April 10, 2013 a third Preliminary Notice of Disciplinary Action (hereinafter "PNDA 3") was issued and served upon Ames asserting violations allegedly having occurred on or about February 22, 2013 (the "Dispatcher Incident") proposing termination of Ames' employment for said alleged violations;

E. Ames went out on sick leave beginning April 2, 2013 and was scheduled to return to work on July 15, 2013;

F. Ames was suspended with pay on July 15, 2013, pending final disposition of disciplinary proceedings;

G. On July 29, 2013 Ames sent a Notice of Tort Claim to counsel for the Township via facsimile, wherein he raised potential claims against the Township including, without limitation, age discrimination;

H. A hearing was held with regard to PNDA 1 and the McKendall Incident on or about August 6, 2013;

I. Hearings were held before a hearing officer on PNDA 2 and PNDA 3 on December 27, 2013, January 28, 2014, February 4, 2014, February 11, 2014, and February 25, 2014;

J. On or about April 11, 2014, the hearing officer of PNDA 1 (the McKendall Incident) upheld a five (5) day suspension of Ames, finding that certain of the violations had occurred and a Final Notice of Disciplinary Action was issued on or about April 29, 2014, upholding the five (5) day suspension of Ames;

K. Ames filed a Complaint on an Action in Lieu of Prerogative Writ, in the Superior Court of New Jersey, Essex County, Docket No L-2977-14 ("Essex Case") seeking to appeal and overturn the finding and suspension on PNDA 1 (McKendall Incident) and the FNDA entered thereon and said Essex Lawsuit is still pending;

L. The hearing officer of PNDA 2 (Wald Incident) recommended, in a written decision dated June 29, 2014, to uphold a fifty day (50) day (or 3 months based upon an 8

hour work day) suspension of Ames under PNDA 2, and determined that Ames should be demoted to the rank of Sergeant;

M. The hearing officer of PNDA 3 (Dispatcher Incident), in a written decision dated August 1, 2014, recommended a fifty day (50) day (or 3 months based upon an 8 hour work day) suspension of Ames under PNDA 3, with the suspension to be stayed pending any appeal relative to PNDA 2, and recommended that Ames should be demoted to the rank of Sergeant;

N. On or about July 10, 2014, a Final Notice of Disciplinary Action was issued on PNDA 2 (Wald Incident), upholding the fifty day (3 working month) suspension of Ames (which became effective on the same day, July 10, 2014) and further demoting him to the position and rank of Sergeant;

O. On or about September 10, 2014, a final Notice of Disciplinary Action was issued on PNDA 3 (Dispatcher Incident), effective as of and on that day, demoting Ames to the rank and position of Patrol Officer;

P. Ames served his suspensions (without pay) as aforementioned, which ended on October 16, 2014;

Q. On or about October 20, 2014, Ames returned to work as a Patrol Officer;

R. Ames filed appeals of the decisions of the hearing officer and Final Notices of Disciplinary Action on PNDA 2 and PNDA 3, with the New Jersey Civil Service Commission, to be tried before the New Jersey Office of Administrative Law (PNDA 2 or the Wald Incident being filed under OAL , Docket no. CSV-09157-2014N, Agency Reference # CSC Docket # 2015-121 and PNDA 3 or the Dispatcher Incident being filed under OAL Docket no. CSV-12669-2014N; Agency Reference # Docket 2015-884) with

both such appeals having been consolidated (the "OAL Cases") seeking to overturn the PNDA's, FNDA's and decisions and sanctions thereon;

S. As of the date of this Agreement to OAL Cases and the Essex Case are pending and awaiting trial;

T. In addition to the claims indicated in his Notice of Claim, Ames seeks, in the Essex Case and in the OAL Cases, among other things, a determination that the charges set forth in PNDA 1, PNDA 2 and PNDA3 were not supported and that the charges should have been dismissed, rescission and overturning of his demotion from the rank and position of Lieutenant, an award of back pay at his Lieutenant's rate of pay for the periods of suspension that he served, an award of the differential between what he was paid after returning to duty as a Patrol Officer on or about October 16, 2014, to date, and what he would have been paid as a Lieutenant had he not been demoted, and an award of counsel fees;

U. On or about December 30, 2015, Ames was issued a Fourth PNDA, hereinafter referred to as "PNDA 4," asserting violations of Department General Order 2013-007 and other violations relating to the internal affairs investigation of that matter, referred to here as "the GO 2013-007" matter;

V. PNDA 4 based upon the GO 2013-007 matter imposed an immediate suspension without pay pending the outcome of a departmental hearing on the charges;

W. Ames asserts that PNDA 4 was issued without the Township having complied with N.J.A.C. 4A:2-2.5(b) which affords the right to a hearing where on the issue of the propriety of the immediate suspension without pay, and asserts other legal

challenges to PNDA 4 as well as having pleaded "not guilty" and having requested a hearing and seeking to exercise his appeal rights;

X. In addition to denying any legal liability to Ames, whether as asserted in Ames' Notice of Claim or otherwise, the Township maintains and asserts that all four PNDA's and all underlying charges should be sustained, that the suspensions, demotions and other sanctions or remedial measures taken were proper and should be upheld, that Ames is not entitled to any back pay during the period of suspension (and further that Ames failed to mitigate during his period of suspension) any back pay differential as described above, or attorneys' fees;

Y. Ames and the Township recognize that the outcome of any pending or threatened legal claim or litigation is uncertain, that in the pending OAL Cases and the Essex Litigation, and Ames' threatened lawsuit (as mentioned in the Notice of Claim) a wide range of different outcomes could be decided (and the same uncertainty would apply to any further appeals of the ultimate outcomes of those matters), and that in addition to the risk inherent in such matters, there is a high cost associated therewith in the form of legal fees and other expenses;

Z. After extensive negotiation between the parties, who have throughout said negotiations each been represented by competent counsel of their choosing (and the parties hereby acknowledging by signing this Agreement that they are satisfied with the representation and advice of their respective attorneys throughout the course of all of these proceedings, with the exception that Ames makes no such representation as to the representation by his former attorney, Patrick Toscano, only acknowledging satisfaction with the legal services provided by Todd J. Gelfand, Esq. of Barker, Gelfand and James)

the Township and Ames have, in light of the uncertainty of outcome and the costs of these disputes determined to settle all of their differences, pending claims, threatened claims, appeals, future appeals and any other claims or rights they might have to assert against each other until reaching this settlement, in accordance with the terms of this Agreement.

THEREFORE, in exchange for the mutual covenants, promises, dismissals of claims and litigation, payments, and forbearances set forth below, and for other good and valuable consideration (receipt of which is acknowledged by the parties' execution of this Agreement) agreed as follows:

1. Ames will immediately, within 5 days of both parties executing this agreement in writing, file his application for a special pension retirement with the Division of Pensions and Benefits with his date of retirement as April 1, 2016, and Ames shall retire as an employee of the South Orange Police Force, effective on April 1, 2016.

2. The Township agrees, based upon Ames' retirement as set forth above, that it shall:

(a) Rescind Ames' demotion from the position of lieutenant to the position of police officer from and as of the date of same, thus reinstating Ames as a Step 2 (top) Lieutenant as of and effective as of July 10, 2014, when his without pay suspension commenced.

(b) Pay Ames the difference between what he was paid as a Patrol Officer and what he would have been paid as a Step 2 (top) Lieutenant from October 16, 2014, when he returned from his suspension without pay (which shall not include any differential on previously paid overtime pay) through and

including his date of permanent retirement, namely April 1, 2016. Said sum shall be paid to Ames but Ames hereby agrees that upon receipt of the Township's payment he is obliged to immediately endorse the check to his attorney, Todd J. Gelfand Esq.'s attorney trust account for immediate deposit in said Trust account, and his attorney shall hold same in escrow pending a decision on Ames' retirement pension application by the Pension Board;

(b)(1) PNDA 4 shall be dismissed and withdrawn, for the mutual promises contained in this agreement, and Lt. Ames shall receive back pay at the lieutenant rate reflected herein above in paragraph 2(b) for the period of suspension from December 30, 2015 through January 17, 2016. From January 17, 2016 through March 1, 2016, Lt. Ames shall utilize his accumulated 24 days vacation time for 2016 and shall continue to receive full pay through April 1, 2016; and from March 1, 2016, Lt. Ames will exercise 30 days terminal leave as provided by the collective bargaining contract so that his final date will be March 31, 2016 with an April 1, 2016 date of retirement.

(c) Township will pay Ames said differentials after ordinary payroll deductions, including his employee pension contribution(s).

(d) Ames shall be entitled to utilize and shall be required to utilize 24 vacation days he is due for 2016 starting immediately and retroactive to his reinstatement date of January 17, 2016, which shall result in paid vacation from January 17, 2016 date of reinstatement (from which time Lt. Ames will be deemed to have been on paid vacation and using vacation time) through

March 1, 2016. Ames shall thereafter be entitled to utilize 30 days terminal leave as per the collective bargaining agreement through March 31, 2016.

3. Based upon Ames' retirement as mentioned above the Township will upon the effective date hereof, further dismiss PNDA 1, PNDA 2 PNDA 3 and PNDA 4, and all Final Notices of Disciplinary Action entered thereon with prejudice and shall not pursue same further. On and as of the effective date, the Township shall further, on the basis of Ames' retirement, terminate all disciplinary proceedings and pursue no further or any other charges, internal affairs investigations, or other investigative or disciplinary actions that might be underway, under investigation, pending or contemplated.

4. In addition to his general release to the Township as set forth below, and his covenant hereunder not to sue or pursue further claims against the Township, Ames agrees that he shall not be entitled to any back pay for the period of time where he was suspended without pay in 2014, but shall be entitled to back pay from the date of his suspension without pay from PNDA 4 (December 30, 2015). However, and consistent with the terms of this Agreement, including, without limitation, the dismissal of the charges, it is hereby agreed that Ames' periods of suspension in 2014 (50 days) shall be deemed and treated as an approved unpaid leave of absence.

5. Pursuant to this settlement, Ames and the Township shall further upon the effective date hereof, have their attorneys dismiss the OAL Cases, the Essex Case, Ames' request for a hearing on PNDA-4 and a PBA grievance filed concerning PNDA-4 with prejudice.

6. It is understood that the "effective date" hereof shall be the date that the Pension Board determines that Ames' retirement and pension as a Lieutenant has been

approved. On said effective date this Agreement will become final and binding, Ames' retirement as called for hereunder shall become permanent and irrevocable and the Township's remaining obligations hereunder shall likewise become final. Upon the award of the Lieutenant's pension Ames' attorney, Mr. Gelfand, will be permitted to release the escrowed differential in back pay award called for in ¶2(b) above, to Ames.

7. Should Ames be denied, by the Pension Board, a retirement pension at the grade of Lieutenant, then this entire agreement shall be null and void. In such case, Ames will be permitted to rescind and withdraw his retirement and pension application, the Township will reinstate all sanctions, disciplinary proceedings and disciplinary actions previously taken, pending or contemplated (including, without limitation, Ames' demotion to Patrol Officer) the OAL Cases, Essex Case and PNDA-4 and the suspension issued thereunder will be re-activated and the parties will be permitted to pursue or raise all rights, claims and issues they would have been entitled to pursue or raise as though this Agreement was never reached. It is further agreed that in the event this Agreement does not go into effect and becomes null and void as aforesaid, Ames shall be required to cause his attorney, Todd Gelfand, and Todd Gelfand separately agrees as escrow agent, to within five (5) business days, return to the Township the funds he is holding in escrow pursuant to ¶ 2(b) above.

8. Ames shall receive and retire with all rights, entitlements, and benefits of any Police Lieutenant honorably retiring and in good standing from the Township. The Township agrees to cooperate to whatever extent is necessary and reasonable to ensure that Ames' pension application is acted upon by the New Jersey Pension Board as soon as practicable after his retirement as specified above. Should Ames seek a "SORA" card

for security certification purposes, a permit to carry a firearm as permitted by law as a retired law enforcement officer, and a retired law enforcement id card, the Township agrees that it shall comply with all measures and procedures ordinarily and customarily required of a municipality where a retired police officer formerly under its employ seeks same.

9. Except in the case that this Agreement is deemed null and void and of no effect pursuant to ¶ 7 above, Ames hereby covenants and promises not to sue, assert claims against or make demands upon the Township, for any of the claims, rights, choses in action or demands referred to in this Agreement or otherwise arising (or known or discoverable with the exercise of reasonable diligence) up to and as of the effective date of this Agreement, including, without limitation, any and all claims and demands raised in the OAL Cases, the Notice of Claim, the Essex Case, the request for a hearing concerning PNDA-4 and the PBA grievance filed in connection with PNDA-4, and any and all claims that could or should have been raised in same whether pursuant to New Jersey claim preclusion principles (including, without limitation, the entire controversy doctrine) or otherwise.

10. As used, referenced and mentioned in this Agreement the "Township" shall mean the Township of South Orange Village, its agencies and departments (including, without limitation the South Orange Police Department) its elected and non-elected officials and officers (including without limitation its governing body, managers and department heads) and its employees, servants, agents and representatives.

11. In exchange for the consideration set forth herein, you, Ames, on behalf of yourself, your spouse, family, agents, attorneys, heirs, executors, administrators, and

anyone else who has or obtains any legal rights or claims through you, Ames, are, as of the effective date hereof, waiving, relinquishing and releasing and shall hereafter be forever barred from asserting or pursuing, all known or unknown claims and causes of action you have or may have, as of the day you sign this Agreement, against the Township, and any other affiliated, related or associated companies, subsidiaries, divisions, parents, predecessors, successors, current and former officers, elected or non-elected officials, directors, managers, employees, shareholders, agents, attorneys, representatives, insurance companies, insurers, and assigns of such named companies and entities (collectively, the "Released Parties"), arising from any reason or cause, including but not limited to your employment, disciplinary actions and your separation from employment as set forth herein. The claims you are releasing include, but are not limited to, any and all allegations set forth in the Notice of Tort Claim and any and all allegations that the Township or the Released Parties:

- have discriminated against you in violation of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, Section 1981 of the Civil Rights Act of 1866, the Equal Pay Act of 1963, the Age Discrimination in Employment Act ("ADEA"), the Family and Medical Leave Act, the Americans with Disabilities Act, the Employee Retirement Income Security Act, the Older Worker's Benefit Protection Act, the New Jersey Law Against Discrimination, and any and all other applicable federal, state and local fair employment practices and discrimination laws, or on the basis of race, color, sex (including sexual harassment), national origin, ancestry, disability, religion, sexual orientation, marital status, parental status, veteran status, source of income, entitlement to benefits, union activities, or any other status protected by local, state or federal laws, constitutions, regulations, ordinances or executive orders; or

- have violated any other employment-related laws including but not limited to the Family and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), the Worker Adjustment and Retraining Notification Act (WARN Act), violation of the New Jersey Attorney General's "Internal Affairs Policy & Procedures," or any federal, state or local laws or statutes whether employment related or not; or

- have violated personnel policies, procedures, handbooks, any covenant of good faith and fair dealing, or any express or implied contract of any kind, including, without limitation, any claim of breach of the collectively negotiated agreement between the Township of South Orange Village and the Policeman's Benevolent Association Local No. 12; or

- have violated public policy, statutory or common law, including claims for: personal injury; invasion of privacy; retaliatory discharge; negligent hiring, retention or supervision; defamation; intentional or negligent infliction of emotional distress and/or mental anguish; intentional interference with contract or prospective economic advantage; negligence; detrimental reliance; loss of consortium to you or any member of your family, and/or promissory estoppel; or

- are in any way obligated for any reason to pay you damages, expenses, litigation costs (including attorneys' fees), back pay, front pay, disability or other benefits, compensatory damages, punitive damages, and/or interest.

ADDITIONALLY, THIS AGREEMENT SPECIFICALLY WAIVES ALL OF YOUR RIGHTS AND POTENTIAL CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (29 U.S.C. § 621 et seq.), AS AMENDED, AND THE OLDER WORKERS' BENEFIT PROTECTION ACT, AS AMENDED. In connection with this age discrimination waiver, you acknowledge and agree to the following:

- You acknowledge that by this Agreement, you were encouraged and advised by the Township in writing to consult counsel prior to signing this Agreement and you have done so.

- You further acknowledge that you were given sufficient time, whether pursuant to statute or other law, to consider this Agreement.

- You further acknowledge that you did, in fact, have this Agreement reviewed, explained to you and negotiated by counsel of your choosing, namely Todd Gelfand, Esq., and hereby represent and acknowledge that you are satisfied with said counsel's services.

- You further understand that you may revoke this Agreement at any time within seven days after you sign it, and that this Agreement shall not become effective or enforceable until the seven-day revocation period has expired. If you wish to revoke this Agreement during the seven (7) days after signing it, you will do so by sending written notice of same to the attention of DAVID L. EPSTEIN, ESQ., AT POST, POLAK, GOODSELL, MACNEILL & STRAUCHLER, PA, 425 EAGLE ROCK AVENUE, ROSELAND, NEW JERSEY 07068, via certified mail, return receipt requested, **and** e-mail to lml@ppgms.com **NO LATER THAN**

THE CLOSE OF BUSINESS SEVEN DAYS AFTER YOU SIGN THE AGREEMENT.

- If you sign this Agreement prior to the end of the 21-day time period, you certify that, in accordance with 29 CFR §1625.22 (e)(6), you knowingly and voluntarily decided to sign the Agreement after considering it less than 21 days and your decision to do so was not induced by the Released Parties through fraud, misrepresentation, or a threat to withdraw or alter the offer prior to the expiration of the 21-day time period.

- You have carefully read and fully understand all of the provisions and effects of this Agreement and you knowingly and voluntarily entered into all of the terms set forth in this Agreement.

- You knowingly and voluntarily intended to be legally bound by all of the terms set forth in this Agreement.

- You relied solely and completely upon your own judgment or the advice of your attorney(s) in entering into this Agreement.

- You are, through this Agreement, releasing the Released Parties from any and all claims you may have against the Released Parties, relating to your employment and separation, including claims arising under the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621, et. seq.).

12. Ames hereby further agrees and represents that other than the payments called for hereinabove by the Township, The Township owes him, and he is entitled to, no further money, compensation or other benefit or consideration from the Township including, without limitation, salary, wages, employer contributions, accrued sick or vacation time payments, or bonuses. Ames agrees that he is hereunder further waiving his right to recover money in connection with a charge filed by any other individual or by the Equal Employment Opportunity Commission (EEOC) or any other federal or state agency. Ames is acknowledging by his execution of this Agreement and acceptance of the consideration defined herein, that he is no longer owed any wages due, including any amounts for any vested wages, benefits or other incentive compensation.

13. The Township and Ames agree that they will maintain the confidentiality of this Agreement to the extent permitted by law.

14. Each party agrees to be responsible for their own attorney's fees and costs whether incurred in connection with this Agreement, the OAL Cases, the Essex Case, other disciplinary matters or investigations, or otherwise.

15. This Agreement contains the sole and entire agreement between Ames and the Township, and fully supersedes any and all prior agreements, representations, promises and understandings (whether verbal or in writing) pertaining to the subject matter hereof. In executing this Agreement, Ames acknowledges that he has not relied upon any representation or statement not set forth herein made by the Township or their counsel or representatives with regard to the subject matter of this Agreement. No other promises, representations, understandings, arrangements or agreements shall be binding or valid unless contained in writing, signed by each of the parties hereto, and explicitly stated to be an amendment to this Agreement.

16. This Agreement is the product of active negotiations by and between the parties who are represented by competent counsel of their choosing. Each and every word, sentence, phrase, clause, paragraph and passage of this Agreement shall thus be deemed to have been drafted by both parties equally and together in the event this Agreement is ever to be interpreted by a Court or other tribunal.

17. The parties represent and acknowledge that they have been given the opportunity in connection with the hearings and litigation matters referenced hereinabove and elsewhere to obtain any discovery they might require, and to independently investigate all facts and circumstances pertaining to the matters being settled, waived and

released herein. The parties thus represent and acknowledge that they have obtained and/or have had full access to any information that might be relevant to their respective decisions to enter into this Agreement.

18. This Agreement shall be governed by the laws of the State of New Jersey, regardless of conflict of law principles, as to all matters including, without limitation, validity, construction, effect, performance and remedies.

TOWNSHIP OF SOUTH ORANGE VILLAGE

By: Barry R. Lewis, Jr.

Title: Township Administrator

Dated:

Lieutenant Hugh Ames

Dated: 2/10/16

4/5/17

STATE OF NEW JERSEY

In the Matter of Elizabeth Blevins
Atlantic County,
Department of Human Services

CSC DKT. NO. 2017-1423
OAL DKT. NO. CSV 18422-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18422-16

AGENCY DKT. NO. 2017-1423

IN THE MATTER OF ELIZABETH BLEVINS, ATLANTIC COUNTY, DEPARTMENT OF HUMAN SERVICES.

Elizabeth Blevins, appellant, pro se

Richard Andrien, Esq., for the Atlantic County Department of Human Services, respondent (James F. Ferguson, County Counsel, attorney)

Record Closed: February 27, 2017 Decided: March 13, 2017

BEFORE **LISA JAMES BEAVERS,** ALJ:

This matter concerns the appeal of Elizabeth Blevins from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 7, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 13, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 3/16/17

Date Mailed to Parties: 3/16/17

/lam

SETTLEMENT AGREEMENT BETWEEN ELIZABETH BLEVINS AND THE COUNTY OF ATLANTIC

This Settlement Agreement, hereinafter referred to as "Agreement" is made by and between ELIZABETH BLEVINS, hereinafter referred to as "Employee," and Atlantic County referred to as "Employer" or "County." Employee and the County are sometimes hereinafter collectively referred to as the "Parties."

WHEREAS, Employee was served with a Preliminary Notice of Disciplinary Action for incidents which occurred on August 3, 2016 and August 4, 2016, a copy of which is attached hereto as **Exhibit A**; and

WHEREAS, the disciplinary sanction being sought in the above Preliminary Notice of Discipline (31A) was a 6-day suspension from employment; and

WHEREAS, Employee requested and appeared at the departmental hearing for the above disciplinary sanction on September 15, 2016; and

WHEREAS, The Hearing Officer upheld the 6-day suspension and a Final Notice of Discipline Action (31B) was issued on October 14, 2016, a copy of which is attached as **Exhibit B.**

WHEREAS, Employee appealed the Final Notice of Disciplinary Action (31-B) to the Civil Service Commission/Office of Administrative Law (Docket No: CSV 18422-2016 S); and

WHEREAS, the parties to this agreement have decided to resolve the disposition of the charges in a summary fashion without the necessity for a hearing, and in order to avoid the expense and burden of litigation, and in resolution of all other matters and proceedings that might arise between Employee and Employer as a result of the aforesaid charges.

NOW, THEREFORE, Employee and Employer agree as follows:

1. The above recitals are repeated, incorporated and made a part of this Agreement.

2. Employee shall attend a minimum of six (6) sessions of mandatory EAP.

3. ***Modified Action:*** In consideration for entering into this Agreement and attending mandatory EAP, the Employer agrees to modify the 6-day suspension charge noted above to a 3-day suspension on the record, with no time served. Employee agrees to waive any rights to appeal..

(a) A new Final Notice of Disciplinary Action (31-B) will be issued, reflecting a 3-day suspension (minor discipline), and will be maintained in Employee's

personnel file. Other documents retained in the personnel file related to this action will be limited to the Hearing Officer's decision and supporting documents.

(b) Employee shall withdraw her appeal to the Civil Service Commission/Office of Administrative Law within 10 days of the execution of this agreement.

(c) Should Employee not complete the mandatory sessions of EAP as outlined in this agreement, the negotiated 3-day suspension will convert back to the initial 6-day suspension, all of which will need to be served. Should this occur, there will be no further negotiation of the number of days to be served.

The County's decision to modify the employee's 6-day suspension to a 3-day suspension on the record, is expressly conditioned upon Employee agreeing to the terms of this Agreement and Employee waiving her right to a departmental hearing and a hearing before the New Jersey Department of Personnel / Civil Service Commission.

THE PARTIES ACKNOWLEDGE THESE ARE MATERIAL TERMS AND THE EMPLOYEE'S FAILURE TO PERFORM UNDER THE TERMS OF THIS SECTION SHALL BE CAUSE FOR THE COUNTY TO PROCEED WITH AND PURSUE THE FULL SUSPENSION NOTED ABOVE IN EXHIBIT A.

4. *Nondisclosure.* All parties to this Agreement agree that the terms of this Agreement, and the circumstances surrounding same, are not to be divulged to any outside sources, either directly or indirectly. Outside sources do not include various agents of the County of Atlantic, the State of New Jersey, the United States of America, or any court of competent jurisdiction.

The provisions of this paragraph are binding only on the Employee and Employer. The Employer makes no representation and takes no responsibility for any unofficial actions of other employees who are not parties to this Agreement.

5. ***Discipline and Future Conduct.*** Employee EXPRESSLY ACKNOWLEDGES AND UNDERSTANDS future violations of policy regarding conduct will not be tolerated. Future violations of any County policy will result in progressive discipline up to and including termination of employment.

6. ***General Release/Exclusions.*** Except as expressly provided in paragraph 6(a) below, Employee knowingly and voluntarily releases and forever discharges for herself, his heirs, executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, as a result of the charges and conduct at issue, including, but not limited to, any alleged violation of:

- The National Labor Relations Act;
- Family Medical Leave Act (Federal and State);
- Title VII of the Civil Rights Act of 1964;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act of 1974;
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- New Jersey State Wage and Hour Law;
- The New Jersey Law Against Discrimination;
- The New Jersey Workers' Compensation laws;
- The Conscientious Employee Protection Act;
- New Jersey Civil Service Statutes;
- any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;
- any public policy contract (whether oral or written, expressed or implied), tort or common law;

- any claim for costs, compensation, fees or other expenses including attorney's fees incurred in these matters.

7. *Exclusions* The above general release specifically excludes only claims to enforce this settlement.

8. ***Waiver of Right to Costs and Fees.*** The Parties agree that the Employee waives any claims for fees and costs, including but not limited to attorney's fees.

9. ***Governing Law.*** This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.

10. ***Binding Agreement.*** This agreement constitutes the entire agreement between the parties. This agreement supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this agreement shall be binding unless in writing and executed by the parties. No waiver of any of the provisions of this agreement shall be deemed or shall constitute a waiver of any other provisions, whether or not similar. Nor shall any waiver constitute a continuing waiver. The Parties have negotiated the terms of this Agreement through and by their counsel. Accordingly, this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

11. ***Execution in Counterparts/Facsimile and E-mail Signatures.*** This Agreement may be executed in counterparts, and all counterparts so executed will together constitute one (1) binding agreement. The Agreement shall be validly executed and delivered by exchange of executed counterparts by regular mail, facsimile or e-mail.

12. Without in any way limiting the scope or effect of the preceding paragraphs:

A. Employee represents that she is able to read the English language and understands the meaning and effect of this Agreement.

B. Employee understands that the above paragraphs include a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Employee may have as a result of any act that has occurred arising out of the filing of the attached Notice of Discipline.

C. Employee understands that if this Agreement were not signed, the Employee would have the right to submit information to a hearing officer, and then on appeal to an administrative law judge assigned to hear the cause of action by the New Jersey Department of Personnel / Civil Service Commission, and further understands that upon receipt of an unfavorable ruling by an administrative law judge, would have the right to make submissions to the Civil Service Commission, and thereafter, if unsatisfied with the final decision of the Civil Service Commission, would have the right to take an appeal to the New Jersey Superior Court, Appellate Division, together with any further rights to file appeals, either by right or by grace in the New Jersey State Court and Federal Court system.

D. **Employee understands and agrees that she has sought and received the advice of counsel and Union Representation of her own choice prior to executing this Settlement Agreement and General Release.**

E. **Employee acknowledges having had ample time to review this document, she has reviewed its terms, understands them and that she has voluntarily decided to release all claims against the County except as otherwise set forth herein after thoroughly reviewing this Settlement Agreement and the General Release.**

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names:

The Parties:

Elizabeth Blevins (Employee)

Dated: 2/24/17 BP

ATLANTIC COUNTY

Patricia Diamond, Department Head
Atlantic County Human Services
(Employer)

Dated: 2-27-2017

Preliminary Notice of Disciplinary Action (31-A)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal, or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

Employing Agency Name	Address/ Phone Number	Date
Atlantic County Department of Human Services	235 Dolphin Avenue Rm 216, Northfield, NJ 08225 (609) 645-7700 Ext. 4517	08/24/2016

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Atlantic County Law Department	1333 Atlantic Avenue, 8th Floor, Atlantic City NJ 08401 (609) 345-6700

Employee Name	Permanent Civil Service Title	Employee Identification Number
ELIZABETH BLEVINS	SUPERVISOR OF NURSES	000099649

Address/ Phone Number	Pension Number
4711 BOXWOOD PLACE, MAYS LANDING, NJ 08330 (609)629-2820	1199513

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charges: N.J.A.C. 4A:2-2.3 (a)
6. Conduct unbecoming a public employee (2 counts)
12. Other sufficient cause
Violation of county policy regarding workplace standards P.S. 3.02

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

SEE ATTACHED

☒ *If checked, incidents are continued on attached page.*

☐ **You are hereby suspended effective** _____
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 5 days in writing ***days of receipt of this form. If you request a hearing it will be held on** September 15, 2016
at (time) 9:00 AM **at (place of hearing)** Meadowview Room 229, Northfield, NJ 08225
**Must be a minimum of five days*

The following disciplinary action may be taken against you:

☒ Suspension for six (6) working days, beginning TBD and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature _____ **Title** Department Head

This form must be personally served on the employee or sent by certified or registered mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number** _____

☐ **Signature of Server** Stacie Bates, RN ☐ **Date of personal service** 8/30/16

CPF-31A Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

A

August 24, 2016
Elizabeth Blevins, SON #000099649
31A – Specifications

1) On or about 8/3/16 while speaking with RN Juliette Hunko, Supervisor of Nurses Elizabeth Blevins turned around and while facing LPN Elizabeth Argentiero mouthed an obscenity about Juliette Hunko, (i.e. "Shut the F- - - up")

2) On 8/4/16 after being confronted about the August 3rd incident at a meeting in the office of the Assistant Director of Nursing Stacie Bates, Elizabeth Blevins approached the 1st floor Nurses Station where Argentiero was seated and proceeded to engage in harassing conduct by pointing in Argentiero's direction, snapping her fingers and wiggling her hips.

These two incidents have resulted in distress being caused to Argentiero who had to endure her supervisor's unprofessional conduct.

The two incidents specified above constitute two separate incidents of conduct unbecoming a public employee in violation of NJAC A:2-2.3 (a) (6); NJAC 4A:2-2.3 (a) (12) and County Policy P.S. 3.02 Workplace Standards.

CC ACHR, LHH, SHIFLAGO T. ARMIDEO (REG & CERT MAIL 7015 0640 0003 6436 3610) SHIPACL, JONES, FILE, WORK PERM

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM:

Employing Agency Name	Address/ Phone Number	Date
Atlantic County Human Services	235 Dolphin Avenue Rm 216, Northfield, NJ 08225 609-645-7700 ext 4517	10/14/2016

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Atlantic County Law Department	1333 Atlantic Avenue, 8th Floor, Atlantic City, NJ 08401 609-345-6700

TO:

Employee Name	Permanent Civil Service Title	Employee Identification Number
ELIZABETH BLEVINS	SUPERVISOR OF NURSES	000099649

Address/ Phone Number	Pension Number
4711 BOXWOOD PLACE, MAYS LANDING, NJ 08330 (609)829-2820	1199513

On 08/30/2016 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ **You requested a hearing which was held on** 09/15/2016 ☐ **You did not request a hearing**

☐ **You requested a hearing and did not appear at the designated time and place**

Sustained Charges: N.J.A.C. 4A:2-2.3 (a)

6. Conduct unbecoming a public employee (2 counts)
12. Other sufficient cause
    Violation of county policy regarding workplace standards
    P.S. 3.02

☐ *If checked, charges are continued on attached page.*

Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:

SEE ATTACHED

☐ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for SIX (6) working days, beginning TBD and ending PENDING RETURN FROM LEAVE OF ABSENCE

☐ Indefinite suspension pending criminal charges effective (date)____

☐ Removal, effective (date)____

☐ Demotion to position of ____ effective (date)____

☐ Resignation not in good standing, effective (date)____ ☐ Other Disciplinary Action

☐ Fine ____ (amount) which is equal to ____ (number) (number of working days)

Appointing authority or authorized agent's signature and title.

Signature (Patricia) [signature] Title Department Head

This form must be personally served on the employee or sent by certified or registered mail.

☒ **Certified or Registered Mail** ☒ **Receipt Number** 7015 0640 0003 6436 2663

& REGULAR MAIL

☐ **Signature of Server** ____ ☐ **Date of personal service** ____

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. **Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee.** Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. Any appeal postmarked after the 20 days statutory **time limit will be denied.** We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

DPF-31B Revised 03-24-11

B

4/5/17

STATE OF NEW JERSEY

In the Matter of Clement Collins
Newark School District

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2015-1743
OAL DKT. NO. CSV 17044-14

ISSUED: APRIL 6, 2017 BW

The appeal of Clement Collins, Supervisor of Custodians, Newark School District, 45 working day suspension (10 days in the form of a fine), on charges, was heard by Administrative Law Judge Joan Bedrin Murray, who rendered her initial decision on January 6, 2017 reversing the 45 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 5, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to the equivalent of 45 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to 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, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Clement Collins. The Commission further orders that appellant be granted the equivalent of 45 days back pay, benefits, and seniority. 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 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 or counsel fees.

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
APRIL 5, 2017

Dolores Gorzcyca
Dolores Gorzcyca
Member
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, Northern Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 17044-14
AGENCY DKT. NO. 2015-1743

IN THE MATTER OF CLEMENT COLLINS,
NEWARK PUBLIC SCHOOL DISTRICT.

David Bander, Esq., for appellant Clement Collins (Mets Schiro & McGovern, LLC, attorneys)

Christina Abreu, Esq. and **Ramon E. Rivera**, Esq., for respondent Newark Public School District (Scarinci Hollenbeck, attorneys)

Record Closed: July 25, 2016 Decided: January 6, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE

Respondent Newark Public School District (the District) suspended appellant Clement Collins, who is employed as a Supervisor of Custodians, for a period of forty-five days, which was effectuated by imposing a twenty-five day suspension beginning

December 2, 2014, and a fine equivalent to ten working days.[1] The suspension stemmed from a determination that appellant had a duty to report to the District that his driving privileges had been suspended for a period of two years, a fact that became known to the District after appellant's driving privileges were restored. Appellant contends that there was no policy, written or otherwise, that required him to report the loss of his driving privileges.

PROCEDURAL HISTORY

On August 19, 2014, the District issued a Preliminary Notice of Disciplinary Action (PNDA) informing appellant of the charges of conduct unbecoming a public employee, misuse of public property, including motor vehicles, and other sufficient cause against him. N.J.A.C. 4A:2- 2.3(a)(2), (8), (12). A revised PNDA issued on August 29, 2014, with a Rider attached containing revised specifications to each charge set forth in the initial PNDA. Along with failing to report his driver's license revocation, the revised specifications charged appellant with driving his assigned vehicle while his license was suspended, thereby exposing the District to liability and compromising the well-being of students, staff, and others. In addition, the revised specifications alleged that driving was a necessary element of appellant's job duties, and that he was required to have a driver's license.

After a departmental hearing, the District issued a Final Notice of Disciplinary Action (FNDA) dated November 24, 2014, dismissing all charges in the PNDA except for the charge of other sufficient cause, "insofar as [appellant] had a duty to report his suspension." (J-3.) The FNDA provided for appellant's suspension for twenty-five working days, along with a fine equivalent to ten working days. Appellant requested a hearing, and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on December 19, 2014 for hearing and determination as a contested matter. The initial hearing date was adjourned at the request of the District with the consent of appellant, and the matter was heard on July 15, 2015. The parties filed briefs and reply briefs. The record closed on July 25, 2016.

[1] The hearing officer below left it to respondent to impose a fine at a ratio of one day for every two days of suspension for all or part of the suspension. (J-18.)

FACTUAL DISCUSSION AND FINDINGS

At the hearing, the District presented testimony by Ronald Hale, Nate Harp, and Keith Barton. Appellant testified on his own behalf, and also presented testimony by Mark Tucker. Based on a review of the pertinent testimony and documentary evidence presented, I **FIND** the following **FACTS**.

Appellant began his employment with the District in 1992 as a per diem custodian worker, and rose through the ranks to attain his current position as Supervisor of Custodians. On or about November 15, 2009, appellant was charged with driving while intoxicated (DWI), which led to a two-year suspension of his driving privileges for the period of February 17, 2010 through February 17, 2012. Appellant did not notify the District that his driving privileges had been suspended, nor did the District have a written policy requiring facilities employees to make such notification. Such a policy was promulgated in July 2014, when the District became aware of appellant's suspension.

Appellant testified that he was embarrassed by the DWI conviction, and also believed that news of it would diminish him as a leader in the eyes of his staff. He thought of himself as a role model at work, due to the fact that he began his work with the District as a per diem custodian and worked his way up to Supervisor of Custodians. In not reporting the DWI, he was not motivated by fear. Instead, he stated that he had nothing to fear because he refrained from driving. He also stated that had there been a policy requiring him to notify the District of the DWI conviction, he would have done so. He stated that he never drove the District's vehicles during the period of his suspension. Instead, he made modifications at home and work that enabled him to continue to perform his work duties.

As Supervisor of Custodians, he was assigned to the North Region, which encompassed approximately fifteen schools. The main office for the facilities staff was located at the Rafael Hernandez School. Approximately four months after his driving privileges were suspended appellant moved his family from Bloomfield, New Jersey to

Newark, New Jersey, within walking distance of the Rafael Hernandez School. Another school in the region, Branch Brook, was on the same street as the Rafael Hernandez School. The majority of the other schools in the North Region were within a two-mile radius of appellant's new home. Appellant either walked to work, or relied on family members and friends; occasionally co-worker Mark Tucker drove him to work in the morning.

The facilities staff, including appellant, Carlos Edmundo, a building manager, Mark Tucker (Tucker), a Supervisor of Trades, and his two trades workers would then map out their day, including any plans to travel to the region's schools. If appellant needed to visit a school, he shared a ride with whomever was headed to that destination. In addition, each of the three supervisors, including appellant, was assigned a vehicle. One of the three vehicles was often inoperable, so the team would share the other two vehicles. The trades workers frequently used the vehicle assigned to appellant due to the fact that it had a liftgate, enabling them to move equipment and supplies from one location to another. There were several sets of keys to each vehicle. Appellant and Tucker testified that the atmosphere in the North Region facilities office was very congenial, and that the custodial and trades staffs often crossed over to assist with the other's tasks.

Another factor in appellant's favor was that commencing sometime in 2010, the mode of delivering supplies to the region's schools changed. Previously, all the region's supplies were delivered to the Rafael Hernandez School, requiring appellant to then deliver them to the various other schools. In 2010, these supplies were delivered directly to the recipient school, eliminating the need for appellant to transport them by car. In sum, appellant's job performance during his two-year license suspension period did not come into question by the District.

Regarding the performance of his work duties relative to his loss of driving privileges, the job description for the Supervisor of Custodians position states that:

> Appointees will be required to possess a driver's license valid in New Jersey only if the operation of a vehicle, rather

> than employee mobility, is necessary to perform the essential duties of the position.
> (J-9.)

Appellant testified that as far as he understood, operation of a vehicle was not a necessary part of his job. He further stated that he was able to perform his job efficiently without operating a vehicle. Tucker also differentiated the need for a driver's license from employee mobility as he applied it to his trades workers. He stated that his trades workers needed only to get to the job, and then be able to perform their tasks.

Keith Barton (Barton), Executive Managing Director of Operations for the District, disagreed that appellant did not require a driver's license pursuant to the above job description. He based his opinion on the fact that visiting the region's schools was a basic function of appellant's job. During the period of appellant's license revocation, Barton served as a special assistant to an assistant superintendent in a different region. He stated that based on his knowledge of the facilities department, the supervisors of custodians and trades would not be regularly traveling to the same schools. However, in the case of emergencies, which are frequent in the District, both would likely be needed on the scene. Barton had no firsthand knowledge of the daily operations of the North Region between February 2010 and February 2012, and was unable to speak to appellant's job performance during that time period.

Ronald Hale (Hale), the District's risk manager since November 1996, testified that he assumed responsibility for its commercial automobile insurance program from Joe Somaie (Somaie) in July 2014. He testified that Somaie had obtained motor vehicle abstracts for all employees who drove District vehicles, but he relied on the notice on the abstract that the person's driving privileges were in good standing rather than review the entire document. Hale reviewed appellant's driver's abstract sometime in July 2014, and although his privileges were in good standing, the report listed a DWI suspension for the two-year period noted above. (See R-12.) Hale notified the District's legal department and Laurette Asante, Esq. (Asante), Director of Labor Relations, that appellant should no longer be allowed to drive its vehicles. Asante sent a letter dated July 25, 2014, to appellant advising him that he would be immediately prohibited from doing so. (R-5.) The letter also noted that the district had received a Named Driver

Coverage Limitation Endorsement (the Endorsement) effective July 1, 2014, that listed appellant among other employees whose liability coverage would be limited to statutory minimum limits for claims arising from accidents or losses. (R-6.) Hale stated that full liability coverage under the policy was $1,000,000, whereas the endorsement limits were $15,000 for bodily injury and $30,000 for property damage. Hale testified that while appellant never notified him that his license was suspended, he may have had a conversation with him about the DWI. Six months after Asante's July 25, 2014 letter issued, she sent him a notice that he was again permitted to operate the district's motor vehicles. (R-7.)

Hale corroborated appellant's testimony that the District had no written policy requiring facilities employees to notify a supervisor if they were facing a license suspension or other driving-related problem. He testified that such a policy went into effect in July 2014. The policy is fourteen pages long, and lists approximately one dozen specific motor vehicle infractions that will result in disciplinary action. Each employee is required to acknowledge that he or she has read the policy by signing the document.

Other testimony was offered by the District; however, it was not pertinent to the issue at bar and, as such, cannot be afforded weight in formulating the **FINDINGS** of **FACT**.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A:2-2.2, -2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the

number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Appellant has been charged with other sufficient cause insofar as he had a duty to report the DWI-related suspension of his driving privileges. However, it is undisputed that the District had no such policy in place at any time during the subject period. The District only promulgated a policy requiring notification in response to Risk Manager Hale's review of appellant's motor vehicle abstract, and discovering the prior license suspension. The policy currently in place is lengthy, as one might expect, and sets forth with specificity the violations that will result in disciplinary proceedings. Further, employees are required to acknowledge receipt of the policy.

The District relies on Herbert Holman v. Newark Board of Education, 92 N.J.A.R. 2d 454, 1992 N.J. AGEN LEXIS 4576 (1992), as its case on point in support of its argument that a written policy is not required in order for the charge against appellant to be sustained. Holman was a mechanic who failed to report to the Newark Board of Education that his license had been suspended due to his involvement in a fatal accident while on vacation. However, the facts in Holman are distinguishable from those at bar. First, the ALJ found that Holman drove his assigned vehicle on several occasions while suspended, which is not the case in the instant matter. Also, Holman, a Union member, was subject to a negotiated contract with the Newark Board of Education that required him to have a driver's license in good standing. No such proof has been offered in this matter. In light of the absence of any conclusive evidence to the contrary, the equivocal wording of the job description for Supervisor of Custodians, and divergent testimony as to its meaning, I **CONCLUDE** that the operation of a vehicle was not a necessary element of appellant's job. Moreover, lack of a driver's license did not prevent him from performing his regular and emergency duties in the North Region, nor was any such proffer made by the District to that effect.

In sum, there simply is no evidence that the District gave appellant any type of notice, written or otherwise, that he had a responsibility to report a DWI-related suspension. Still, a major discipline ensued. Appellant cites Nicholas Condito v. County of Essex, 2007 N.J. AGEN LEXIS 117 (March 8, 2007), for the proposition that a

civil service employee cannot be held responsible for an action in the absence of a policy or regulation to guide him. In Condito, a corrections officer was held not to be responsible for allowing subordinate officers to leave their posts without proper relief. There, the respondent had no rules or regulations in place to guide Condito. The ALJ noted that in the absence of a policy, differing interpretations ensue as to what is appropriate.

Based on the foregoing, I **CONCLUDE** that the District has not met its burden of proving, by a preponderance of the credible evidence, that appellant's failure to report the suspension of his driving privileges constitutes other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12).

ORDER

It is hereby **ORDERED** that the charge by the appointing authority of other sufficient cause be and hereby is **DISMISSED**.

It is further **ORDERED** that the forty-five day suspension against appellant be and hereby is rescinded.

It is also **ORDERED** that back pay and other benefits be issued to appellant as may be dictated by 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.

January 6, 2017
DATE

JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 1-6-17

Date Mailed to Parties: 1-6-17

dr

APPENDIX

WITNESSES

For Appellant:

Clement Collins

Mark Tucker

For Respondent:

Nate Harp

Ronald Hale

Keith Barton

EXHIBITS

Joint:

J-1 Revised Preliminary Notice of Disciplinary Action and Rider, dated August 29, 2014 (Bate No. 106-11)

J-2 Original Preliminary Notice of Disciplinary Action and Rider, dated August 19, 2014 (Bate No. 1-4)

J-3 Revised Final Notice of Disciplinary Action, dated November 24, 2014 (Bate No. 130-135)

J-4 Original Final Notice of Disciplinary Action, dated November 6, 2014 (Bate No. 120-129; 114-119; 112-113)

J-9 NPS Job Bid Application Re: Supervisor of Custodians (Bate No. 9-10)

J-11 Printout of vehicles operated by Facilities Management personnel (three registered vehicles and five named drivers) (Bate 8)

J-13 Copy of Gasoline Receipt, Division of Motor Transportation re: "Vehicle license plate # MG67618" assigned to Clement Collins, dated February 24, 2010 through February 14, 2012 (Bate No. 14-80)

J-18 Hearing Officer Decision and Order (TBD) (Bate No. 136-161)

For Respondent:

R-5 July 25, 2014 Correspondence from Laurette K. Asante, Director of Labor Relations to Clement Collins Re: removal of Mr. Collins name from Motor Vehicle insurance endorsement and prohibition of operating all District vehicles (Bate No. 5)

R-6 July 11, 2014 Copy of Named Driver Coverage Limitation Endorsement effective July 1, 2014 (DISTRICT 6-7)

R-7 January 8, 2015 Correspondence from Laurette K. Asante, Director of Labor Relations to Clement Collins Re: Restriction from prohibition on operating all District vehicles lifted (Bate No. 162)

R-8 Gasoline Storage/Purchase/Usage Policy, dated March 2011 (DISTRICT 234-237)

R-10 Map of Newark Public Schools Region (Bate No. 211)

R-12 N.J. Motor Vehicle Commission Driver History Abstract printout dated May 13, 2014 (Bate No. 11-13)

R-16 Timecard for Mark A. Tucker for period February 1, 2010 (Bate No. 212-233)

4/5/17

STATE OF NEW JERSEY

In the Matter of Diane Croom
Edna Mahan Correctional Facility,
Department of Corrections

CSC DKT. NO. 2011-2911
OAL DKT. NO. CSV 06459-11

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06459-11
AGENCY DKT. NO. 2011-2911

IN THE MATTER OF DIANE CROOM,
EDNA MAHAN CORRECTIONAL FACILITY,
DEPARTMENT OF CORRECTIONS

Sean Sprich, Vice President, PBA Local 105, for appellant pursuant to N.J.A.C. 1:1-5.4(a)6

Karen Campbell, Legal Specialist, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: March 9, 2017 Decided: March 20, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on June 1, 2011, for determination as a contested case. The parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 20, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: 3/21/17

Date Mailed to Parties: 3/21/17

SGC/mel

IN THE MATTER OF
DIANE CROOM,

APPELLANT

AND

EDNA MAHAN CORRECTIONAL FACILITY,

RESPONDENT

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSV 06459-2011
AGENCY DOCKET NO. 2011-2911

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated December 22, 2010, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(6) Conduct Unbecoming	Ten (10) working day suspension	12/22/10
2.	NJAC 4A:2-2.3(a)(11) Other sufficient cause	same	same
3.	HRB 84-17, as amended C8 Falsification; Intentional Misstatement of material Fact in connection with work, Employment application, or Any other record, investigation Or other proceeding.	same	same
4.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same

B. The Appellant withdraws her appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

	Charge	Disposition
1.	NJAC 4A:2-2.3(a)(6) Conduct Unbecoming	Five (5) working day suspension
2.	NJAC 4A:2-2.3(a)(11) Other sufficient cause	same
3.	HRB 84-17, as amended C8 Falsification; Intentional Misstatement of material Fact in connection with work, Employment application, or Any other record, investigation Or other proceeding.	Dismissed
4.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same

C. The parties have agreed to the following:

1. The Appellant has served ten (10) working days suspension. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will receive five (5) days back pay.
2. The personnel file for the Department of Corrections will indicate that the appellant received a Five (5) day suspension. Any other time off shall be reflected in appellant's record as authorized leave without pay.
3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
4. As set forth in paragraph C (2), the Appellant shall receive five (5) days back pay.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other

monetary relief, except as provided in paragraph C(2).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties acknowledge that a minor disciplinary sanction of 5 days or less may be eligible for expungement pursuant the terms of IMP PSM.002.EXP.01, providing all necessary conditions are satisfied.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 2.16.17

DIANE CROOM, Appellant

DATE: 2-21-17

SEAN SPRICH
On Behalf of Appellant

DATE: 3-8-17

KAREN CAMPBELL, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, DIANE CROOM, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 2·16·17

Diane Croom

DIANE CROOM

4-5-17

STATE OF NEW JERSEY

In the Matter of Rhonda Denson
Atlantic County,
Department of Public Safety

CSC DKT. NO. 2017-1427
OAL DKT. NO. CSV 17675-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 17675-16
AGENCY DKT. NO. 2017-1427

IN THE MATTER OF RHONDA DENSON, ATLANTIC COUNTY, DEPARTMENT OF PUBLIC SAFETY.

Jacqueline M. Vigilante, Esq., for Rhonda Denson, appellant

Elizabeth D'Ancona, Esq., Assistant County Counsel, for the Atlantic County, Department of Public Safety, respondent (James F. Ferguson, County Counsel, attorney)

Record Closed: March 2, 2017 Decided: March 13, 2017

BEFORE **LISA JAMES BEAVERS,** ALJ:

This matter concerns the appeal of Rhonda Denson from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on November 21, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 13, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 3/16/17

Date Mailed to Parties: 3/16/17

/lam

SETTLEMENT AGREEMENT BETWEEN RHONDA DENSON AND THE COUNTY OF ATLANTIC

This Settlement Agreement, hereinafter referred to as "Agreement" is made by and between RHONDA DENSON, hereinafter referred to as "Employee," and Atlantic County and the Atlantic County Justice Facility referred to as "Employer" or "County." Employee and the County are sometimes hereinafter collectively referred to as the "Parties."

WHEREAS, Employee was served with Preliminary Notice of Disciplinary Action for an incident which occurred on May 31, 2016, a copy of which is attached hereto as **Exhibit A**; and

WHEREAS, the disciplinary sanction being sought in the above Preliminary Notice of Discipline was a 6-day suspension from employment; and

WHEREAS, Employee waived the departmental hearing for the above disciplinary sanction, and a Final Notice of Disciplinary Action (31-B) was issued, a copy of which is attached hereto as **Exhibit B**; and

WHEREAS, Employee served the 6 days' suspension associated with the disciplinary sanction and appealed the 31-B to the Civil Service Commission/Office of Administrative Law (Docket No: CSV 17675-2016 S); and

WHEREAS, Employee also supplemented her appeal with an affirmative claim of retaliation under N.J.A.C. 4A:2-5.1 and 5.3; and

WHEREAS, the parties to the agreement, having attended a settlement conference with the Honorable Bernard Goldberg on January 17, 2017, have decided to resolve the disposition of all of the above charges and claims in a summary fashion without the necessity for hearings, and in order to avoid the expense and burden of litigation, and in resolution of all other matters and proceedings that might arise between Employee and Employer as a result of the aforesaid charges.

NOW, THEREFORE, Employee and Employer agree as follows:

1. The above recitals are repeated, incorporated and made a part of the Agreement.

2. ***Modified Suspension Time.*** In consideration for entering into the Agreement, the Employer agrees to modify the suspension as follows:

(a) A new Final Notice of Disciplinary Action (31-B) for the May 31, 2016 violation will be issued, and the suspension will be reduced to 5 days. Employee will not have to

serve these days, as they have already been served. Employee will be paid one (1) day's pay in consideration for the one day she served which exceeds the five (5) days of settled discipline.

(b) Employee shall withdraw her pending appeal to the Civil Service Commission/Office of Administrative Law (Docket No: CSV 17675-2016 S) within 10 days of the execution of the agreement.

(c) Employee shall dismiss the affirmative claim of retaliation which was submitted with the appeal of the 31-B to the Civil Service Commission/Office of Administrative Law with prejudice, and in writing, within 10 days of the execution of the agreement.

The County's modification of Employee's suspension as listed above is expressly conditioned upon Employee agreeing to the terms of the Agreement and Employee withdrawing her appeal and dismissing her affirmative claim before the New Jersey Civil Service Commission/Office of Administrative Law for the above-referenced charge. **THE PARTIES ACKNOWLEDGE THESE ARE MATERIAL TERMS AND THE EMPLOYEE'S FAILURE TO PERFORM UNDER THE TERMS OF THIS SECTION SHALL BE CAUSE FOR THE COUNTY TO PROCEED WITH AND PURSUE ALL OF THE CHARGES NOTED ABOVE IN EXHIBIT A AND B.**

3. ***Nondisclosure.*** All parties to the Agreement agree that the terms of the Agreement, and the circumstances surrounding same, are not to be divulged to any outside sources, either directly or indirectly. Outside sources do not include various agents of the County of Atlantic, the State of New Jersey, the United States of America, or any court of competent jurisdiction.

The provisions of the paragraph are binding only on the Employee and Employer. The Employer makes no representation and takes no responsibility for any unofficial actions of other employees who are not parties to the Agreement.

4. ***Discipline and Future Conduct.*** Employee EXPRESSLY ACKNOWLEDGES AND UNDERSTANDS future violations of policy will not be tolerated by the Atlantic County Justice Facility. Future violations of any County policy will result in progressive discipline up to and including termination of employment.

5. ***Release/Exclusions.*** Except as expressly provided in paragraph 5(a) below, Employee knowingly and voluntarily releases and forever discharges for herself, her heirs,

executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, arising from the charges and conduct associated with the May 31, 2016 incident (specifically excluding any and all other incidents and claims Employee may have), including, but not limited to, any alleged violation of:

- The National Labor Relations Act;
- Family Medical Leave Act (Federal and State);
- Title VII of the Civil Rights Act of 1964;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act of 1974;
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- New Jersey State Wage and Hour Law;
- The New Jersey Law Against Discrimination;
- The New Jersey Workers' Compensation laws;
- The Conscientious Employee Protection Act;
- New Jersey Civil Service Statutes;
- any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;
- any public policy contract (whether oral or written, expressed or implied), tort or common law;
- any claim for costs, compensation, fees or other expenses including attorney's fees incurred in these matters.

5(a) *Exclusions* The above general release specifically excludes only the following:

i) Claims to enforce the settlement.

ii) Claims Employee may have as a member of the class action law suit in *Hebert et al v. County of Atlantic* under Civil Action No. 1:13CV04170 JHR-KMW in Federal Court in Camden NJ, if any.

6. ***Waiver of Right to Costs and Fees.*** The Parties agree that the Employee waives any claims for fees and costs, including but not limited to attorney's fees.

7. ***Governing Law.*** The Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.

8. ***Binding Agreement.*** The agreement constitutes the entire agreement between the parties. The agreement supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of the agreement shall be binding unless in writing and executed by the parties. No waiver of any of the provisions of the agreement shall be deemed or shall constitute a waiver of any other provisions, whether or not similar. Nor shall any waiver constitute a continuing waiver. The Parties have negotiated the terms of the Agreement through and by their counsel. Accordingly, the Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing the Agreement to be drafted.

10. ***Execution in Counterparts/Facsimile and E-mail Signatures.*** The Agreement may be executed in counterparts, and all counterparts so executed will together constitute one (1) binding agreement. The Agreement shall be validly executed and delivered by exchange of executed counterparts by regular mail, facsimile or e-mail.

11. Without in any way limiting the scope or effect of the preceding paragraphs:

A. **Employee represents that she is able to read the English language and understands the meaning and effect of her Agreement.**

B. Employee understands that the above paragraphs include a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Employee may

have as a result of any act that has occurred arising out of the filing of the attached Notice of Discipline.

C. Employee understands that if the Agreement were not signed, the Employee would have the right to submit information to a hearing officer, and then on appeal to an administrative law judge assigned to hear the cause of action by the New Jersey Department of Personnel / Civil Service Commission, and further understands that upon receipt of an unfavorable ruling by an administrative law judge, would have the right to make submissions to the Civil Service Commission, and thereafter, if unsatisfied with the final decision of the Civil Service Commission, would have the right to take an appeal to the New Jersey Superior Court, Appellate Division, together with any further rights to file appeals, either by right or by grace in the New Jersey State Court and Federal Court system.

D. **Employee understands and agrees that she has sought and received the advice of counsel and Union Representation of her own choice prior to executing the Settlement Agreement and General Release.**

E. **Employee acknowledges having had ample time to review the document, she has reviewed its terms, understands them and that she has voluntarily decided to release all claims against the County except as otherwise set forth herein after thoroughly reviewing the Settlement Agreement and the General Release.**

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names:

The Parties

Rhonda Denson (Employee)

Dated: Feb 22, 2017

ATLANTIC COUNTY

Geraldine A Cohen

Warden Geraldine Cohen
Atlantic County
(Employer)

Dated: 02-23-2017

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM

Employing Agency Name	Address/ Phone Number	Date
Atlantic County	5060 Atlantic Ave, Mays Landing, NJ 08330 609-645-5855	06-14-2016

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Elizabeth DAncona, Atlantic County Department of Law	1333 Atlantic Ave, Atlantic City, NJ 08401 / (609) 343-2310 / DAncona_Elizabeth @aclink.org

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Rhonda Denson	County Correction Officer	

Address/ Phone Number	Pension Number
23 Hopkins St Woodbury NJ 08096 856-845-0140	

You are hereby notified that the following charge(s) have been made against you: *(If necessary, use additional sheets and attach)*

Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
See Attached	See Attached
☒ *If checked, charges are continued on attached page.*	☒ *If checked, incidents are continued on attached page.*

☐ You are hereby suspended effective _____
(Check box to indicate if employee is suspended pending final disposition of the matter)

If you desire a departmental hearing before the appointing authority on the above charge(s), notify it within 5 Days ***days of receipt of this form. If you request a hearing it will be held on** July 14, 2016
at (time) 10 am **at (place of hearing)** training suite

**Must be a minimum of five days*

The following disciplinary action may be taken against you:

☒ Suspension for 6 working days, beginning when and ending notified

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____ ☐ Other Disciplinary Action

☐ Fine _____ *amount* which is equal to _____ *number* (number of working days)

Appointing authority or authorized agent's signature and title.

Signature Geraldine D. Cohen Title Warden

This form must be personally served on the employee or sent by certified or registered mail.

☐ Certified or Registered Mail ☐ Receipt Number _____

☒ Signature of Server Capt Mayes ☐ Date of personal service 6-15-16

DPF-31A Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

PRELIMINARY NOTICE OF DISCIPLINARY ACTION

June 14, 2016
Atlantic County New Jersey
Preliminary Notice of Disciplinary Action
Denson , Rhonda , County Correction Officer,

Specifications:
On May 31, 2016 employee failed to obey Lt. Iuliucci's direct order to include specific information in report 16050656 on where and when she first saw the pitchers in medical. Employee refused this order writing she will provide the information after speaking with her attorney.

Charge(s):
Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11 Personnel Rules and Regulations ;
Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11, Manual of Personnel Rules and Regulations, Chapter 1 - Professional Conduct: 01.10 INSUBORDINATION Officers shall not commit acts of insubordination, cause, or incite other employees to become insubordinate in areas such as listed below but not limited to: (a) Failure or deliberate refusal to obey a lawful order given by a superior officer. (b) Any disrespectful, mutinous, insolent, or abusive language or action toward a superior officer.

New Jersey Administrative Code, Title 4A Chapter #2, Sub chapter #2 Major Discipline, 4A:2-2.3 General Causes, (a) An employee may be subject to discipline for: 2. Insubordination. (county charges)

Special Conditions:

Hearing is Requested [X]
Hearing is Not Requested [ ]
Check appropriate box

Rhonda Denson — Print and Sign
6/15/2016 — Date

Note: Further disciplinary infractions of this nature will result in progressive levels of discipline.

SIGNATURE: Geraldine D. Cohen — TITLE: Geraldine D. Cohen, Warden
(Appointing Authority or Authorized Agent)

METHOD OF SERVICE
SERVICE [X] PERSONAL — Capt Ramos — 6-15-16
[ ] CERTIFIED OR REGISTERED MAIL — NAME AND TITLE OF SERVER — DATE SERVED

POSTAL RECEIPT NUMBER: _____ Total Pages 2

Final Notice of Disciplinary Action (31-B)
Civil Service Commission – State of New Jersey

Instructions for employer: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine for more than five working days at any one time; (b) suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the Departmental hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or by certified or registered mail.

FROM

Employing Agency Name	Address/ Phone Number	Date
Atlantic County	5060 Atlantic Ave, Mays Landing, NJ 08330 609-645-5855	11-02-2016

Attorney representing your agency should this matter be appealed	Address/Phone number/Email address
Elizabeth DAncona, Atlantic County Department of Law	1333 Atlantic Ave, Atlantic City, NJ 08401 / (609) 343-2310 / DAncona_Elizabeth@aclink.org

TO

Employee Name	Permanent Civil Service Title	Employee Identification Number
Rhonda Denson	County Correction Officer	

Address/ Phone Number	Pension Number
23 Hopkins St Woodbury, NJ 08096 856-845-0140	

On 08-15-2016 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☒ **You requested a hearing which was held on** Waived ☐ **You did not request a hearing**

☐ **You requested a hearing and did not appear at the designated time and place**

Sustained Charges:	**Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:**
See attached	See attached
☒ *If checked, charges are continued on attached page.*	☒ *If checked, incidents are continued on attached page.*

The following disciplinary action has been taken against you:

☒ Suspension for 6 working days, beginning 11-29-2016 and ending 12-6-2016

☐ Indefinite suspension pending criminal charges effective (date)

☐ Removal, effective (date)

☐ Demotion to position of effective (date)

☐ Resignation not in good standing, effective (date) ☐ Other Disciplinary Action

☐ Fine amount which is equal to number (number of working days)

Appointing authority or authorized agent's signature and title.

Signature Kathleen A. Cohen Title Warden 11/2/2016

This form must be personally served on the employee or sent by certified or registered mail.

☐ **Certified or Registered Mail** ☐ **Receipt Number**

☒ **Signature of Server** Capt. [illegible] ☒ **Date of personal service** 11-2-2016

APPEAL PROCEDURE TO THE EMPLOYEE: You have the right to appeal within 20 days from receipt of this form. All appeals must include a copy of this form. **Pursuant to P.L. 2010, c. 26, effective July 1, 2010 there is a $20 fee for disciplinary appeals. Please include the required $20 fee with your appeal. Payment must be made by check or money order only, payable to NJ CSC. Persons receiving public assistance pursuant to P.L. 1947, c.156 (C.44:8-107 *et seq.*), P.L.1973, c. 256 (C.44:7-85 *et seq.*), or P.L.1997, c.38 (C.44:10-55 *et seq.*), and veterans as defined by N.J.S.A.11A:5-1 *et seq.* are exempt from this appeal fee.** Appeals should be addressed to the Civil Service Commission, P.O. Box 312, Trenton, New Jersey 08625-0312. **Any appeal postmarked after the 20 days statutory time limit will be denied.** We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail. Do not give your appeal to your personnel office for forwarding to the Civil Service Commission.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at: www.state.nj.us/csc.

DPF-31B Revised 03-24-11

DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.
When using a form downloaded from the Internet you still must provide the indicated above number of copies to all parties.

B

FINAL NOTICE OF DISCIPLINARY ACTION

November 2, 2016
Atlantic County New Jersey
Final Notice of Disciplinary Action
Denson , Rhonda , County Correction Officer,

Specification s:

On May 31, 2016 employee failed to obey Lt. Iuliucci's direct order to include specific information in report 16050656 on where and when she first saw the pitchers in medical. Employee refused this order writing she will provide the information after speaking with her attorney.

Charge(s):

Atlantic County Department of Public Safety, Division of Adult Detention , Policy and Procedure Manual, 1.3.11

Personel Rules and Regulations ;

Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11, Manual of Personnel Rules and Regulations, Chapter 1 - Professional Conduct 01.10 INSUBORDINATION Officers shall not commit acts of insubordination, cause, or incite other employees to become insubordinate in areas such as listed below but not limited to: (a) Failure or deliberate refusal to obey a lawful order given by a superior officer. (b) Any disrespectful, mutinous, insolent, or abusive language or action toward a superior officer.

New Jersey Administrative Code, Title 4A Chapter #2, Sub chapter #2 Major Discipline, 4A:2-2.3 General Causes, (a) An employee may be subject to discipline for: 2. Insubordination. (county charges)

Special Conditions:

Hearing waived by employee on November 2, 2016. 6 Day suspension dates are : November 29, 2016, November 30, 2016, December 1, 2016, December 2, 2016, December 3, 2016, December 6, 2016.

Employee Signature _____ **Date** 11/2/2016

SIGNATURE: Geraldine D. Cohen **TITLE:** **Geraldine D. Cohen, Warden**
(Appointing Authority or Authorized Agent)

Note: Further disciplinary infractions of this nature will result in progressive levels of discipline.

METHOD OF SERVICE	[X] PERSONAL	Captain	11-2-2016
SERVICE	[ ] CERTIFIED OR REGISTERED MAIL	**NAME AND TITLE OF SERVER**	**DATE SERVED**

POSTAL RECEIPT NUMBER: _____ **Total Pages**_____

4/5/17

STATE OF NEW JERSEY

In the Matter of Joshua Feldman
Hudson County,
Department of Corrections

CSC DKT. NO. 2017-853
OAL DKT. NO. CSR 14933-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The appeal of Joshua Feldman, County Correction Sergeant, Hudson County, Department of Corrections, removal effective September 1, 2016, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on March 10, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 5, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Joshua Feldman.

Re: Joshua Feldman

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 14933-16

IN THE MATTER OF JOSHUA FELDMAN, HUDSON COUNTY (DEPARTMENT OF CORRECTIONS).

Matthew W. Young, Esq., for appellant Joshua Feldman (Mason Thompson, attorneys)

Daniel W. Sexton, Assistant County Counsel, for respondent Hudson County Department of Corrections (Donato J. Battista, County Counsel, attorney)

Record Closed: February 1, 2017 Decided: March 10, 2017

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

County correction sergeant Joshua Feldman was removed from his employment at the Hudson County Department of Corrections (HCDOC) for alleged insubordination, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, as a result of his driving while intoxicated and involvement in a motor-vehicle accident on October 30, 2012.

PROCEDURAL HISTORY

On November 2, 2012, the HCDOC served upon Feldman a Preliminary Notice of Disciplinary Action (PNDA) reflecting that he was suspended effective November 2, 2012. (J-1.) He was issued a Notice of Immediate Suspension on November 2, 2012, reflecting that suspension was necessary to maintain safety, health, order, or effective direction of public services, and because he had been formally charged with a crime of the first, second, or third degree. (J-1.) A departmental hearing was held on November 9, 2012. (J-1.) On April 4, 2013, the HCDOC served upon Feldman a Final Notice of Disciplinary Action (FNDA) reflecting that he was indefinitely suspended. Feldman was thereafter indicted on one count of assault by auto (third degree) and three counts of endangering the welfare of a child (second degree). On or about June 24, 2013, Feldman pleaded guilty to (1) assault by auto; (2) DWI with minors; and (3) DWI, and entered Pretrial Intervention (PTI) with conditions. The charges of careless driving and endangering the welfare of a child were recommended for dismissal. (J-1.) Feldman completed PTI, and an order was entered on June 24, 2016, dismissing the complaint/indictment/accusation and discharging the posted bail.

On June 27, 2016, the HCDOC served upon Feldman a second PNDA. (J-1.) A second departmental hearing was held on August 29, 2016. On September 1, 2016, the HCDOC served upon Feldman a second FNDA, removing him from his employment effective September 1, 2016. (J-2.) Feldman filed a request for a hearing with the Office of Administrative Law (OAL) and the Civil Service Commission (Commission). The appeal was received by the OAL on September 20, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 40A:14-200 et seq., and was perfected on September 22, 2016.

I heard the matter on January 4, 2017, and the record closed on February 1, 2017.[1]

[1] The record was to have closed on January 25, 2017, but respondent's brief was not received via email, and the hard copy was received on February 1, 2017.

FACTUAL DISCUSSION

Background

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following material **FACTS** in this case:

Feldman commenced employment with the HCDOC as an officer in September 1997 and was promoted to sergeant in August 2006.

On October 30, 2012, the day after Superstorm Sandy, Feldman was driving home from a gathering. Feldman's wife and three children, then ages eleven, ten and four, were with him. At approximately 6:55 p.m., Feldman swerved over the double yellow lines and crashed head-on into another vehicle (the crash). Special Officer Haley had been traveling behind the other vehicle and witnessed the accident. (R-1.) Det. Ryan Hoppock has been employed by the Woodbridge Police Department since October 2009 and was a patrol officer at the time of the crash. He was dispatched to the crash scene. Lt. Joseph Licciardi has been a police officer since 1995, and was a patrol sergeant at the time of the crash. Licciardi arrived at the crash scene shortly after Hoppock.

Hoppock observed two vehicles with heavy damage disabled in the middle of the road. It appeared to Hoppock that there was a serious injury to the other driver (injured driver) and that he was trapped inside his vehicle. The fire department was at the crash scene and had to cut the driver-side door to remove the injured driver. Licciardi arrived as the fire department was trying to remove the injured driver from his vehicle.

After the injured driver was removed from his vehicle and taken to the hospital, Hoppock went to speak to Feldman. It appeared to Hoppock that Feldman had been drinking. After determining that there were no injuries to Feldman or his family, Hoppock asked Feldman if he had been drinking. Feldman admitted to having consumed alcohol.

Hoppock told Licciardi that he detected an odor of alcohol on Feldman's breath and told Licciardi that Feldman said he had consumed alcohol. Licciardi went to speak to Feldman. Licciardi greeted Feldman and observed that his eyes were bloodshot and watery. Licciardi also detected an odor of alcohol on Feldman's breath. Licciardi asked Feldman what happened and Feldman told him that he crossed over the double yellow lines to avoid a tree branch and then he struck the other vehicle. (R-3.) Licciardi asked Feldman about alcoholic beverages and Feldman admitted that he had consumed alcohol.

Licciardi commenced the standard field sobriety testing. Licciardi was trained at the State Police Standard Field Sobriety Testing course in 1996 and he was a breathalyzer operator and is now an Alcotest operator. Licciardi checked Feldman's eyes for nystagmus by having Feldman follow a pen with his eyes. Licciardi observed a lack of smooth pursuit in both eyes, nystagmus at maximum deviation in both eyes, and an onset of nystagmus prior to forty-five degrees in both eyes. Licciardi asked Feldman to do the one-leg stand after demonstrating it to him. Feldman stood on his right leg and immediately fell down, so Licciardi stopped the one-leg stand test. Licciardi then conducted the "walk and turn" test, and Feldman missed every step on that test. Licciardi concluded that Feldman was intoxicated, and he was placed under arrest and taken to the police station.

Hoppock completed a New Jersey Police Crash Investigation Report and Incident Report. (R-1; R-2.) Licciardi completed an Incident Report. (R-3.) Feldman was charged with driving while intoxicated (DWI), DWI with minors, and careless driving. Due to the seriousness of the injuries to the other driver, Feldman was also charged with aggravated assault (N.J.S.A. 2C:12-1(b)), and because his children were in the vehicle Feldman was also charged with three counts of endangering the welfare of children (N.J.S.A. 2C:24-4). (R-2; R-3.) Hoppock determined that Feldman was responsible for the crash. (R-1.) Feldman was polite and cooperative with the officers.

Licciardi attempted a breathalyzer at police headquarters, but the machine malfunctioned. Feldman consented to a blood sample, and was taken to the hospital for a legal BAC[2] sample. Feldman's BAC was .298.

On November 2, 2012, the HCDOC served upon Feldman a PNDA reflecting that he was suspended effective November 2, 2012. (J-1.) He was issued a Notice of Immediate Suspension on November 2, 2012, reflecting that suspension was necessary to maintain safety, health, order, or effective direction of public services, and because he had been formally charged with a crime of the first, second, or third degree. (J-1.) A departmental hearing was held on November 9, 2012. (J-1.) On April 4, 2013, the HCDOC served upon Feldman a FNDA reflecting that he was indefinitely suspended. Feldman was thereafter indicted on one count of assault by auto (third degree) and three counts of endangering the welfare of a child (second degree). On or about June 24, 2013, Feldman pleaded guilty to (1) assault by auto; (2) DWI with minors; and (3) DWI, and he entered PTI with conditions. The charges of careless driving and endangering the welfare of a child were recommended for dismissal. (J-1.)

On June 24, 2013, Feldman admitted on the record that he consumed beer and liquor prior to operating his vehicle on October 30, 2012; that his toxicology results were a .298; that it impaired his ability to operate his vehicle; that his three children, ages eleven, ten, and four, were with him in the vehicle; that as a result of his alcohol consumption he was involved in a motor-vehicle accident with another vehicle; and that as a result of his driving while intoxicated he caused serious injury to the driver of the other vehicle. He entered pleas to driving while intoxicated (a traffic violation) and driving while intoxicated with minors in the vehicle (a traffic violation), and to assault by auto (a third-degree crime). In exchange for the pleas, the three counts of endangering the welfare of a child (a second-degree crime) would be dismissed at the time of sentencing, and the charge of careless driving (a traffic violation) would also be dismissed. The assistant prosecutor noted on the record that Feldman "is a Hudson County Corrections officer, and he understands that by pleading guilty to this, as a condition of PTI, that he will not be able to work while he's in PTI." (R-6.) Likewise, the

[2] Blood alcohol content.

judge stated, "I'm being told that as a condition of pre-trial intervention, you will not be able to work. I'm inferring from that that once PTI is up, he can go back to work. But I have no idea." (R-6.)

An Order of Postponement was executed on June 26, 2016, which reflects the following:

> In accordance with the provisions of N.J.S.A. 2C:43-12 & 13 & R. 3:28, and upon the recommendation of the PTI Director and with the consent of the Prosecutor and defendant to the attached listed terms and conditions of the supervisory treatment, it is ORDERED that all further proceedings be and are postponed for a period of 36 months, beginning June 26, 2016.
>
> [R-4.]

The terms and conditions reflected on the Special Conditions of PTI Supervisor (Special Conditions) included, inter alia, fifty hours of community service, restitution to the injured driver, certain drug/alcohol testing and/or counseling, and medical/psychological tests/evaluations or counseling. (R-4.)

Feldman completed PTI. On June 26, 2013, an Order of Dismissal and Discharge of Bail (Dismissal Order) was entered by the Honorable Alberto Rivas, P.J.Cr., ordering that the complaint(s)/indictment(s)/accusation(s) were dismissed and the posted bail discharged. (P-2.) Feldman received a copy of the Dismissal Order on July 13, 2016. (P-3.) On August 26, 2016, an Order was entered by the Honorable Mary K. Costello, P.J.Civ., denying with prejudice the HCDOC's Order to Show Cause for an order forfeiting Feldman's public employment. (P-4.)

Feldman's disciplinary history includes some minor discipline for lateness and one major discipline in 2008 for excessive force, for which he received a twenty-day suspension.

Testimony

Ryan Hoppock

At the crash scene, Feldman told Hoppock he had a couple of drinks today.

Joseph Licciardi

Licciardi observed Feldman swaying and unable to stand. Licciardi asked Feldman what type of alcoholic beverages he had consumed and Feldman stated, "ten beers." Feldman was alert and conscious and spoke coherently. Standard field sobriety testing only indicates whether someone is a .08 or above; .08 is the legal limit. Feldman's BAC of .298 is significantly above the legal limit. However, Licciardi has seen people with a .30 remain standing, and some people at .08 or .09 falling during the standard field sobriety testing.

The other driver was seriously injured. Licciardi happened to see the injured driver a couple of years after the accident, and he was still recuperating.

Chris Yurecko

Capt. Chris Yurecko started as an officer in September 1997. He became a lieutenant in 2012 and became a captain a year ago. As a lieutenant, he was the unit commander. Unit commanders handle discipline of members.

Yurecko testified that Feldman's was not a run-of-the-mill DWI. A typical DWI is when someone gets pulled over and they are .08 or above, and it results in a six-month driver's-license suspension. Feldman's DWI involved aggravated assault by auto, endangering the welfare of minors, a guilty plea, and PTI. Feldman was a sergeant at the time. An officer, in particular a supervisor, being arrested on a charge that hurts a person does not reflect well on the officer or the HCDOC. Officers are held to a higher standard, and supervisors are held to a higher standard than officers. Typically if an

officer and a supervisor are found guilty of the same infraction at a hearing, the supervisor winds up with a more severe punishment.

James Nieves

Sgt. James Nieves has been employed by the HCDOC since October 1994 and has been a sergeant for eleven years. He is the PBA president for the Supervisor's Association. At the time of the crash he was a trustee.

Nieves has known Feldman since Feldman commenced his employment with the HCDOC. Feldman is a strong individual, and is liked by everyone. Nieves has never heard a complaint about Feldman, but he has heard compliments. Feldman worked in an area that many supervisors try to avoid. If a mistake is made in that area, it could result in suspension or termination. Feldman is an exceptional supervisor. Nieves had no knowledge of any drug or alcohol abuse by Feldman. Feldman made a mistake.

Joshua Feldman

At the time of the crash, it was dark out and there were no lights or power because of Superstorm Sandy. Feldman could only see headlights coming. There was debris on the road. Feldman moved over the center line and the two vehicles hit their headlights together. On impact, Feldman's body hit the steering wheel and his eyeglasses went flying. Feldman was all bruised the next day. He thought he lost consciousness for a second. His wife was screaming. Feldman closed his eyes and opened them and made sure his children were okay. His son was screaming. Feldman got out of the car. The airbags had deployed on the other vehicle, and the injured-driver's face was bleeding.

Several police officers came and spoke to Feldman. Feldman was concerned about his eyeglasses because he could not see, but they were unable to locate them. The first "officer" on scene was a "special" officer, not a full officer. Hoppock arrived shortly after that. Feldman told Hoppock that he had crossed the double yellow lines to avoid debris on the road and then he collided with the other vehicle.

Feldman denied telling Licciardi he had ten beers. Feldman said "two" to everyone he spoke to, but one officer reported he said "ten," and another reported he said "too much." Feldman was drinking. He does not recall how many beers. He had a lot of beers throughout the day, and before he left he had a couple of mixed drinks. Feldman is not contesting the DWI.

Feldman thought he was just getting tickets, and did not find out about the criminal charges until after the breathalyzer and blood test. He thought the charges would impact his employment, so he hired an attorney and spoke to numerous people, including his superiors, union representatives, and colleagues. Feldman appeared in Superior Court on the criminal charges. There was an offer of PTI, and he discussed the implications of PTI with the HCDOC. The prosecutor had mentioned pleading guilty to one of the charges, and that Feldman should pick one. Feldman did not think that would be good for his job, so he discussed it with Deputy Director Eady. Eady contacted county counsel. Feldman waited for answers, but did not immediately get feedback. On June 10, 2013, at 2:45 p.m., Feldman's criminal attorney emailed Donald Battista, county counsel. Battista emailed back that he would let the criminal attorney know. Battista did not further respond via email or in writing. Feldman's criminal attorney received a telephone call from Battista, who told his criminal attorney that it was fine for PTI with a guilty plea and that Feldman was not going to be terminated, but that he would definitely have to go through the disciplinary process. Before Feldman entered into PTI, Feldman's criminal attorney told him Battista had input. Feldman had numerous discussions about not wanting to go to a hearing. He was told once PTI was completed and dismissed, he could get his job back. Feldman has nothing in writing about getting his job back.

Feldman entered PTI on June 26, 2013, after making sure he had his job secure. Feldman's understanding, based on his consultations with various people, was that after he signed the PTI paperwork he could go right back to work after the disciplinary hearing; that he could work while on PTI; and that he would be demoted and suspended for six months. Feldman received a PNDA on November 2, 2012, and everything was held in abeyance until any final proceedings in the criminal matters took place. Since PTI took so long, the HCDOC had to issue the PNDA. Feldman received another

PNDA on June 27, 2013, because the previous PNDA had been for an indefinite suspension pending the criminal charges.

Feldman was not allowed to return to work while on PTI or at any time since the accident. Feldman's license was suspended. Feldman had a breathalyzer in his car for seven months.

Feldman was in PTI for thirty-six months. The entire indictment was dismissed on June 24, 2016, after he satisfied all the requirements. Feldman received another PNDA on June 27, 2016. He did not receive the Dismissal Order until July 27, 2016, when his current attorney forwarded it to him via email.

Hudson County filed a complaint against Feldman in Superior Court in July 2016 seeking automatic forfeiture of Feldman's employment for a third-degree crime. However, Feldman does not have a criminal record because all charges have been dismissed.

Feldman feels horrible about the crash. One event changed his life. He will regret it for the rest of his life. His memory of the crash is clear because it happened to him and his family. The crash scene is near his house. He passes it daily and thinks about this. Feldman acknowledges the DWI and that it was conduct unbecoming to drink and drive and disobey the law. It happens. He made a bad judgment call and a bad mistake. He is not an alcoholic, and he did not have to go for treatment. Feldman's conduct does not warrant his termination. He was offered six months, and many other officers were not terminated for similar conduct. Feldman feels remorseful about what he did. Feldman does not deny that .298 was his BAC or that he was drinking. Feldman acknowledged drinking and careless driving. He made a stupid mistake. He did not purposely assault the other driver with his vehicle. He got into a car accident.

Feldman was promised numerous times that he would get his job back and he followed the correct protocol for it. At one point Feldman went and got his uniform without his sergeant stripes on it, but was told to get the stripes because he was going back to work. However, thereafter he was no longer receiving telephone calls and was

told not to get the stripes. Instead, he was told to shut up and not say anything and to come back in three years because HCDOC had every right to fire him then if they wanted to. Feldman looked up title 4A of the New Jersey Administrative Code relative to actions involving criminal matters, and determined that the HCDOC could do whatever it wanted involving PTI. The HCDOC could allow Feldman back to work, fire him, give him a hearing, or have him wait until PTI was completed. Feldman decided that if the HCDOC wanted him to wait he would humbly wait until he completed PTI, because he did something wrong. Feldman did not want to forfeit his job. He thought he was getting his job back after PTI, but the HCDOC thereafter suddenly did everything in N.J.A.C. 4A:2-2.7 and gave him a hearing the following Monday. It is a game the HCDOC plays. Feldman feels that he has been treated unjustly, but is not sure by whom. Deputy Director Eady told him he could have his job back. Director Nalls gave Feldman a big hug at a retirement party and said that she could not wait until Feldman finished PTI, and that he would get his job back. After Nalls became the director, county counsel told her not to speak to Feldman anymore.

Feldman was involved in the Officers' Union from 2001 to 2008, and was treasurer until he became a sergeant in 2008. Thereafter, he served as treasurer, vice-president, and acting president of the Supervisors' Union. Feldman was a union representative numerous times. Feldman has never had a subordinate make a complaint about him. He has good rapport with all officers and the chain of command.

Additional Findings of Fact

Based upon the testimony, I **FIND** the following additional **FACTS**:

Feldman had "a lot of beers throughout the day" on the day of the crash, and before he left the gathering he had a couple of mixed drinks. There exists nothing in writing that Feldman was to be reinstated to his employment.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline shall include removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for a number of reasons enumerated in N.J.A.C. 4A:2-2.3(a), including "insubordination," "conduct unbecoming a public employee," "neglect of duty," and "other sufficient cause." In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Feldman is charged with insubordination (N.J.A.C. 4A:2-2.3(a)(2)), conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6)), neglect of duty (N.J.A.C. 4A:2-2.3(a)(7)), and other sufficient cause (N.J.A.C. 4A:2-2.3(12)). The HCDOC Rules and Regulations reflect that insubordination may include, but shall not be limited to, (1) refusing to obey lawful orders or commands from a supervisor, (2) using profane or insulting language to a supervisor, and (3) making insulting gestures to a supervisor. The HCDOC Rules and Regulations also reflect that custody-staff members shall not commit acts of insubordination, and that the following specific acts are prohibited: (1) failure or deliberate refusal to obey a lawful order, verbal or written, by the director of corrections, deputy director, deputy warden(s), unit manager(s), or other supervisory staff member(s) or any authorized person; and (2) any disrespectful, mutinous, insolent, obscene, and/or abusive behavior or language towards any supervisory staff member or their orders (verbal and/or

written). In view of the applicable HCDOC Rules and Regulations regarding insubordination, I **CONCLUDE** that the charge of insubordination is not sustained.

Per the HCDOC Rules and Regulations, custody staff members (CSMs) are prohibited from engaging in "unprofessional or illegal behavior, both on and off duty that could in any manner reflect negatively on the HCDOC"; every CSM shall "[c]omply with all federal and state laws, regulations and/or statutes"; every CSM shall "[a]dhere to all rules, regulations, policies, procedures, orders, and directives of the HCDOC"; intoxication is subject to disciplinary action and may include that which is "off duty, not in uniform, and arrested"; "[a]ny act or omission to act contrary to good order, discipline, or accepted social practice may subject a custody staff member to disciplinary action"; CSMs "shall comply with all Federal and State laws; HCDOC policies, procedures, rules and orders"; and CSMs "shall conduct their private and professional life in such a manner as to avoid an adverse reflection upon themselves and the HCDOC." Feldman's conduct, including driving while intoxicated with three children in the vehicle, resulting in serious injury to another driver, was illegal; was a violation of federal and State laws, regulations, and statutes; was a violation of several Rules and Regulations of the HCDOC; and was contrary to acceptable social practice. The HCDOC Rules and Regulations reflect that "neglect of duty" may include failure to comply with HCDOC Rules and Regulations. Accordingly, I **CONCLUDE** that the charge of neglect of duty is sustained.

With respect to conduct unbecoming a CSM, the HCDOC Rules and Regulations state:

> A custody staff member of the HCDOC is a conspicuous representative of the Department and all of its custody staff members. To the majority of people, he/she is a symbol of stability and reliability. His/her conduct is scrutinized and when his/her actions are found to be excessive, unwarranted, or unjustified, he/she is criticized far more severely than comparable conduct of persons in other fields of endeavor. The conduct of a public employee, on and off duty, reflects upon the HCDOC. Therefore, custody staff members must avoid conduct that might discredit themselves or the Department.

The HCDOC Rules and Regulations state that a CSM may be subject to disciplinary action for conduct unbecoming an officer and infractions of rules and regulations and/or policy and procedures of the HCDOC.

Notwithstanding the foregoing, conduct unbecoming an employee need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted). Per N.J.S.A. 2A:154-3, correction officers are recognized as law-enforcement officers, and as such may enforce the criminal law of this state, and a correction officer's involvement in maintaining security at the jail is a compelling public interest. Allen v. Cnty. of Passaic, 219 N.J. Super. 352, 374 (Law Div. 1986). Police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). This higher standard of conduct is one of the obligations a police offer undertakes upon voluntary entry into the public service. In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A police officer's primary duty is to enforce and uphold the law, and a police officer "represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). The obligation to act in a responsible manner is especially compelling in a case involving a law enforcement official. In re Philips, supra, 117 N.J. at 576.

By his own admission, Feldman had "a lot of beers throughout the day," and before he left the gathering he had a couple of mixed drinks. Feldman nevertheless drove his vehicle while intoxicated, with a BAC of .298, at night the day after Superstorm Sandy when there was no power, with three children in the vehicle, and he caused a head-on collision resulting in serious injury to the other driver. I **CONCLUDE** that such conduct, especially by a law-enforcement officer, in particular a sergeant, is unbecoming a public employee and sufficient cause for discipline pursuant to N.J.A.C. 4A:2-2.3(a).

Section 1.14 of the HCDOC Rules and Regulations reflects, in pertinent part, that CSMs, "regardless of rank or position, shall be subject to disciplinary action according to the nature of the offense for violating their oath and/or trust by committing an offense punishable under the laws or statutes of the United States of America, the State of New Jersey, or Municipal ordinances" or for violation of any general order or rules of the HCDOC. Section 1.14 also reflects that "[d]isciplinary action in all cases shall be decided on the merits of each case."

The Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated. Accordingly, my review of the case is de novo, and I am not bound by a prior penalty determination.

Appellant argues that Feldman's guilty plea and entry into PTI should not constitute sufficient cause for removal on their own. I concur with appellant, as the determination as to the appropriate penalty is instead based upon Feldman's conduct on October 30, 2012. As such, the parties' difference of opinion as to the effect of PTI upon appellant's criminal record, specifically whether appellant does or does not have a criminal record after the Dismissal Order was entered, is immaterial, and no determination or opinion is made herein as to appellant's current criminal record. Likewise, the parties' difference of opinion relative to the forfeiture statute is immaterial. Appellant also argues that he was the subject of unfair and unequal treatment by the HCDOC. However, any such treatment would be cured by the within de novo review.

Since West New York v. Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct: to support the imposition of a more severe penalty for a public employee who engages in habitual misconduct, and to mitigate the penalty for a current offense. In re Herrmann, 192 N.J. 19, 30–33 (2007). However, in an instance where an employee

commits an act that is sufficiently egregious, removal may be appropriate notwithstanding the lack of a prior history of infractions. See, e.g., In re Herrmann, supra, 192 N.J. 19. According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

> Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306, 633 A.2d 577 (App. Div. 1993), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).
>
> [Id. at 33–34.]

In addition, "[o]ur appellate courts also have upheld dismissal of employees, without regard to whether the employees have had substantial past disciplinary records, for engaging in conduct that is unbecoming to the position." Id. at 34.

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that "the question for the courts is 'whether such punishment is so disproportionate to the offense, in the light of all the circumstances,

as to be shocking to one's sense of fairness.'" Ibid. (quoting In re Polk License Revocation, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle, where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. Id. at 485.

Feldman did not present any recent history of promotions or commendations, but prior to his removal, Feldman's only major discipline was a twenty-day suspension in 2008 for excessive force. As a correction officer, Feldman is undeniably subject to a higher standard, and it is imperative that he represent law and order and present an image of personal integrity and dependability. A number of aggravating factors exist that far exceed a DWI. Feldman operated his vehicle at night the day after Superstorm Sandy when there was no power and there was debris on the roads, with a blood alcohol concentration of .298, and with three children in the vehicle, and caused a head-on collision and serious injury to another driver. Although Feldman testified that he swerved to avoid debris, and that it was "an accident," opting to swerve into an oncoming vehicle rather than hit a tree branch suggests impairment and that his intoxication, rather than the tree branch, was the cause. Additionally, he was not charged solely with DWI. He was charged with assault by auto, a third-degree crime; endangering the welfare of three children, a second-degree crime; DWI with minors; and careless driving. Likewise, the result was not the typical penalty for a first-time DWI. Instead, he was in PTI for thirty-six months and required to comply with a number of conditions.

Progressive discipline has been bypassed especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. Feldman's conduct caused actual harm to the injured driver and to property, and caused risk of harm to his wife and children. In view of a totality of the circumstances, I **CONCLUDE** that removal is not shocking to one's sense of fairness and is the appropriate penalty.

ORDER

It is hereby **ORDERED** that the charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause are **SUSTAINED**. It is hereby further **ORDERED** that the penalty of removal of Joshua Feldman from his public employment is **AFFIRMED**.

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. 40A:14-204.

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.

3/10/17
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 3/10/17

Date Mailed to Parties: 3/10/17

dlc

APPENDIX

WITNESSES

For Appellant:

Ryan Hoppock

Joseph Licciardi

Chris Yurecko

For Respondent:

Joshua Feldman

James Nieves

EXHIBITS IN EVIDENCE

Joint

J-1 PNDA, dated June 27, 2016

J-2 FNDA, dated September 1, 2016

For Appellant:

P-1 (Not in evidence)

P-2 PTI Program Order of Dismissal and Discharge of Bail

P-3 Email from Shylo Rollins to Matt Young, dated July 13, 2016

P-4 Order, dated August 26, 2016

For Respondent:

R-1 New Jersey Police Crash Investigation Report

R-2 Incident Report of Hoppock

R-3 Incident Report of Licciardi

R-4 Pretrial Intervention Documents and Plea Form

R-5 HCDOC Custody Staff Rules and Regulations Manual

R-6 Transcript of Plea

4/5/17

STATE OF NEW JERSEY

In the Matter of Jeneen Forman
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-91
OAL DKT. NO. CSV 10494-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 10494-16
AGENCY DKT. NO. 2017-91

IN THE MATTER OF JENEEN FORMAN,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER

Raymond Montgomery, AFSCME Council One, for appellant, Jeneen Forman, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director Employee Relations, for respondent, Departmnet of Human Services, Woodbine Developmental Center, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)

Record Closed: March 2, 2017 Decided: March 6, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on July 14, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

3-6-17
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 3/8/17

Date Mailed to Parties: 3/8/17

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on March 2, 2017

New Jersey Administrative Legislative Council 1

American Federation of State, County and Municipal Employees, AFL-CIO

Sherryl Gordon-Hall
Executive Director

Ron McMullen
President

Linda Johnson
Secretary

Gary Little
Treasurer

Trustees
Rosiland McLean
Robert Turner
Jason Rogers

March 2, 2017

Honorable Jeffrey R. Wilson, ALJ
Office of Administrative Law
9 Quakerbridge Plaza
Trenton, New Jersey 08625

Re: Jeneen Forman Vs Department of Human Services, Woodbine Dev. Ctr.
OAL Docket Number: CSV 10494-2016 S, Agency Ref. No. 2017-91

Dear Judge Wilson:

Enclosed for your approval is a fully executed Settlement Agreement disposing of the above reference matter. The document is signed by all parties.

Please contact me at the telephone number listed below if you have any questions.

Sincerely,

Ray Montgomery, Staff Representative
On Behalf of Sherryl Gordon-Hall, Executive Director
AFSCME Council 1

SG: wm
Cc: Sherryl Gordon- Hall, Executive Director, AFSCME, Co 1
Robert Little, Assistant to the Director, AFSCME, Co 1
Anita Pinkas, ERO, Department of Human Services
Gerald Murray, President, Local 2210

OAL DKT. NO. CSV 10494-2016
AGENCY DKT. NO.: 2017-91

SETTLEMENT AGREEMENT

IN THE MATTER OF
Jeneen Forman
AND
Woodbine Developmental Center,
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated June 23, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
Admin. Order 4:08, A.2.3	20 days suspension	Not Yet Served

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: **None**.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: **None**.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: **N/A**.

C. The Appellant withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Penalty	Disposition
Admin. Order 4:08, A.2.3	10 days suspension	Sustained---Respondent shall schedule Appellant to serve the suspension of 10 days.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Jeneen Forman's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family

Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/16/17
DATE

Jeneen Forman, Appellant

2/14/17
DATE

On Behalf of Appellant

2/14/17
DATE

ADITA PINKAS
On Behalf of Respondent

2/14/17
DATE

ERC
On Behalf of Woodbine Dev. Center

CERTIFICATION

I, , being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/6/17
DATE

Appellant

4/5/17

STATE OF NEW JERSEY

In the Matter of Douglas Hogate
Salem County Sheriff's Department

CSC DKT. NO. 2016-4052
OAL DKT. NO. CSV 08150-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 08150-16

AGENCY DKT. NO. 2016-4052

IN THE MATTER OF DOUGLAS HOGATE, SALEM COUNTY SHERIFF'S DEPARTMENT.

Michael Blaszczyk, CWA Local 1085, for appellant, Douglas Hogate, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(6)

Josph DiNicola, Jr., Esq., for respondent, Salem County Sheriff's Department (DiNicola and DiNicola, attorneys)

Record Closed: February 14, 2017 Decided: February 28, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on June 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/28/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 3/3/17

Date Mailed to Parties: 3/3/17

JSK/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 14, 2017

NOTICE

This is a very important legal document, and you should thoroughly review and understand the terms and effect of this document before signing it. By signing this Settlement Agreement and General Release, you will be completely releasing the County from all liability to you. Therefore, you should consult with an attorney before signing this Settlement Agreement and General Release, if you desire.

SETTLEMENT AGREEMENT *AND* GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is made this 1 day of February, 2017 by and between the COUNTY OF SALEM, (hereinafter collectively referred to as the "County") and DOUGLAS HOGATE, Jr. (hereinafter referred to as the "Employee").

WITNESSETH

WHEREAS, the Employee faced internal disciplinary charges filed by the County dated, April 6, 2016, in a Preliminary Notice of Disciplinary Action, which sought his/her suspension with pay pending termination. The hearing was held on April 15, 2016 at which time employee was discharged from his position. Employee filed an appeal to his discharge May 10, 2016. The parties wish to settle the matter at this time.

WHEREAS, the Employee acknowledges that the charges listed below were reflected in disciplinary notice dated April 6, 2016 and later sustained in by the local County hearing Officer:

Salem County Sheriff's Office Rules and Regulations, Section 3:2.3 (absence from duty), Section 3:1.10 (insubordination), Section 3:1.1 (standards of conduct), Section 3:1.7 (neglect of duty), Section 3:1.8 (performance of duty), and Section 3:1.34 (work expectations).

N.J.A.C 4A:2-2.3(a), Subsection 1 (incompetency, inefficiency or failure to perform duties), Subsection 2(insubordination), Subsection 3 (conduct unbecoming a public employee), and Subsection 4 (neglect of duty).

WHEREAS, the Employee has appealed the finding of the aforementioned charges under Title 11A of the New Jersey Statutes (Civil Service) as well as the provisions of N.J.S.A. 40A: 14-147. Said hearing and appeal rights includes, but is not limited to a determination of the level of discipline which should be imposed for admitted infractions; and

NOW, THEREFORE, in consideration of the mutual promises and representations herein contained, and intending to be legally bound, the parties understand and agree as follows:

1. Removal of Termination/Resignation. The County shall remove the termination of the Employee permanently from the records of the Employee and in consideration the Employee shall agree to voluntarily resign from his position as of the date of his termination and dismiss the current appeal with docket number CSC Dkt# 2016-4052.

2. Release of Claims. Employee, for him, his heirs, executors, administrators, successors, and assigns, hereby releases and forever discharges the County * and its departments, political subdivisions, successors, and assigns, and their respective past, present and future representatives, council members, officers, agents, employees, insurance carriers, or their successors, and assigns, and/or the estate(s) (hereinafter jointly referred to as "Releasee") from any and all action, causes of action, lawsuits, claims, charges, debts, sums of money, accounts, covenants, contracts, controversies, agreements, promises, trespasses, damages, liabilities, judgments, executions, and/or . demands of any nature whatsoever, whether in law or in equity, or with any individual, agency, organization, or governmental body, whether known or unknown, which Employee ever had, now has, or can, shall or may have under any contract, tort or common law theory, and/or under any Federal, State, local statute, including but not limited to: the Age Discrimination in Employment Act, 29 U.S.C' 621 et seq., as amended by the Older Workers Benefit Protection Act, specifically * 626; Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. ' 2000e et seq., and laws amended thereby; the Civil Rights Act of 1966,42 U.S.C. ' 1981 et seq; the Civil Rights-Statutes contained in 42 U.S.C.[4] 1983, 1985 and 1986 and any related laws; the Americans with Disabilities Act (ADA), 42 U.S.C. ' 12101, et seq; the Federal Family and Medical Leave Act, 29 U.S.C. * 2601, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. '1001, et seq.; the Rehabilitation Act of 1973,29 U.S.C.[4] 791, et seq.; the Equal Pay Act, 29 U.S.C. ' 206(d); the New Jersey Conscientious Employee Protection Act, N J.S.A. 34:19-1, et seq.; the New Jersey Family Leave Act, N.J.S.A. New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, et seq.; the New Jersey Law against Discrimination N.J.S.A. * 10:5-1; the New Jersey Workers Compensation Statute and any other Federal, State or local equal employment opportunity laws, regulations, or ordinances; or under a theory of negligence; interference with contract/business advantage, fraud; intentional infliction of emotional distress; and/or any other duty or obligation of any kind or description. This release shall apply to all known, unknown, unsuspected, and anticipated claims, liens, injuries, and damages up to and including the day of the date of this Agreement as such claims pertain to the incident for which the guilty plea is based pursuant to paragraph one of this agreement.

3. Non-Vilification. The County and the Employee mutually agree that they shall not, in writing or orally, disparage, deprecate, discredit, vilify or otherwise say anything negative about each other. In the event that the County is asked by a future employer about the Employee the County shall provide the limited response that the Employee voluntarily resigned from the position and provide the date of resignation.

4. Integration: Representation by Counsel. It is understood between the parties that neither party has relied upon any representation, egress or implied, made by any other party or their counsel or any of their representatives, and that this Agreement constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto. **Employee acknowledges that he/she has been advised that his/her legal rights and responsibilities will be affected by executing this Agreement and he/she acknowledges that he/she is represented by his/her own attorney and has consulted with his/her attorney prior to executing this Agreement, if so desired.**

5. Severability. In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplus age and the remainder of the Agreement shall remain in full force and effect.

6. Governing Law; Jurisdiction. The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey and that any dispute involving the terms of this Agreement shall be brought in the Superior Court of New Jersey, Salem County, which the parties agree shall have exclusive jurisdiction of any such claims.

IN WITNESS WHEREOF, the parties hereto have caused this Settlement Agreement and General Release to be executed and signed the day and year first written above.

ATTEST

County of Salem

Sheriff Charles M. Miller

Employee

Douglas Hogate, Jr.

Douglas Hogate, Jr.

4-5-17

STATE OF NEW JERSEY

In the Matter of Casandra Huylebroeck
New Jersey Veterans Memorial Home, Vineland,
Department of Military and Veterans Affairs

CSC DKT. NO. 2017-1582
OAL DKT. NO. CSV 18270-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18270-16

AGENCY DKT. NO. 2017-1582

IN THE MATTER OF
CASANDRA HUYLEBROECK,
NEW JERSEY VETERANS MEMORIAL HOME, VINELAND, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS.

Jessica Shaw, CWA Local 1040, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Susan C. Sweeney, Esq., Administrator, for respondent New Jersey Department of Military and Veterans Affairs, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 23, 2017 Decided: February 23, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Cassandra Huylebroeck, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 5, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/23/17 — DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

/nd

OAL DKT. NO. CSV 18270-2016 S

AGENCY DKT. NO. ~~20~~ - 2017-1582

SETTLEMENT AGREEMENT

IN THE MATTER OF

Casandra Huylebroeck

AND

NJ DMAVA - NJ Veterans Home @ Vineland

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The ~~Final~~ Notice of Disciplinary Action dated Release @ end of Working Test period 10/16/2016 ~~contained the following charges and proposed discipline~~:

	Charge	Discipline	Dates Effective
1.	N/A	Release @ end of WTP	10/16/2016
2.			
3.			
4.			
5.			

B. The Appellant Casandra Huylebroeck withdraws his/her appeal and request for a hearing, and the Respondent Department of NJDMAVA - NJ Veterans Home @ Vineland agrees that the following result will occur with regard to each charge:

	~~Charge~~ Appellant,	Disposition	New Penalty:
1.	Casandra Huylebroeck, to be provided with a New Working		
2.	Test period (4 month) ~~WTP~~ as soon as practicable.		
3.	Appellant to contact human resources to arrange same.		

4. _____

5. _____

C. The parties have agreed to the following: N/A

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of N/A days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following N/A

1. To date, appellant has served a total of N/A days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) ~~The appellant agrees to a~~ N/A

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Casandra Huylebroeck (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of NJ DMAVA will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Casandra Huylebroecks's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of NJ DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 18270-2016S

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/23/16
DATE

Appellant

2/23/17
DATE

Respondent NJDMVA
Susan C. Sweeney, Esq
Admin. Der 1, CLA

2-23-17
DATE

ON BEHALF OF CLALoad140

DATE

ON BEHALF OF

OAL DKT. NO. CSV 18270-2016S

CERTIFICATION

I, Casandra Hugelbroeck, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/23/17
DATE

NAME

4/5/17

STATE OF NEW JERSEY

In the Matter of Jacqueline Ingraham
Department of Children and Families

CSC DKT. NO. 2017-1749
OAL DKT. NO. CSV 18912-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18912-16

AGENCY DKT. NO. 2017-1749

IN THE MATTER OF JACQUELINE INGRAHAM,
DEPARTMENT OF CHILDREN AND FAMILIES.

Nicole J. Curio, Esq., for appellant (Gruccio, Pepper, DeSanto & Ruth, P.A., attorneys)

Douglas Banks, Assistant Director, Office of Cooperative Labor Relations, for respondent, appearing pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: February 23, 2017 Decided: February 23, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Jacqueline Ingraham, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 16, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/23/17
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

/nd

OAL DKT. NO. CSV 18912-2016
CSC DKT
AGENCY DKT. NO. 2017-1749

SETTLEMENT AGREEMENT

IN THE MATTER OF
Jacqueline DO
~~**Jessica**~~ **Ingraham**

AND

Department of Children and Families

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Release at the end of the WTP** dated 11/11/16 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.		
2.		
3.		
4.		
5.		

B. The Appellant Jacqueline Ingraham withdraws ~~his~~ her DB appeal and request for a hearing, and the Respondent Department of Children and Families agrees that the following result will occur: Appellant will receive a General Resignation with the condition the Appellant agrees not to apply for, accept, and or seek future employment with the Department of Children and Families.

Charge	Disposition	New Penalty
1.		
2.		
3.		
4.		
5.		

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows:

_____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

__X__ general resignation

which shall be effective 11/16/16 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Children and Families (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Children and Families will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of

New Jersey, the Department of Children and Families, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/23/17	Jacqueline Ingraham
DATE	Appellant
2/23/17	
DATE	Respondent
2/23/17	
DATE	ON BEHALF OF Jacqueline Ingraham
DATE	ON BEHALF OF

CERTIFICATION

I, Jacqueline Ingraham, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/23/17
DATE

NAME

4/5/17

STATE OF NEW JERSEY

In the Matter of Nicholas Mionie
Bayside State Prison,
Department of Corrections

CSC DKT. NO. 2016-2984
OAL DKT. NO. CSV 04084-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 04084-16
AGENCY DKT. NO. 2016-2984

IN THE MATTER OF NICHOLAS MIONIE,
BAYSIDE STATE PRISON,
DEPARTMENT OF CORRECTIONS.

William G. Blaney, Esq., for appellant, Nicholas Mionie (Blaney & Karavan, P.A., attorneys)

Karen Campbell, Legal Specialist, Office of Employee Relations, for respondent, Bayside State Prison, Department of Corrections, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)

Record Closed: February 7, 2017 Decided: February 13, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 14, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2-13-17
DATE

JEFFEREY WILSON, ALJ

Date Received at Agency: 2/16/17

Date Mailed to Parties:

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 7, 2017

State of New Jersey
DEPARTMENT OF CORRECTIONS
WHITTLESEY ROAD
PO BOX 863
TRENTON NJ 08625-0863

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

GARY M. LANIGAN
Commissioner

February 2, 2017

The Honorable Jeffrey R. Wilson, A.L.J.
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625

Re: Nicholas Mioni v. Bayside State Prison
OAL Docket No. CSV 04084-2016S

Dear Judge Wilson:

This matter is scheduled for a Status Conference on February 16, 2017. However, the parties have reached an agreement. I have attached the fully executed Settlement Agreement for your review and approval.

Should you have any questions, I can be reached at (609) 292-4036, ext. 5253.

Thank you kindly.

Respectfully submitted,

Karen Campbell, Esq.
Legal Specialist

c: William G. Blaney, Esq.
File

IN THE MATTER OF
NICHOLAS MIONIE,

APPELLANT

AND

BAYSIDE STATE PRISON,
CORRECTIONAL FACILITY,

RESPONDENT

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSV 04084-2016
AGENCY DOCKET NO. 2016-2984

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated February 23, 2015, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(6) Conduct Unbecoming	Sixty (60) working days suspension	2/23/15
2.	NJAC 4A:2-2.3(a)(7) Neglect of duty	same	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4.	HRB 84-17, as amended C8 Falsification; Intentional Misstatement of material Fact in connection with work, Employment application, or Any other record, investigation Or other proceeding.	same	same
5.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same
6.	HRB 84-17, as amended D7 Violation of Administrative procedures	same	same

	And/or regulations Involving safety and security		
7.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

Charge		Disposition

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

1.	NJAC 4A:2-2.3(a)(6) Conduct Unbecoming	Five (5) working days suspension	
2.	NJAC 4A:2-2.3(a)(7) Neglect of duty	same	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4.	HRB 84-17, as amended C8 Falsification; Intentional Misstatement of material Fact in connection with work, Employment application, or Any other record, investigation Or other proceeding.	Withdrawn	same
5.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same
6.	HRB 84-17, as amended D7 Violation of Administrative procedures And/or regulations Involving safety and security	same	same

7.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

C. The parties have agreed to the following:

1. The Appellant has served sixty (60) working days suspension. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.

2. The personnel file for the Department of Corrections will indicate that the appellant received a five (5) working days suspension, for record keeping purposes only. Any other time off shall be reflected in appellant's record as authorized leave without pay. As set forth above, any claim for back pay or attorneys' fees is waived by the Appellant.

3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

4. As set forth in paragraph B(1), the Appellant shall not receive back pay, no counsel fees, return of vacation, sick days or any other monetary relief.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(2).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to

the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties acknowledge that a minor disciplinary sanction of 5 days or less may be eligible for expungement pursuant the terms of IMP PSM.002.EXP.01, providing any necessary conditions are satisfied.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 01/20/17

NICHOLAS MIONIE, Appellant

DATE: 1/24/17

WILLIAM BLANEY
On Behalf of Appellant

DATE: 2/1/17

KAREN CAMPBELL, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, NICHOLAS MIONIE, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 01/20/17

Nicholas Mionie

NICHOLAS MIONIE

4-5-17

STATE OF NEW JERSEY

In the Matter of Nicholas Mionie
Southern State Correctional Facility,
Department of Corrections

CSC DKT. NO. 2015-2241
OAL DKT. NO. CSV 01570-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 01570-15
AGENCY DKT. NO. 2015-2241

IN THE MATTER OF NICHOLAS MIONIE,
SOUHTERN STATE CORRECTIONAL FACILITY,
DEPARTMENT OF CORRECTIONS.

William G. Blaney, Esq., for appellant, Nicholas Mionie, (Blaney and Karavan, P.C., attorneys)

Tamara Rudow, Legal Specialist, Office of Employee Relations, for respondent Southern State Correctional Facility, Department of Corrections, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)

Record Closed: February 7, 2017 Decided: February 8, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on September 22, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/8/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 2/14/17

Date Mailed to Parties: 2/14/17

JSK/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on February 7, 2017

State of New Jersey
DEPARTMENT OF CORRECTIONS
WHITTLESEY ROAD
PO BOX 863
TRENTON NJ 08625-0863

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

GARY M. LANIGAN
Commissioner

February 1, 2017

Honorable Bruce M. Gorman, ALJ
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

RE: Nicholas Mione vs. Southern State Correctional Facility
Agency Docket No. 2015-2241
OAL Docket No. CSV 1570-2015S

Dear Judge Gorman:

Enclosed for your review and approval is an original fully executed Settlement Agreements in the above-referenced matter.

If deemed appropriate by your Honor, please process via an Initial Decision and forward to the Civil Service for their acknowledgement.

Thank you for your attention to this matter.

Respectfully submitted,

Tamara Rudow-Steinberg, Esq.
Legal Specialist, Office of Employee Relations
609.292.4036 ext. 5255

cc: Kyle Weinberg

IN THE MATTER OF
NICHOLAS MIONIE,

APPELLANT

AND

SOUTHERN STATE CORRECTIONAL FACILITY,

RESPONDENT

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSV 01570-2015
AGENCY DOCKET NO. 2015-2241

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated January 21, 2015, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(2) Insubordination	Thirty (30) working days suspension	1/21/15
2.	NJAC 4A:2-2.3(a)(6) Conduct unbecoming An employee	same	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4	HRB 84-17, as amended C9 insubordination, Intentional disobedience Or refusal to accept an Order, assaulting or Resisiting authority, Disrespect or use of Insulting or abusive Language to supervisor	same	same
5.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same

6.	HRB 84-17, as amended D7 Violation of Administrative procedures And/or regulations Involving safety and security	same	same
7.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

	Charge	Disposition
1.	NJAC 4A:2-2.3(a)(2) Insubordination	Official Written Reprimand
2.	NJAC 4A:2-2.3(a)(6) Conduct unbecoming An employee	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same
4.	HRB 84-17, as amended C9 insubordination, Intentional disobedience Or refusal to accept an Order, assaulting or Resisiting authority, Disrespect or use of Insulting or abusive Language to supervisor	same
5.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same
6.	HRB 84-17, as amended D7 Violation of Administrative procedures And/or regulations	same

Involving safety and security

7.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same

C. The parties have agreed to the following:

1. The Appellant has served thirty (30) working days suspension. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.
2. The personnel file for the Department of Corrections will indicate that the appellant received an Official Written Reprimand, for record keeping purposes only. Any other time off shall be reflected in appellant's record as authorized leave without pay. As set forth above, any claim for back pay or attorneys' fees is waived by the Appellant.
3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
4. As set forth in paragraph C(2) and (3), the Appellant shall not receive back pay, counsel fees, return of vacation, sick days or any other monetary relief.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(2).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this

agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties acknowledge that a minor disciplinary sanction of 5 days or less may be eligible for expungement pursuant the terms of IMP PSM.002.EXP.01, providing any necessary conditions are satisfied.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 01/20/17

NICHOLAS MIONIE, Appellant

DATE: 1/24/17

WILLIAM BLANEY
On Behalf of Appellant

DATE: 2/1/17

TAMARA L. RUDOW, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, NICHOLAS MIONIE, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 01/20/17

Nicholas Mionie

NICHOLAS MIONIE

4-5-17 4/5/17

STATE OF NEW JERSEY

In the Matter of Tami Moore-Abedu
Newark Public School District

CSC DKT. NO. 2016-4194
OAL DKT. NO. CSV 08925-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement, with clarification, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 08925-16
Agency DKT NO. 2016-4194

IN THE MATTER OF TAMI MOORE-ABEDU, NEWARK PUBLIC SCHOOL DISTIRCT.

Samuel Wenocur, Esq., for appellant (Oxfeld Cohen, P.C., attorneys)

Sabrina Styza, Esq., for respondent

Record Closed: February 10, 2017 Decided: February 24, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on June 14, 2016, for determination as a contested case. On February 1, 2017, the parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 24, 2017
DATE

Joan Bedrin Murray
JOAN BEDRIN MURRAY, ALJ

Date Received at Agency:

JAN 28 2017

Date Mailed to Parties:

dr

2-28-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent State-operated
School District of the City of Newark

Tami Moore-Abedu,	:	OFFICE OF ADMINISTRATIVE LAW
Appellant,	:	
	:	OAL DKT. NO. CSV: 08925-2016N
vs.	:	AGENCY REF. NO.: 2016-4194
NEWARK PUBLIC SCHOOL DISTRICT,	:	SETTLEMENT AGREEMENT
Respondent.	:	

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Tami Moore-Abedu ("Appellant") and Respondent State-Operated School District of the City of Newark ("Respondent") and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, her appeal and request for a hearing filed under OAL Docket No. CSV 08925-2016N, Agency Ref. No.: 2016-4194 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other suits or claims that she may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all of Appellant's outstanding claims against the District related to her employment. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Appellant fail to submit a formal letter of withdrawal for each suit or claim.

3. In exchange, and for good consideration provided as hereby acknowledged by the parties, the District will permit Appellant to resign her former position with the District in good standing. Appellant's separation from employment with the District effective March 31, 2016 will be converted to and deemed to be a voluntary and permanent "Resignation in Good Standing". The District will amend Appellant's personnel records to conform to the terms of the settlement.

4. Appellant will not receive any back pay or any monies from the District as part of this Settlement Agreement.

5. Appellant agrees that she will not apply for reemployment with the District at any time. If Appellant does apply for reemployment with the District and is approved for employment, the terms of this Settlement Agreement will control and shall be grounds for immediate termination of Appellant's employment.

6. As of the date of her resignation, all of Appellant's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including all fees, back pay, front pay or any other monetary relief.

8. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that she may have against the District and the Released Parties relating to her employment with the District and/or separation from the District. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with and separation from the District, including but not limited to any and all rights or claims she may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower

claim, having any bearing whatsoever on her employment with and separation from the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should enforcement of this agreement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving her rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 8, Appellant agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient and adequate time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Appellant understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

11. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

12. Appellant understands, agrees to and acknowledges that she is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

13. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

14. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

15. This Settlement Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey Law.

16. This Settlement Agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective on the District upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

17. This Settlement Agreement is subject to final approval by the Civil Service Commission and will only become final and binding on Appellant and Respondent upon the approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: 2/1/17

TAMI MOORE-ABEDU
Appellant

Dated: 2/1/17

SAMUEL WENOCUR, ESQ.
Attorney for Appellant

Dated: 2/3/17

CHRISTOPHER CERF
State District Superintendent

Dated: 2/3/17

SABRINA STYZA, ESQ.
Attorney for Respondent

CERTIFICATION

I, TAMI MOORE-ABEDU, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 2/1/17

Tami Moore-Abedu
TAMI MOORE-ABEDU

Angiulo, Nicholas

From: Samuel Wenocur <SWenocur@oxfeldcohen.com>
Sent: Friday, March 24, 2017 11:13 AM
To: Angiulo, Nicholas; sstyza@nps.k12.nj.us
Subject: RE: Tami Moore-Abedu Settlement

Mr. Angiulo:

It is the parties' intention that the period between 1/5/15 and 3/31/16 be treated as an approved leave of absence without pay. I have confirmed as much with Ms. Styza, who is also included in this email.

Samuel Wenocur
Oxfeld Cohen, PC
60 Park Place, Suite 600
Newark, NJ 07102
(973) 642-0161, ext. 3334
Fax: (973) 802-1055

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Friday, March 24, 2017 9:41 AM
To: sstyza@nps.k12.nj.us; Samuel Wenocur <SWenocur@oxfeldcohen.com>
Subject: Tami Moore-Abedu Settlement
Importance: High

Ms. Styza and Mr. Wenocur:

I am the Deputy Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Tami Moore-Abedu indicating that the removal is being settled to a resignation in good standing, effective March 31, 2016.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, the appellant's removal date on the Final Notice of Disciplinary is January 5, 2015. Thus, the time period between the effective date of her removal and the effective date of her resignation must be accounted for. For example, will those days be considered an approved leave of absence without pay, or something else? Without clarification, the settlement cannot be acknowledged by the Commission and would instead be remanded back to the Office of Administrative Law.

Please let me know as soon as possible the intention of the parties. An e-mail response is sufficient so long as it is agreed upon by the parties. As we would like to have this matter on the Civil Service Commission's April 5, 2017 meeting agenda, I would need the information **as soon as possible.**

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

4-5-17

STATE OF NEW JERSEY

In the Matter of David Olaniyan
Greystone Park Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2016-3621
OAL DKT. NO. CSV 06153-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06153-16
AGENCY DKT. NO. 2016-3621

IN THE MATTER OF DAVID OLANIYAN,
DEPARTMENT OF HUMAN SERVICES,
GREYSTONE PARK PSYCHIATRIC HOSPITAL

Renata Wooden, Esq., for appellant

Adam K. Phelps, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 17, 2017 Decided: February 27, 2017

BEFORE **KELLY J. KIRK**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on April 21, 2016, for determination as a contested case. At the hearing on February 17, 2017, the parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/27/17
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 3-1-17

Date Mailed to Parties: JAN 28 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dlc

[redacted]

OAL DOCKET NO. CSV06153-2016N

SETTLEMENT AGREEMENT

IN THE MATTER OF
DAVID OLANIYAN
AND
STATE OF NEW JERSEY, DEPARTMENT
OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated February 12, 2016, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)6 conduct unbecoming a public employee-Removal effective November 9, 2015.

2. N.J.A.C. 4A:2-2.3(a) 12 Other sufficient cause-Removal effective November 9, 2015.

3. DHS Disciplinary Action Program

E1 Violation of Policy and Procedure

B2 Neglect of Duty

B7 Serious Mistake

D9 Failure to Report Injury, Abuse or Accident Involving Patient

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. The Respondent Department of Human Services agrees to accept a General Resignation from Appellant David Olaniyan effective November 9, 2015. Appellant

[redacted]

David Olaniyan agrees not to seek or accept employment with the Department of Human Services [redacted] at any time in the future.

C. The Appellant David Olaniyan withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the charges in paragraph A are withdrawn.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend David Olaniyan's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department of Human Services from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Human Services with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of David Olaniyan's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against

[redacted]

Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

2/17/2017
DATE

David Olaniyan

2/17/2017
DATE

ON BEHALF OF David Olaniyan

2/17/17
DATE

ON BEHALF OF Respondent
Department of Human Services

2/17/17
DATE

Adam K. Phelps, DAG

[redacted]

CERTIFICATION

I, David Olaniyan, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that as a result of this Settlement Agreement, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/17/2017
DATE

David Olaniyan

4/5/17

STATE OF NEW JERSEY

In the Matter of Jose I. Roman, Jr.
City of Perth Amboy,
Department of Code Enforcement

CSC DKT. NO. 2016-1998
OAL DKT. NO. CSV 01874-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 01874-16
CSC DKT. #2016-1998

IN THE MATTER OF JOSE I. ROMAN, JR., CITY OF PERTH AMBOY, DEPARTMENT OF CODE ENFORCEMENT.

Jose I. Roman, pro se

Arlene Quinones Perez, Esq., for respondent (DeCotiis, Fitzpatrick & Cole, LLP, attorneys)

Record Closed: March 1, 2017 Decided: March 2, 2017

BEFORE **LELAND S. McGEE**, ALJ:

On February 1, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Prior to completion of the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

Therefore, I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

March 2, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: 3-8-17

Mailed to Parties: MAR 8 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

Attachment

JOSE I. ROMAN, JR. Petitioner, and CITY OF PERTH AMBOY, Respondent.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: CSV-01874-2016N **SETTLEMENT AGREEMENT AND RELEASE**

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release (the "Agreement") by and between the Respondent, City of Perth Amboy (the "City") and Petitioner, Jose I. Roman, Jr. (the "Petitioner") settles and releases the parties in the Jose I. Roman, Jr. v. City of Perth Amboy as follows:

WHEREAS, the Petitioner was formerly employed by the City as a Code Enforcement Officer in the Department of Code Enforcement; and

WHEREAS, the Petitioner was removed from his position with the City effective November 6, 2015, for failure to follow call-out procedures during a period of time in which the Petitioner was sick; and

WHEREAS, the removal was deemed a termination of the Petitioner's employment with the City;

WHEREAS, the Petitioner appealed his removal with the Office of Administrative Law, captioned as above; and

NOW, THEREFORE, in consideration of the foregoing, the mutual promises contained herein, and for other good and valuable consideration, the Parties, intending to be mutually

bound, agree as follows:

1. **Change in Status:** By no later than March 1, 2017, the City will change the status of Jose I. Roman, Jr. from "terminated" to "resigned," effective November 6, 2015. The City Department of Personnel will add a copy of this Agreement to the Petitioner's file.

2. **Dismissal of the Litigation**: The Parties shall within five (5) days of the Effective Date of this Agreement file an executed copy of a stipulation dismissing the Litigation with Prejudice with the Chambers of Hon. Leland S. McGee, A.L.J. A copy of the stipulation is attached hereto as **Exhibit A.**

3. **Terms of Dismissal:** Petitioner, on behalf of himself and his past, present and/or future, attorneys, trusts, trustees, predecessors, successors, assigns, heirs, insurers, indemnitees and any/all other representatives, hereby releases, waives and discharges: (i) the claims brought in the Petition against the City; and (ii) any and all other claims, causes of action, demands, actions, suits, debts and sums of monies, of any kind, including, without limitation, claims for compensatory damages, punitive damages, equitable relief, administrative relief, attorney's fees, costs of litigation, accounts, rights, obligations, contracts, agreements, controversies or the like, known or unknown, liquidated or unliquidated, contingent or non-contingent, in law or in equity, that he ever had or now has as of the Effective Date of this Agreement, whether based on federal, state, local, statutory, or common law or any other law, rule, or regulation, against the "Released Defendant Entities," which for purposes of this Agreement shall include and be defined as: (a) the City of Perth Amboy; (b) the City's past, present or future elected officials, appointed officials, employees, attorneys, representatives, insurers and indemitors and any/all other representatives.

IN WITNESS WHEREOF, each of the undersigned confirms that he or she has read the Agreement consisting of 3 (three) pages, and that he or she fully understands all of the terms

herein and that he or she executed this Agreement voluntarily in the full knowledge of its significance and after consultation with his or her representative or legal counsel or the full and knowing waiver of the right to consult with counsel.

FOR THE PETITIONER, JOSE I. ROMAN, JR.

Date: 2/27/2017

By: _____

FOR THE RESPONDENT, CITY OF PERTH AMBOY

Date: 2/27/17

By: _____

4/5/17

STATE OF NEW JERSEY

In the Matter of Dwayne Simms
Juvenile Justice Commission

CSC DKT. NO. 2017-2275
OAL DKT. NO. CSV 01379-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01379-17

AGENCY DKT. NO. 2017-2275

IN THE MATTER OF DWAYNE SIMMS,
JUVENILE JUSTICE COMMISSION.

William Shelton, Union Representative, PBA 105, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Randy Miller, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 23, 2017 Decided: February 23, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Dwayne Simms, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on January 30, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

2/23/17 — DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

/nd

OAL DKT. NO.: CSV 01379-2017S

AGENCY DKT. NO.: 2017-2275

SETTLEMENT AGREEMENT

IN THE MATTER OF

DWAYNE SIMMS

AND

JUVENILE JUSTICE COMMISSION

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action (FNDA) dated: **1/9/2017,** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
NJAC: 4A:2.3(a) 6. Conduct Unbecoming	Removal	Sept. 7, 2016
NJAC: 4A:2.3(a)12. Other sufficient cause defined as	Removal	Sept. 7, 2016

Violation of: JJC Policy 11SC:01.02 – Use of Force; and JJC Policy 11H-19.7 – Custody Discipline Policy (C4 – Physical or mental abuse of a resident, employee, patient, client or adult inmate, C6 – Inappropriate physical contact or mistreatment of a patient, client, resident, employee or adult inmate, and C12 – Conduct unbecoming a public employee).

B. The Appellant, **Dwayne Simms**, withdraws his appeal and request for a hearing, and the Respondent, **Juvenile Justice Commission**, agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
NJAC:4A:2.3(a) 6. Conduct Unbecoming	Modified	6-month suspension
NJAC:4A:2.3(a)12. Other sufficient cause defined as	Modified	6-month suspension

violation of: JJC Policy 11SC:01.02 – Use of Force; and JJC Policy 11H-19.7 – Custody Discipline Policy (C4 – Physical or mental abuse of a resident, employee, patient, client or adult inmate, C6 –

Inappropriate physical contact or mistreatment of a patient, client, resident, employee or adult inmate, and C12 – Conduct unbecoming a public employee).

C. The parties have agreed to the following:

1. To date, Appellant has served a total of **118** days without pay based upon the above charges.

2. The total number of days back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: **None.**

3. Any other days from the time of last suspension day until return to work shall be treated as follows: **Authorized Leave without Pay.**

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. **The Juvenile Justice Commission** (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority, **Juvenile Justice Commission,** will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent, **Juvenile Justice Commission,** with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of **Dwayne Simms'** disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the

Appointing Authority, **Juvenile Justice Commission**, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that this Settlement Agreement is a "Last Chance Agreement." Subsequent conduct warranting disciplinary action shall authorize the Appointing Authority to seek to remove the employee from employment notwithstanding any other consideration.

I. The Appellant agrees to participate in any additional training, to include, use of force training as determined by the Appointing Authority and to accept a permanent reassignment to the Johnstone Campus.

J. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

K. Both parties agree not to file exceptions or cross exceptions in this matter.

L. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/23/17
DATE

Dwayne Simms, Appellant

2/23/2017
DATE

Craig Farr, Respondent

2/23/2017
DATE

William Shelton, PBA 105
ON BEHALF OF APPELLANT

2/23/2017
DATE

Randy Miller, DAG
ON BEHALF OF RESPONDENT

CERTIFICATION

I, **Dwayne Simms**, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/23/17
Date

Dwayne Simms

4/5/17

STATE OF NEW JERSEY

In the Matter of Kathleen Staples
Juvenile Justice Commission

CSC DKT. NO. 2017-1791
OAL DKT. NO. CSV 18514-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18514-16

AGENCY DKT. NO. 2017-1791

IN THE MATTER OF KATHLEEN STAPLES,
JUVENILE JUSTICE COMMISSION.

Thomas J. Gossé, Esq., for appellant

Randy Miller, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 16, 2017 Decided: March 17, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Kathleen Staples, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 8, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that these matters are no longer contested cases before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 17, 2017 _____ _____
DATE **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 3/20/17

Date Mailed to Parties: 3/20/17

/nd

OAL DKT. NO.: CSV 18514-2016S

AGENCY DKT. NO.: 2017-1791

SETTLEMENT AGREEMENT

IN THE MATTER OF

KATHLEEN A. STAPLES

AND

JUVENILE JUSTICE COMMISSION

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action (FNDA) dated: **11/17/2016**, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
NJAC: 4A:2.3(a) 6. Conduct Unbecoming	Removal	Sept. 25, 2015

B. The Appellant, **Kathleen Staples**, withdraws her appeal and request for a hearing, and the Respondent, **Juvenile Justice Commission**, agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
NJAC:4A:2.3(a) 6. Conduct Unbecoming	Modified	General Resignation

C. The parties have agreed to the following:

1. To date, Appellant has served a total of **370** working days without pay based upon the above charges.

2. The total number of days back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: **N/A.**

3. Any other days from the time of last suspension day until return to work shall be treated as follows: **N/A.**

4. The Appellant agrees to a **General Resignation**, which shall be effective **September 25, 2015.**

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. **The Juvenile Justice Commission** (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority, **Juvenile Justice Commission,** will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent, **Juvenile Justice Commission,** with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of **Kathleen Staples'** disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the Appointing Authority, **Juvenile Justice Commission**, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age

Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Both parties agree not to file exceptions or cross exceptions in this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

2/22/2017
DATE

Kathleen Staples
Kathleen Staples, Appellant

2/23/2017
DATE

Craig Farr, Respondent

2/22/2017
DATE

Thomas J. Gosse, Esq.
ON BEHALF OF APPELLANT

2/23/2017
DATE

Randy Miller, DAG
ON BEHALF OF RESPONDENT

OAL DKT. NO. CSV 18514-2016S

CERTIFICATION

I, **Kathleen Staples**, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/22/2017
Date

Kathleen Staples
Kathleen Staples

4-5-17

STATE OF NEW JERSEY

In the Matter of Bahku Thorpe,
Albert C. Wagner Youth Correctional Facility, Department of Corrections

CSC DKT. NO. 2016-3479
OAL DKT. NO. CSR 5841-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 5841-16
Agency DKT. NO. CSC 206-3479

IN THE MATTER OF BAHKU THORPE, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY.

Jeffrey S. Ziegelheim, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Robert Strang, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 7, 2017 Decided: March 8, 2017

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter concerns the appeal of Bahku Thorpe from the action of the respondent. The appeal was filed with the Office of Administrative Law on May 19, 2016, pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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. 40A:14-204.

March 8, 2017
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 3/9/17

Date Mailed to Parties: 3/9/17

/cb

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSR 05841-2016S
AGENCY DOCKET NO. N/A

IN THE MATTER OF
BAHKU THORPE,

APPELLANT

AND

DOC, ALBERT C. WAGNER
YOUTH CORRECTIONAL FACILITY,

RESPONDENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated March 8, 2016, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(6) Conduct unbecoming An employee	Removal	January 29, 2016
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4	HRB 84-17, as amended B2 Neglect of duty, loafing, Idleness or willful failure to devote attention to tasks which could result in danger to persons or property	same	same
5.	HRB 84-17, as amended C3 . Physical or mental abuse on an inmate, patient, client, resident, or employee	same	same

6.	HRB 84-17, as amended C8. Falsification, intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding	same	same
7.	HRB 84-17, as amended C11 Conduct unbecoming an employee	same	same
8.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

B. The Appellant withdraws his appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

	Charge	Disposition
1.	NJAC 4A:2-2.3(a)(6) Conduct unbecoming An employee	90 Working Day Suspension
2.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	dismissed
4	HRB 84-17, as amended B2 Neglect of duty, loafing, Idleness or willful failure to devote attention to tasks which could result in danger to persons or property	90 Working Day Suspension
5.	HRB 84-17, as amended C3 . Physical or mental abuse on an inmate, patient, client, resident, or employee	dismissed

6.	HRB 84-17, as amended C8. Falsification, intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding	dismissed
7.	HRB 84-17, as amended C11 Conduct unbecoming an employee	90 Working Day Suspension
8.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	90 Working Day Suspension

C. The parties have agreed to the following:

1. The Appellant was removed from State service on January 29, 2016. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.
2. The personnel file for the Department of Corrections will indicate that the Appellant will serve a Ninety (90) Working Day Suspension, for record keeping purposes only. Any other time off shall be reflected in Appellant's record as authorized leave without pay. As set forth above, any claim for back pay or attorneys' fees is waived by the Appellant.
3. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
4. As set forth in paragraph C(2) and (3), the Appellant shall not receive back pay, counsel fees, return of vacation, sick days or any other monetary relief.
5. The Appellant shall be re-assigned to the Central Region.
6. The Appellant shall be sent to the Corrections Training Academy for re-training as deemed appropriate.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant

or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(2).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 3/2/17

BAHKU THORPE, Appellant

DATE: 3/2/17

JEFFREY ZEIGELHEIM
On Behalf of Appellant

DATE: 3/6/17

ROBERT STRANG
Deputy Attorney General
On Behalf of Respondent

CERTIFICATION

I, BAHKU THORPE, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 3/2/17

BAHKU THORPE

4/5/17

STATE OF NEW JERSEY

In the Matter of Carlos Valencia
Atlantic County,
Department of Pubic Safety

CSC DKT. NO. 2017-1152
OAL DKT. NO. CSV 15924-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 BW

The Civil Service Commission, at its meeting of April 5, 2017, acknowledged the attached settlement, with clarification, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15924-16
AGENCY DKT. NO. 2017-1152

IN THE MATTER OF CARLOS VALENCIA, ATLANTIC COUNTY, DEPARTMENT OF PUBLIC SAFETY.

Michael Mormando, Esq., for Carlos Valencia, appellant

Elizabeth D'Ancona, Esq., Assistant County Counsel, for the Atlantic County, Department of Public Safety, respondent (James F. Ferguson, County Counsel, attorney)

Record Closed: February 23, 2017 Decided: February 23, 2017

BEFORE **LISA JAMES BEAVERS,** ALJ:

This matter concerns the appeal of Carlos Valencia from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 19, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

February 23, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

/lam

SETTLEMENT AGREEMENT BETWEEN CARLOS VALENCIA AND THE COUNTY OF ATLANTIC

This Settlement Agreement, hereinafter referred to as "Agreement" is made by and between CARLOS VALENCIA, hereinafter referred to as "Employee," and Atlantic County and the Atlantic County Justice Facility referred to as "Employer" or "County." Employee and the County are sometimes hereinafter collectively referred to as the "Parties."

WHEREAS, Employee was served with Preliminary Notice of Disciplinary Action for an incident which occurred on July 28, 2016, a copy of which is attached hereto as **Exhibit A**; and

WHEREAS, the disciplinary sanction being sought in the above Preliminary Notice of Discipline was a 17-day suspension from employment; and

WHEREAS, Employee failed to appear at the departmental hearing for the above disciplinary sanction, and a Final Notice of Disciplinary Action (31-B) was issued; and

WHEREAS, Employee served the 17 days' suspension associated with the disciplinary sanction and appealed the 31-B to the Civil Service Commission/Office of Administrative Law (Docket No: CSV 15924-2016 S); and

WHEREAS, Employee was served with a second Preliminary Notice of Disciplinary Action for an incident which occurred on September 20, 2016, a copy of which is attached hereto as **Exhibit B**; and

WHEREAS, the disciplinary sanction being sought in the second Preliminary Notice of Discipline was a 6-day suspension from employment; and

WHEREAS, Employee was served with a third Preliminary Notice of Disciplinary Action for an incident which occurred on September 28, 2016, a copy of which is attached hereto as **Exhibit C**; and

WHEREAS, the disciplinary sanction being sought in the third Preliminary Notice of Discipline was a 6-day suspension from employment; and

WHEREAS, the parties to this agreement have decided to resolve the disposition of all of the above charges in a summary fashion without the necessity for hearings, and in order to avoid the expense and burden of litigation, and in resolution of all other matters and proceedings that might arise between Employee and Employer as a result of the aforesaid charges;

NOW, THEREFORE, Employee and Employer agree as follows:

1. The above recitals are repeated, incorporated and made a part of this Agreement.

2. ***Modified Suspension Time.*** In consideration for entering into this Agreement, the Employer agrees to modify the suspensions as follows:

(a) The 17 suspension days which Employee has already served will be split between the July 28, 2016 and September 20, 2016 violations, as set forth in subparagraphs (b) and (c) below.

(b) A new Final Notice of Disciplinary Action (31-B) for the July 28, 2016 violation will be issued, and the suspension will be reduced to 11 days. Employee will not have to serve these days, as they have already been served. Employee shall withdraw his appeal to the Civil Service Commission/Office of Administrative Law within 10 days of the execution of this agreement.

(c) When the Final Notice of Disciplinary Action (31-B) for the September 20, 2016 violation is issued, no changes will be made. The 31-B will reflect a 6 day suspension. Employee will not be required to serve these days, as they have already been served. Employee agrees to waive any rights to appeal.

(d) When the Final Notice of Disciplinary Action (31-B) for the September 28, 2016 violation is issued, it will reflect a 6 day suspension, all of which will be held in abeyance for 6 months. Should Employee violate Atlantic County Policy P.S. 5.11 and /or ACJF policy 1.3.1D (Personnel Time and Attendance) within six months of the date of execution of this agreement, Employee will be required to serve these 6 days. Employee agrees to waive any rights to appeal.

The County's modification of Employee's suspension(s) as listed above is expressly conditioned upon Employee agreeing to the terms of this Agreement and Employee waiving his right to a departmental hearing and a hearing before the New Jersey Department of Personnel / Civil Service Commission for all of the above-referenced charges. **THE PARTIES ACKNOWLEDGE THESE ARE MATERIAL TERMS AND THE EMPLOYEE'S FAILURE TO PERFORM UNDER THE TERMS OF THIS SECTION SHALL BE CAUSE FOR THE COUNTY TO PROCEED WITH AND PURSUE ALL OF THE CHARGES NOTED ABOVE IN EXHIBITS A, B, C.**

3. ***Nondisclosure.*** All parties to this Agreement agree that the terms of this Agreement, and the circumstances surrounding same, are not to be divulged to any outside sources, either directly or indirectly. Outside sources do not include various agents of the County of Atlantic, the State of New Jersey, the United States of America, or any court of competent jurisdiction.

The provisions of this paragraph are binding only on the Employee and Employer. The Employer makes no representation and takes no responsibility for any unofficial actions of other employees who are not parties to this Agreement.

4. ***Discipline and Future Conduct.*** Employee EXPRESSLY ACKNOWLEDGES AND UNDERSTANDS future violations of policy will not be tolerated by the Atlantic County Justice Facility. Future violations of any County policy will result in progressive discipline up to and including termination of employment.

5. ***General Release/Exclusions.*** Except as expressly provided in paragraph 5(a) below, Employee knowingly and voluntarily releases and forever discharges for himself, his heirs, executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, as a result of the charges and conduct at issue, including, but not limited to, any alleged violation of:

- The National Labor Relations Act;
- Family Medical Leave Act (Federal and State);
- Title VII of the Civil Rights Act of 1964;
- Sections 1981 through 1988 of Title 42 of the United States Code;
- The Employee Retirement Income Security Act of 1974;
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;

- New Jersey State Wage and Hour Law;
- The New Jersey Law Against Discrimination;
- The New Jersey Workers' Compensation laws;
- The Conscientious Employee Protection Act;
- New Jersey Civil Service Statutes;
- any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;
- any public policy contract (whether oral or written, expressed or implied), tort or common law;
- any claim for costs, compensation, fees or other expenses including attorney's fees incurred in these matters.

5(a) ***Exclusions*** The above general release specifically excludes only the following:

i) Claims to enforce this settlement.

ii) Claims Employee may have as a member of the class action law suit in *Hebert et al v. County of Atlantic* under Civil Action No. 1:13CV04170 JHR-KMW in Federal Court in Camden NJ, if any.

6. ***Waiver of Right to Costs and Fees.*** The Parties agree that the Employee waives any claims for fees and costs, including but not limited to attorney's fees.

7. ***Governing Law.*** This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey.

8. ***Binding Agreement.*** This agreement constitutes the entire agreement between the parties. This agreement supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this agreement shall be binding unless in writing and executed by the parties. No waiver of any of the provisions of this agreement shall be deemed or shall constitute a waiver of any other provisions, whether or not similar. Nor shall any waiver constitute a continuing waiver. The Parties have negotiated the terms of this Agreement through and by their counsel. Accordingly,

this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

10. ***Execution in Counterparts/Facsimile and E-mail Signatures.*** This Agreement may be executed in counterparts, and all counterparts so executed will together constitute one (1) binding agreement. The Agreement shall be validly executed and delivered by exchange of executed counterparts by regular mail, facsimile or e-mail.

11. Without in any way limiting the scope or effect of the preceding paragraphs:

A. **Employee represents that he is able to read the English language and understands the meaning and effect of this Agreement.**

B. Employee understands that the above paragraphs include a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Employee may have as a result of any act that has occurred arising out of the filing of the attached Notice of Discipline.

C. Employee understands that if this Agreement were not signed, the Employee would have the right to submit information to a hearing officer, and then on appeal to an administrative law judge assigned to hear the cause of action by the New Jersey Department of Personnel / Civil Service Commission, and further understands that upon receipt of an unfavorable ruling by an administrative law judge, would have the right to make submissions to the Civil Service Commission, and thereafter, if unsatisfied with the final decision of the Civil Service Commission, would have the right to take an appeal to the New Jersey Superior Court, Appellate Division, together with any further rights to file appeals, either by right or by grace in the New Jersey State Court and Federal Court system.

D. **Employee understands and agrees that he has sought and received the advice of counsel and Union Representation of his own choice prior to executing this Settlement Agreement and General Release.**

E. **Employee acknowledges having had ample time to review this document, he has reviewed its terms, understands them and that he has voluntarily decided to release all claims against the County except as otherwise set forth herein after thoroughly reviewing this Settlement Agreement and the General Release.**

IN WITNESS WHEREOF, the parties have hereunto set their hands ~~and seals the day~~ and year written below their respective names:

The Parties

Carlos Valencia (Employee)

Dated: 2·14·2017

ATLANTIC COUNTY

Warden Geraldine Cohen
Atlantic County
(Employer)

Dated: February 15, 2017

Angiulo, Nicholas

From: Michael Mormando <mcmesq@attorneyshartman.com>
Sent: Thursday, March 23, 2017 5:17 PM
To: Angiulo, Nicholas; DAncona_Elizabeth
Subject: RE: Settlement for Carlos Valencia - CSV 15924-16

Dear Mr. Angiulo/Ms. D'Ancona,

I agree with the clarification; that is my understanding as well.
Please don't hesitate to call if you have any questions.

Mike

Attorneys Hartman

Michael C. Mormando

Michael C. Mormando, Esquire
Attorneys Hartman, Chartered
68 East Main Street
Moorestown, NJ 08057
Office: (856) 235-0220
Fax: (856) 273-8617
mcmesq@attorneyshartman.com

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Thursday, March 23, 2017 12:23 PM
To: DAncona_Elizabeth; Michael Mormando
Subject: RE: Settlement for Carlos Valencia - CSV 15924-16

Ms. D'Ancona:

I understand your explanation, however, that was not my original understanding (or maybe I was just missing the point). Let's see if I now have it.

The record we have indicates that the employee actually served the suspension on 17 working days from 10/23/16 to 11/18/16. The settlement reduces that to an 11 working day suspension. Per your explanation, it appears that, in essence, the reduction to an 11 working day suspension would cover the first period of those dates and the 6 working day suspension would be cover by the remainder of the days? Thus, there would be no unaccounted for days. If so, that would appear to be sufficient clarification.

Please let me know.

Thanks!

Nick

From: DAncona_Elizabeth [mailto:dancona_elizabeth@aclink.org]
Sent: Thursday, March 23, 2017 11:51 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; MCMESQ@ATTORNEYSHARTMAN.COM
Subject: RE: Settlement for Carlos Valencia - CSV 15924-16

Hi Mr. Angiulo:

I cannot remember if this settlement agreement was forwarded to CSC, so if it was, I apologize for re-sending it. We used the 6 day balance from the 17 days already served to cover Officer Valencia for a new 6 day suspension that he received after the 17 days. It is all laid out in the attached agreement. So the second 6-day went on his record, but it did not have to be served because we had reduced the 17 day to an 11 day after it was already served. So we did not pay him back pay, and we did not consider it an unpaid leave of absence either. Is this okay?

He then had a third 6 day imposed, but we agreed to just hold that one in abeyance and so he did not serve any additional days on that.

Elizabeth D'Ancona
Assistant County Counsel
Atlantic County Department of Law
1333 Atlantic Avenue, 8th Floor
Atlantic City, NJ 08401-8278
(609) 345- 6700 Ext 2464
e-mail: dancona_elizabeth@aclink.org

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Thursday, March 23, 2017 11:22 AM
To: DAncona_Elizabeth; MCMESQ@ATTORNEYSHARTMAN.COM
Subject: Settlement for Carlos Valencia - CSV 15924-16
Importance: High

Mr. Mormando and Ms. D'Ancona:

I am the Deputy Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Carlos Valencia indicating that the 17 working day suspension is being reduced to an 11 working day suspension. It also provides two additional matters not appealed to the Commission.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, the appellant served 17 suspension days which will be reduced to 11 days. The remaining 6 working days that he served must be accounted for in his personnel record. For example, will he receive 6 days of back pay for those days, will they be considered an approved leave of absence without pay, or something else? Without clarification, the settlement cannot be acknowledged by the Commission.

Please let me know as soon as possible the intention of the parties. An e-mail response is sufficient so long as it is agreed upon by the parties.

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

4/5/17

STATE OF NEW JERSEY

In the Matter of Victoria Vartolone
Bergen County Board of Social Services

CSC DKT. NO. 2016-4523
OAL DKT. NO. CSV 09825-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 6, 2017 **BW**

The appeal of Victoria Vartolone, Human Services Aide, Bergen County Board of Social Services, release at the end of the working test period, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on February 27, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 5, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Victoria Vartolone.

Re: Victoria Vartolone

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 5, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09825-16
AGENCY DKT. NO. 2016-4523

IN THE MATTER OF VICTORIA VARTOLONE, BERGEN COUNTY BOARD OF SOCIAL SERVICES.

Victoria Vartolone, pro se, appellant

Yaacov Brisman, Esq., for respondent Bergen County Board of Social Services (Cleary Giacobbe Alfieri Jacobs, attorneys)

Record Closed: January 27, 2017 Decided: February 27, 2017

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Bergen County Board of Social Services terminated human services aide Victoria Vartolone effective June 3, 2016, at the end of her working test period, because she failed to demonstrate the ability to successfully perform her job duties.

PROCEDURAL HISTORY

On June 3, 2016, the Bergen County Board of Social Services issued Victoria Vartolone a Memorandum terminating her employment, effective June 3, 2016, at the end of the working test period. Vartolone appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on July 1, 2016. The hearing was held on November 29, 2016, and the record remained open for post-hearing submissions. The record closed on January 27, 2017.

FACTUAL DISCUSSION

Susan Silverstein and Allan LaRobardier testified on behalf of the Bergen County Board of Social Services. Victoria Vartolone testified on her own behalf.

Background

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Susan Silverstein has been employed by the Bergen County Board of Social Services (Board) for forty-two years. She has been in the Training Department for twenty-five years and has been training supervisor for the past eighteen. Silverstein develops the training module and testing, and she writes the evaluations. Silverstein and her assistant, Victoria Osborne, conduct the training. Osborne has been employed by the Board for thirty years. Allan LaRobardier has been employed by the Board for nine years. LaRobardier is a provisional permanent human services specialist 4, which is a supervisor position. LaRobardier was a temporary supervisor in the "intake" and "interviewing" department for eleven months, and has been a provisional permanent supervisor in his own test period for just over a month. LaRobardier's department deals with food stamps and cash assistance. LaRobardier's workers interview the clients, document their stories on an application, and then request required verifications so that

completed interview packets may be sent to the processing department and benefits may be issued.

Robert Calocino is employed by the Board as acting director and personnel officer. On October 9, 2015, Calocino issued to Vartolone a letter offering Vartolone a position as a temporary, part-time (twenty-five hours per week) human services aide (HSA), to commence on October 26, 2015. (R-1.) As such, on October 26, 2015, Vartolone reported to Silverstein for training. Vartolone completed the new employee forms, and Silverstein conducted an orientation. Orientation typically lasts two days and consists of an overview of the entire agency, what the agency does, what the agency administers, the different programs, and eligibility for the programs. After the first two days, the actual program training commences. Silverstein started with food-stamps training. The trainees are given a manual, and it takes approximately one month to review the food-stamps policy and computer systems. Tests are administered to the trainees during the first month to determine progress. At the end of the first month, the trainees receive a thirty-day progress report, and the trainers go over the tests with the trainees, so the trainees are aware of their scores.

On November 30, 2015, Silverstein prepared a 30-Day Training Progress Report for Vartolone. (R-2.) The 30-Day Training Progress Report, signed by Silverstein and Vartolone, states, in pertinent part, as follows:

> Ms. Vartolone scored a 68% on the Food Stamp Program Eligibility Test, indicating that she had difficulty understanding the Food Stamp regulations. The average score for this test for the class was 84%, therefore she scored below the average. Ms. Vartolone scored a 62% on the Financial Eligibility Test and the average for the class was 82%. This exhibits that Ms. Vartolone had difficulty understanding the financial eligibility requirements of the Food Stamp Program. However, after reviewing the test, she now has a better understanding of the financial eligibility requirements of the Food Stamp Program. Ms. Vartolone scored 96% on the FAMIS and DOVE Inquiry Test, indicating that she has a very good understanding of how to access our systems and interpret the information on the screens. The average for the class on this test was 96% therefore she scored at the average on this test. The final

> test, the Utility Allowance Test, Ms. Vartolone scored 94%. The average for the class on this test was 92% therefore she scored above the average. She has a good understanding of the HEA coding and eligibility for the utility allowances.
>
> Ms. Vartolone's Manual Research Exercise had several omissions, which exhibits an inability to research the manual and determine the correct citations for the questions that were imposed.
>
> There is concern that Ms. Vartolone scored below average on two of her tests. However, she is aware of her shortcomings and has shown improvement on the last two tests.
>
> In the next 30 days, the class will learn the SNAPTrac system as well as coding cases into UAP and integrating the OnLine Food Stamp application. They will then begin to interview clients and develop the interviewing skills necessary for the successful processing of a case.
>
> [R-2.]

On January 14, 2016, Silverstein prepared an Interim Progress Report, which she delivered to Vartolone. The Interim Progress Report states, in pertinent part, as follows:

> You exhibit a professional manner, you work independently and you are organized. Your case notes are well-written and thorough. You have good interviewing skills, however at times you have difficulty understanding a situation and applying it to the Food Stamp regulations. You are not asking follow-up questions when necessary and therefore don't have the client's total situation. You need to analyze each circumstance and determine how to proceed based on the circumstances. Some verification requests were not complete and some cases were missing DOVE screens. There were also some budgeting problems which caused issues with determining if a case should be expedited. It is imperative that you take more time and review your work thoroughly prior to submission.
>
> [R-3.]

After thirty days, the trainees work on real food-stamp cases, and must conduct telephone interviews of the clients and ask numerous questions. The food-stamp application is approximately ten to twelve pages, and there are computer systems into which data must be entered.

On February 29, 2016, the Board issued a letter to Vartolone confirming that she had accepted the part-time HSA position and that her appointment was contingent upon her successful completion of the ninety-day working test period (WTP), after which permanent status would be granted. (R-4.) On February 29, 2016, Calocino issued a memorandum to Vartolone confirming that although she had been advised that her start date was February 29, 2016, she would remain in temporary status until Board approval was received. (R-5.)

On March 7, 2016, the Board issued a letter to Vartolone confirming its offer and Vartolone's acceptance of a position as a part-time (twenty-five hours per week) HSA, effective March 7, 2016, and that the appointment was contingent upon her successful completion of the ninety-day working test period, after which permanent status would be granted. (R-6.) Vartolone was instructed to report to supervisor LaRobardier on March 7, 2016. (R-6.)

LaRobardier completed three Employee Performance Reviews for Vartolone: a thirty-day evaluation, a sixty-day evaluation, and a ninety-day evaluation. Specifically, on April 20, 2016, LaRobardier completed an Employee Performance Review for Vartolone's 30-Day Evaluation (30-Day Review). (R-8.) On May 12, 2016, LaRobardier completed an Employee Performance Review for Vartolone's 60-Day Evaluation (60-Day Review). (R-9.) On June 3, 2016, LaRobardier completed an Employee Performance Review for Vartolone's 90-Day Evaluation (90-Day Review). (R-10.) Vartolone's 30-60-90-Day Reviews reflect the following scores (on a scale from poor to outstanding) and comments:

QUALITY: Work assigned to the employee is completed timely, consistently, accurately and thoroughly. Include strengths and weaknesses. (Compute using statistics both with and without employee.)

Review	Score (0-6)	Comments
30-Day	1.5	Ms. Vartolone completed 92 interviews, 25 of which contained errors, an error rate of 27.2%. This error rate is above the training class average of 17.6%
60-Day	0	Ms. Vartolone completed 105 interviews, 29 of which contained errors, an error rate of 27.6%. This error rate is above the training class average of 13.3%. In addition, 27.6% is significantly higher than 17.6%, the 60 day evaluation period average error rate for the other trainee interviewers.
90-Day	0	Ms. Vartolone completed 80 interviews, 25 of which contained errors, for an error rate of 31.3%. This error rate is above the training class average of 12.2% for the 90 day evaluation period. In addition, 31.3% is elevated from the previous period's error rate of 27.6%.

QUANTITY: The amount of work completed by the employee in relation to others in the same job. (Compute using statistics both with and without employee.)

Review	Score (0-6)	Comments
30-Day	2.5	Ms. Vartolone completed 92 interviews during the evaluation period, which is below the training class average of 104.
60-Day	2.5	Ms. Vartolone completed 105 interviews during the evaluation period, which is just below the training class average of 109.
90-Day	2.5	Ms. Vartolone completed 80 interviews during the evaluation period, which is below the training class average of 91 for the 90 day evaluation period.

JOB KNOWLEDGE/SKILL: Employee knows the details of the job, understands the job, and applies necessary knowledge and skills, including knowledge of interviewing techniques, and uses good judgment in caseload management.

Review	Score (0-6)	Comments
30-Day	2	Ms. Vartolone's high error rate and below average number of interviews represent an interviewer who needs improvement on the skills of interviewing and the knowledge of our programs.
60-Day	1	Ms. Vartolone's high error rate has not improved since the previous evaluation period, which illustrates the difficulty she is having in obtaining the skills and knowledge of the position.
90-Day	.5	Ms. Vartolone's error rate continues to remain above an acceptable level for an HSA Interviewer. This high error rate represents an inability to grasp the knowledge and skills needed to be a successful interviewer.

PROFESSIONAL CONDUCT: Extent to which employee contributes to a productive and harmonious working environment by acting in a respectful and dependable manner towards people in the workplace. Is consistently available during working hours.

Review	Score (0-6)	Comments
30-Day	4	Ms. Vartolone has shown to be a dependable and professional employee during her evaluation period. She has zero time away from the agency during this time.
60-Day	4	Ms. Vartolone has shown to be a dependable and professional employee during her evaluation period. She has zero time away from the agency during this time.
90-Day	3	Ms. Vartolone has shown to be a dependable and professional employee during her evaluation period. She has zero time away from the agency during this time.

CUSTOMER SERVICE: Identifies and meets customer needs, treats them with respect and in a professional manner. Returns calls promptly.

Review	Score (0-6)	Comments
30-Day	3	Ms. Vartolone has shown strong customer service skills during the evaluation period.
60-Day	3	Ms. Vartolone has shown strong customer service skills during the evaluation period.
90-Day	3	Ms. Vartolone has shown strong customer service skills during the evaluation period.

SELF-MOTIVATION/INITIATIVE: The extent to which the employee can be consistently depended upon to complete work with minimal supervision. Willingness to undertake problems/projects in a resourceful and independent manner.

Review	Score (0-5)	Comments
30-Day	2.5	
60-Day	2.5	
90-Day	2	Ms. Vartolone's applications must be reviewed thoroughly to ensure the client's eligibility can be determined properly.

COMMUNICATION: Effective expression of ideas, concepts or directions in individual or group situations, including thorough and well-written narratives.

Review	Score (0-5)	Comments
30-Day	2.5	
60-Day	2.5	
90-Day	2.5	

TEAMWORK: Works collaboratively in a group as a dependable team member to accomplish agency goals. Is consistently available during working hours.

Review	Score (0-5)	Comments
30-Day	2.5	
60-Day	2.5	
90-Day	2.5	

FLEXIBILITY/ADAPTABILITY: Adapts effectively to deadlines, workloads and sudden or frequent changes in priorities, policies and programs in order to fulfill the requirements of the job. Meets the needs of the customers and accomplishes agency goals.

Review	Score (0-5)	Comments
30-Day	2.5	
60-Day	2.5	
90-Day	2.5	

ATTENDANCE AND PUNCTUALITY: # OF DAYS ABSENT (attach attendance report), # OF DAYS LATE (attach attendance report).

Review	Days Absent	Days Late
30-Day	0	0
60-Day	0	0
90-Day	0	0

REVIEWERS' COMMENTS

Review	
30-Day	As this is Ms. Vartolone's first evaluation period, needing improvement is unsurprising. Ms. Vartolone is expected to lower her error rate and increase her speed as she gains experience as an interviewer through repetition.

60-Day	HSA trainees are expected to decrease their error rate while increasing their quantity of interviews. Unfortunately, this has not been occurring with Ms. Vartolone. While her quantity of interviews has increased along with the average for the trainees, her error rate has not shown improvement. Ms. Vartolone must drastically reduce her rate of errors.
90-Day	During the 90 day evaluation period, Ms. Vartolone was unable to demonstrate that she is able to complete the required quantity and quality of work that is essential for a Human Services Aide.

OVERALL RATING OF EMPLOYEE:

0-21 Does not meet job requirements (comments required)
22-40 Meets job requirements/job done satisfactorily
41-50 Exceeds job requirements (comments required)

Review	Score	**RECOMMENDATION**
30-Day	23	
60-Day	20.5	Ms. Vartolone must thoroughly review her completed applications, checking for errors. She may find it helpful to review her training materials and to ask questions of her fully trained co-workers and her supervisors when challenging interview circumstances arise. Ms. Vartolone must understand that asking questions is not a hindrance to her training as an interviewer but a necessary step in learning and improving.
90-Day	18.5	

The 90-Day Review reflects that LaRobardier did not recommend Vartolone for permanent status. (R-10.) On June 3, 2016, Calocino issued a memorandum to Vartolone confirming that Vartolone was terminated from her employment with the Board effective June 3, 2016, at the end of the working test period because she did not demonstrate the ability to successfully perform the duties of the HSA title. (R-11.)

Vartolone's personnel file includes fifty-six Referrals for Case Correction. (R-15.) Of those referrals, Vartolone signed fifty. (R-15.)

Testimony

Susan Silverstein

Clients apply for food stamps online or by mailing in an application, and food-stamp-application interviews may be conducted via telephone. The client is contacted and interviewing requires that trainees ask proper questions of the clients. Certain client answers require follow-up questions that do not appear on the application. By way of example, if a client told the interviewer that his income is $1,000 per month and his rent is $1,500 per month, it should suggest to the interviewer that something is amiss and trigger additional questions. Analyzing is very important, and it was a problem with Vartolone. Vartolone was given feedback and was asked to contact clients a second time because she had not asked the proper questions to obtain all necessary information. Vartolone also had problems with budgeting and with coding in the computer systems.

Trainees are kept in the Training Department for ninety days, at which point a decision can be made about whether a trainee is able to handle the position or should be terminated. Silverstein and the other administrators were concerned that Vartolone was not doing very well, so they and the other trainer decided to give Vartolone additional time to see if additional time and reduced class size for more one-on-one attention would help. After the additional month, Vartolone was sent to the "intake" and "redetermination" department, where she continued to interview clients and perform the same tasks she had been performing. At that point, the 30-60-90-Day period commenced, and Silverstein had no more formal interaction with Vartolone. However, at the request of Vartolone's supervisor, Silverstein reviewed some of Vartolone's cases.

A "Referral for Case Correction" was issued when a case was reviewed and determined to contain an error. The referral is a way of providing feedback to correct the error. The December 23, 2015, referral pertained to household composition and was issued because of incorrect application of the food-stamp regulations. (R-15A.)

DOVE is a computer system by which it can be verified if a client has been working or receiving unemployment, disability, or Social Security. Each case record must contain a DOVE screen for every individual aged eighteen and older. (R-15B.) The December 28, 2015, referral was issued because DOVE screens were missing. The January 11, 2016, referral pertained to a food-stamp regulation called "expedited screening." If a client meets certain criteria the client may receive benefits within seven days because of an emergency situation. Every case must have an expedited screening tool completed within seven days after the interview to determine whether it should be expedited or not. Expedited eligibility is important because those clients need food stamps within seven days, when a normal application is processed within thirty days. If a client is eligible for expedited food stamps, it is mandated that the benefits be received within seven days because of their situation, and an issue with interviewing could delay receipt of benefits. The January 11, 2016, referral was issued because that case was past seven days, and because the client's expenses exceeded her income, but there was no follow-up questioning from Vartolone as to how the client was paying her bills. Additionally, the client's daughter was receiving disability benefits, but there was no notice reflecting why, and no documentation of whether the client was receiving child support when there was no father in the household. (R-15C.) A second January 11, 2016, referral was issued because the budgeting for the expedited screening was not correct, because the income used was incorrect. There is a definite formula that is to be used, and it was not used correctly. (R-15D.) The January 25, 2016, referral was prepared by Osborne. The referral reflects that the client-verification request was not complete, and that Vartolone did not request the proper information, proof of contributions, phone, or work history. (R-15E.) The March 11, 2016, referral was signed by Silverstein because even though Vartolone was no longer under her supervision, Silverstein was assisting LaRobardier in reviewing some of Vartolone's cases and another trainee's cases. (R-15F.)

Vartolone's scores for the Food Stamp Program Eligibility Test and Financial Eligibility Test reflected in the 30-Day Training Progress Report were not acceptable scores. Additionally, there were numerous Referrals for Case Correction, including in March, April, and May. Fifty-six referrals is high and not acceptable. An employee with that number of referrals should not be hired permanently. At the end of the WTP,

Silverstein opined that Vartolone could not handle the position. Vartolone had been in training since October 26, 2015, and had received training on all the issues raised in the referrals. She should have known how to properly handle the cases. Vartolone's errors were in many different areas, but interviewing skills and budgeting or determining expedited eligibility were major problems for Vartolone.

Allan LaRobardier

LaRobardier supervises employees during their working test period (WTP employees). The WTP employees are usually coming from training, so his department completes their thirty-, sixty-, and ninety-day evaluations, assigns them work on a daily basis, continues to train and advise the workers, reviews their work and meets with them to discuss mistakes and corrections, and keeps track of work completion. Data is kept on the WTP employees' performance. Every time a WTP employee makes a mistake it is called an "error," and the WTP employee is given an error sheet. LaRobardier takes great pride in making sure his error sheets are very thorough. He does not just state what the error was, but also provides detailed instruction on how to correct it and how to avoid making the same mistake in the future.

Vartolone was assigned to LaRobardier on or about March 7, 2016. (R-12.) LaRobardier completed all of Vartolone's reviews, with some advice from his administration. From March 7, 2016, until April 20, 2016, his interaction with Vartolone would have been getting cases back to her that had errors and discussing the errors.

Quality is a statistical representation of how well the work is being completed, and how many and how often errors are made. It is an objective criteria, determined from statistical data. The scores can be anywhere from 0 to 100. If every application taken was wrong, it would equate to a 100 percent error rate, and if no application taken was wrong, it would equate to a 0 percent error rate. The scoring scale is 0 to 6, with average being a 3 or 4. In LaRobardier's experience, Vartolone's error rate was on the high side for a 30-Day Review, so she was scored at 1.5 for quality. Vartolone's quantity was below the average for the other WTP employees, so she was scored at 2.5. In assessing job knowledge and skill, LaRobardier usually considers the quality

and quantity of work. Vartolone's low quantity of work was showing a significant number of errors, which demonstrates lack of job knowledge and skill. Vartolone was always professional, always on time, and did not use any sick time during the WTP, so she was scored at 4 for professional conduct. Her customer service was scored at 3 because LaRobardier did not receive complaints or compliments about her. With respect to the remaining factors—self-motivation/initiative, communication, teamwork, flexibility/adaptability—LaRobardier explained that Vartolone was scored at 2.5 out of 5, which were fairly standard scores, because she was average in those areas and it is difficult for a trainee, WTP employee, or new employee to score above average. After the 30-Day Review, LaRobardier looks for improvement. A WTP employee is always going to make errors, but he expects the WTP employee to learn from the errors and not continue to make the same ones. LaRobardier also expects the WTP employees to increase their speed and the number of interviews completed.

For her 60-Day Review, Vartolone's error rate was higher than on her 30-Day Review, so she was given a score of 0 for quality. A 0 is not a common score, but it was given because her quality and speed had not increased. Additionally, in comparison with the other WTP employees in her training class, most showed improvement, but Vartolone did not. Although Vartolone's number of interviews had increased, she was not given a higher score on the 60-Day Review than she had received on the 30-Day Review because she remained below the class average. Her overall score was 20.5, which was lower than her 30-Day Review and indicated that she was not meeting the job requirements. It is not common for the score to be lower on the 60-Day Review than on the 30-Day Review.

Throughout the WTP, LaRobardier encourages WTP employees to seek guidance and ask questions of LaRobardier, the other supervisor, and the specialist. WTP employees were provided with handouts and documentation from the Training Department to use as a reference at their desks, and LaRobardier also makes sure there are other trained coworkers situated on either side of them to answer questions. LaRobardier recalled telling Vartolone specifically that she was one of the WTP employees who least frequently came to his office to ask questions, which was why he made it clear in his comments that it was not bad to ask questions. He tells the WTP

employees that it is an investment of his time to make sure they have the correct information and do not make the same mistakes in the future.

LaRobardier's 90-Day Review of Vartolone was reviewed by the lead administrator. On the 90-Day Review, Vartolone received a score of 0 for quality because her error rate had increased, which is not common and is not acceptable. Based on this score alone a WTP employee would not be retained. Vartolone received a score of 2.5 for quantity, because although she had increased the number of interviews, she was still below average. Vartolone received a score of .5 for job knowledge and skill because of her high error rate. A score of .5 is not an acceptable score, and based on this score alone a WTP employee would not be retained. Vartolone received a score of 3 for professional conduct. Her score was reduced one point from the prior review because the lead administrator felt that there could be adverse repercussions for clients if work was not done properly, and work not done properly is not very professional. Vartolone's score for customer service remained the same, but her score for self-motivation/initiative decreased to 2 because her applications had to be reviewed thoroughly to ensure proper eligibility. Her increasing error rate was becoming a hindrance to the Board. The hope is that a WTP employee's work improves and requires less review, but it was taking time for LaRobardier to review all of Vartolone's cases thoroughly because there were so many errors. Vartolone's overall score was 18.5. Vartolone did not demonstrate the ability to successfully perform the duties of an HSA, and LaRobardier did not recommend her for permanent status. LaRobardier had discussions with other supervisors and administrators, and no one felt that Vartolone should be hired after the WTP.

Victoria Vartolone

Vartolone testified that she did not know anything about a ninety-day probation period until training commenced. At the end of the ninety-day training period, she was kept an extra month. She was not told what was going on, and only knew that she was going to be kept there for a couple of weeks to see how she would do. Daily, she never knew if she was going to be laid off or not, which made her nervous and was very confusing to her.

The supervisors did not go over the 90-Day Review with her. She was called into Calocino's office and he gave her the 90-Day Review and told her that he was sorry it did not work out. She was not given an opportunity to look at the 90-Day Review before her swipe card was taken. It was very overwhelming, and she did not understand why the supervisors did not at least sit down with her and go over everything. Vartolone's understanding was that she was terminated because of her error rate.

LaRobardier had been very helpful, and she understood the corrections LaRobardier gave her. LaRobardier did not give her half as many corrections as Silverstein and Hall, another supervisor. LaRobardier had told her to come to his office if she had any questions, which she did. She also asked her coworkers for help or guidance if LaRobardier was busy, but then she would get the case back from Silverstein or Hall and be told it was wrong. Vartolone asked Silverstein, LaRobardier, and her coworkers about a client on unemployment, and she received different answers from each person. Vartolone never really understood the right way, and it was very confusing and overwhelming. Sometimes if she asked Hall to help her understand what was wrong, Hall was dismissive and did not help. Vartolone brought it to LaRobardier's attention on three separate occasions that Silverstein had given her back a case. Vartolone did not understand it at all and tried to figure it out. Additionally, on one occasion Vartolone was on the phone with a client conducting an interview when she was interrupted by Hall, who had a question about a case and asked Vartolone what she did wrong. Vartolone had to hang up with the client and later call the client back. She was back and forth to Hall's office for approximately half an hour, and she was unable to finish her cases on time.

Vartolone has a hard time with test-taking and she spoke to Silverstein about it. Vartolone is more hands-on, working with clients. Vartolone never knew how to process cases the right way because everyone had a different way of doing it, especially coworkers. She felt that Hall targeted her and belittled her a little if she had questions to ask, so she never really felt comfortable when Hall was the supervisor. Hall corrected a lot of Vartolone's cases, and she would put cases on Vartolone's desk and other

coworkers would see her doing it, which was embarrassing because Vartolone got a lot of cases back.

Vartolone did not sign many of the referrals for case correction. Some she refused to sign because she did not feel they were wrong. Others she refused to sign because she knew she had been thorough and printed everything, but received a correction that the items were not there. Additionally, on some of the cases Silverstein gave back to her for correction, Vartolone had already stated everything that needed to be stated, so she wrote "check case notes." There were also multiple occasions where Vartolone was given a correction for another employee's cases, and they had to go back and redo it, which took time from her cases for that day. Vartolone stayed basically every day until 3:30–4:00 p.m. correcting cases she was given by Hall and Silverstein, trying to figure out what was wrong and asking her coworkers. She was becoming more overwhelmed. Even staying late, she could not finish her caseload because she had to go through corrections. She was unable to do anything properly because she was nervous every day.

Vartolone testified that she dedicated a lot to the job. She admits that there were problems with budgeting that she was not correct on, and that was not her strong point.

Additional Findings of Fact

LaRobardier adequately explained the criteria for and means by which Vartolone was evaluated and provided adequate justification for the scores that were given to Vartolone. Neither LaRobardier nor Silverstein felt that Vartolone's evaluation scores were acceptable. Additionally, even if Vartolone had been given some corrections in error, there were still a significant number of referrals.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

Vartolone scored below the class average on both the Food Stamp Program Eligibility Test and the Financial Eligibility Test. Vartolone's error rate was significantly above the class average for each evaluation period, and her error rate increased with each evaluation. Vartolone's quantity was below the class average for each evaluation period. Vartolone did not acquire the requisite job knowledge and skill to properly conduct client interviews and analyze client data, and was therefore unable to meet the job requirements of an HSA.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission within the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. It is the public policy of this state to select and advance employees on the basis of their relative knowledge, skills and abilities. N.J.S.A. 11A:1-2(a). The Commission is vested with the authority to, after a hearing, render the final administrative decision on appeals concerning employees terminated at the end of the working test period for unsatisfactory performance. N.J.S.A. 11A:2-6(a)(4).

N.J.S.A. 11A:4-15 provides as follows:

> The purpose of the working test period is to permit an appointing authority to determine whether an employee satisfactorily performs the duties of a title. A working test period is part of the examination process which shall be served in the title to which the certification was issued and appointment made. The commission shall provide for:
>
> a. A working test period following regular appointment of four months, which may be extended to six months at the discretion of the commission, except that the working test period for political subdivision employees shall be three months and the working test period for entry level law enforcement, correction officer, and firefighter titles shall be 12 months;
>
> b. Progress reports to be made by the appointing

> authority and provided to the employee at such times during the working test period as provided by rules of the commission and a final progress report at the end of the entire working test period shall be provided to the employee and the commission;
>
> c. Termination of an employee at the end of the working test period and termination of an employee for cause during the working test period; and
>
> d. The retention of permanent status in the lower title by a promoted employee during the working test period in the higher title and the right to return to such permanent title if the employee does not satisfactorily complete the working test period, but employees removed for cause during a working test period shall not be so returned.

The WTP furthers the Civil Service Act's purpose "'to fill government positions upon a basis of merit and fitness to serve' by creating a probationary period of service during which time the appointing authority can observe and evaluate the appointee." Commc'ns Workers of Am. v. N.J. Dep't of Pers., 154 N.J. 121, 130 (1998) (citing Devine v. Plainfield, 31 N.J. Super. 300, 303 (App. Div. 1954)). Employees are to be selected based upon knowledge, skills and abilities, and the working test period allows for progress reports in order to determine whether an employee should be retained or terminated for unsatisfactory performance. Based upon the record, I **CONCLUDE** that the Board satisfied its burden to prove that Vartolone's performance as an HSA was unsatisfactory, and required her termination at the end of the working test period.

ORDER

I **ORDER** that the respondent's termination of Vartolone at the end of the working test period is hereby **AFFIRMED**.

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, P.O. 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.

2/27/17
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

dlc

APPENDIX

WITNESSES

For Appellant:

Victoria Vartolone

For Respondent:

Susan Silverstein

Allan LaRobardier

EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 Board's letter, dated October 9, 2015

R-2 30-Day Training Progress Report

R-3 Memorandum, dated January 14, 2016

R-4 Board's letter, dated February 29, 2016

R-5 Memorandum, dated February 29, 2016

R-6 Board's letter, dated March 7, 2016, and Resolution

R-7 (Not in Evidence)

R-8 30-Day Evaluation

R-9 60-Day Evaluation

R-10 90-Day Evaluation

R-11 Memorandum, dated June 3, 2016

R-12 Position History for Employee

R-13 (Not in Evidence)

R-14 (Not in Evidence)

R-15 Referrals for Case Correction

4/19/17

STATE OF NEW JERSEY

In the Matter of Judy Bellamy
Mercer County,
Department of Corrections

CSC DKT. NO. 2016-674
OAL DKT. NO. CSV 13694-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13694-15

AGENCY DKT. NO. 2016-674

IN THE MATTER OF JUDY BELLAMY, MERCER COUNTY, DEPARTMENT OF CORRECTIONS.

David B. Beckett, Esq., for appellant

Christina E. Chubenko, Assistant County Counsel, for respondent (Arthur R. Sypek, Jr., County Counsel)

Record Closed: February 15, 2017 Decided: February 24, 2017

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 3, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

February 24, 2017
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 2/27/17

Date Mailed to Parties: 2/27/17

/cb

IN THE MATTER OF JUDY BELLAMY AND MERCER COUNTY DEPT. OF PUBLIC SAFETY	:	**SETTLEMENT AGREEMENT** OAL DOCKET NO. 13694-2015 S AGENCY DKT. NO. 2016-674; OAL DOCKET NO. 14042-2016S AGENCY DKT. NO. 2017-742; OAL DOCKET NO. 14042-2016S AGENCY DKT. NO. 2017-742;
Consolidated Appeals		

THIS SETTLEMENT AGREEMENT is dated February 7, 2017 is entered into by and between Judy Bellamy ("Employee") and the Mercer County Department of Public Safety ("County") (collectively "the parties") to settle and resolve the above-captioned appeals pending at the Office of Administrative Law and before the Civil Service Commission. For good cause shown, the parties settle and resolve the disciplinary appeals as follows:

WHEREAS, Employee was issued Final Notices of Disciplinary action dated July 1, 2015 (amended July 14, 2016), [Docket No. CSV 13694-2015S] "FNDA 1"; August 30, 2016 [Docket No. CSV 14042-2016S] "FNDA 2"; and August 30, 2016 [Docket No. CSV 14043-2016S] "FNDA 3", respectively seeking a 5 day suspension, an 8 day suspension, and a 10 day suspension all for late infractions; and

WHEREAS, Employee appealed the FNDAs to the Civil Service Commission ("CSC"), Agency Reference numbers 2016-674, 2017-742 and 2017-743, respectively, and the CSC transferred the matter to the Office of Administrative Law ("OAL"), for de novo hearings; and

WHEREAS, all three matters were consolidated and the parties have agreed to resolve all

consolidated appeals by entry into this settlement agreement; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. With respect to FNDA 1, the Employee hereby pleads guilty to the disciplinary charges of N.J.A.C. 4A:2-2.3(a)(4 and 12) specifically chronic or excessive absenteeism or lateness and other sufficient cause and A-7 step 3 on the Mercer County Table of Offenses and the County agrees to reduce the penalty to a 4 day suspension. As such, 1 day of compensatory time will be reimbursed to employee's compensatory time bank. In addition, the County agrees to review and determine if it has already reimbursed employee for 3 days that were to be reimbursed as compensatory time following June 13, 2016 as a result of the amendment of the FNDA. If such reimbursement has not been made, it will be done by the County and those 3 days will be added to employee's compensatory time bank.

2. With respect to FNDA 2, the County agrees to dismiss the charges in their entirety and will reimburse the employee with 8 days of compensatory time reimbursed to employee's compensatory time bank.

3. With respect to FNDA 3, the Employee hereby pleads guilty to the disciplinary charges of N.J.A.C. 4A:2-2.3(a)(4 and 12) specifically chronic or excessive absenteeism or lateness and other sufficient cause and A-7 step 3 on the Mercer County Table of Offenses and the County agrees to reduce the penalty to an 8 day suspension. The fine imposed of $42.43 shall not be rescinded. As such, 2 days of compensatory time will be reimbursed to employee's compensatory time bank.

4. The parties agree that this shall settle and fully resolve appeals pending at the Civil Service Commission and is subject to approval by the Administrative Law Judge assigned to

these consolidated appeals and the Civil Service Commission's review. Upon approval, personnel records shall be amended to reflect these dispositions.

5. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by employee, but instead constitutes the good faith settlement of a disputed claim and the parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

6. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County amending the charges in this matter and agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of these three disciplinary matters that she has now to any relief of any kind from the County, whether or not she now knows about those rights, arising out of her employment with County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans

with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relation Act; New Jersey Family Leave Act and any other claims for unlawful employment practices with regard to this matter. It is emphasized that Employee is waiving all possible claims against the County with regard to these disciplinary matters.

7. Employee represents and certifies that she has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that she is voluntarily entering into this Agreement, that she is satisfied with her representation and is voluntarily entering into this agreement, and that neither the County nor anyone else has made any representations concerning the terms of effects of this Agreement other than those contained herein.

8. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

9. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s)/term(s) or provision(s) shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

10. The foregoing constitutes a full and final disposition of this matter.

11. Employee shall not request relief with respect to this matter, in any forum beyond

that which is contained herein.

12. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

13. This Agreement is the result of negotiations with Employee and Employee's attorney with whom Employee had an opportunity to consult prior to signing same and is satisfied with the representation.

14. This settlement fully and finally disposes of all issues in controversy. It is reached by way of compromise.

15. This Agreement shall neither set a precedent nor constitute a past practice.

16. This Agreement shall not be considered binding and/or final until approved by and executed by the County Administrator and/or his designee. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null and void and shall not interfere with the rights of either party to pursue this matter further.

Dated: 2/8/17

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Witnessed By: _____
Kristina Chubenko, Esq.

Dated: 2-7-17

JUDY BELLAMY, EMPLOYEE

Witnessed By: _____
David Beckett, Esq.

Angiulo, Nicholas

From: Angiulo, Nicholas
Sent: Monday, April 3, 2017 2:05 PM
To: 'David Beckett'
Subject: RE: Judy Bellamy v. Mercer County - CSV 13694-15 and CSV 14042-16 - Settlement

David:

As long as the comp time can be "cashed out," which, in essence makes it the equivalent of back pay, I think that would be sufficient for us, so long as this is okay with Ms. Chubenko.

Nick

From: David Beckett [mailto:dbeckett@dbeckettlaw.com]
Sent: Monday, April 3, 2017 1:27 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Cc: kchubenko@mercercounty.org
Subject: Re: Judy Bellamy v. Mercer County - CSV 13694-15 and CSV 14042-16 - Settlement

Nick
My concern here is that she *is receiving back pay.* It is in the form of comp time, which can be cashed out by the employee or used as leave time. Either way it recognizes that she is is being paid for that day. I don't want that time counted as unpaid leave time, when it is actually being paid. We could, in the alternative count the time as paid leave time so that her service time is accurate for seniority and pension purposes.
David

> On Apr 3, 2017, at 10:41 AM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov> wrote:
>
> Mr. Beckett:
>
> I understand your clarification. However, what we need to ensure in reviewing settlements is that any and all unaccounted for suspension time is dealt with. When a party settles a suspension to a lesser suspension and does not receive actual back pay for all suspension days actually served, we cannot categorize any unaccounted for days as "paid working days." In this regard, any form of "time" received in lieu of back pay essentially leaves a "gap" in the employee's personnel record. For example, even in a settlement of a suspension where an employee receives back vacation days, personal days, compensatory time, etc., (all of which can be used at a later date as paid leave) in lieu of the previous days of suspension served, the *actual suspension days* must still be accounted for in the employee's personnel record since the employee was actually not at work those days. The most common method of categorizing such days is as "leave of absence without pay" since the employee was not at work during those days and not paid.
>
> Please let me know if you need any further information or have any questions regarding the above explanation. Given the above, we will still require clarification as requested in my original email. I know this can sometimes get confusing but we will make it work.
>
> Thanks for your cooperation.
>
> Nick

From: David Beckett [mailto:dbeckett@dbeckettlaw.com]
Sent: Monday, April 3, 2017 10:12 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Cc: kchubenko@mercercounty.org
Subject: Re: Judy Bellamy v. Mercer County - CSV 13694-15 and CSV 14042-16 - Settlement
Importance: High

Mr. Angiulo:

The eleven days were ones that should be deemed paid working days. However, in lieu of receiving back pay, Ms. Bellamy agreed to receive compensatory time. This is similar to what can happen with overtime where an employee can receive comp time that is equal to a comparable amount of overtime pay for the work. Here, the comp time is at straight time; not at 1.5 times the hours (or days) worked. Thus, I believe the eleven days should be classified as working days. She is being paid for the days. She is receiving comp time in lieu of pay so the days are not unpaid or a leave.

I believe from my exchange with Ms. Chubenko that the County is in agreement with this position, but I will let her weigh in. Thanks,
David Beckett

> On Mar 23, 2017, at 11:03 AM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov> wrote:
>
> Mr. Beckett and Ms. Chubenko:
>
> I am the Deputy Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Judy Bellamy indicating her 5, 8 and 10 working day suspensions are being modified to a 4 working day suspension, no suspension and an 8 working day suspension, respectively. In lieu of back pay for the balance of the days, the appellant will receive 11 compensatory days.
>
> Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, we need to know how to account for the 11 working days that the appellant is receiving compensatory days for. In this regard, these days have to be categorized in her official record as either an unpaid leave of absence or something else.
>
> Please let me know as soon as possible the intention of the parties regarding the above. An e-mail response is sufficient so long as it is agreed upon by the parties. The sooner the information is provided the better.
>
> Thank you in advance for your cooperation.
>
> Sincerely,
>
> Nicholas F. Angiulo
> Deputy Director
> Division of Appeals & Regulatory Affairs
> New Jersey Civil Service Commission

STATE OF NEW JERSEY

In the Matter of Wayne Bennett
Newark Public School District

CSC DKT. NO. 2016-974
OAL DKT. NO. CSV 16554-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
(CONSOLIDATED CASES)
OAL DKT. NO. CSV 16172-15
AGENCY DKT. NO.2016-914

IN THE MATTER OF VERNON BOATMAN,
NEWARK PUBLIC SCHOOL DISTRICT.

and

IN THE MATTER OF WAYNE BENNETT,
NEWARK PUBLIC SCHOOL DISTRICT.

OAL DKT. NO. CSV 16554-15
AGENCY DKT. NO. 2016-974

Vipin Varghese, Esq., (Pitta & Giblin, attorneys) for appellants, Vernon Boatman and Wayne Bennett

Bernard Mercado, Esq., and **Sabrina Styza**, Esq., (Newark Public School District, attorneys) for respondent Newark Public School District

Record Closed: March 22, 2017 Decided: March 22, 2017

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on October 9, 2015 and October 15, 2015 for hearing as a contested cases, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties reached an amicable resolution of the matters, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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.

March 22, 2017
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 3-27-17

Date Mailed to Parties: MAR 27 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent State-operated
School District of the City of Newark

WAYNE BENNETT, Appellant, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV 16554-2015N AGENCY REF. NO.: 2016-974 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Wayne Bennett ("Appellant" or "Bennett") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, his appeal and request for a hearing filed under OAL Docket No. CSV 16554-2015N, Agency Ref. No.: 2016-974 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other claims or suits that he may have previously filed against the District that are still pending in any and all other courts and/or before any and all other agencies, with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Appellant up to this point in time.

3. In exchange, the parties agree that the charges set forth in the Final Notice of Disciplinary Action dated August 12, 2015 are sustained but that Appellant's twenty (20) day suspension will be reduced to a ~~ten~~ Eight (10) day suspension. The ~~10~~ 8 day reduction in suspension time will be converted to and recorded as an "Administrative Leave Without Pay". The Final Notice of Disciplinary Action will be amended accordingly.

4. Appellant will not receive any back pay as part of this agreement.

Except for Neglect of Duty charge and other sufficient cause charge

5. This Agreement shall not constitute a precedent in any matters involving other employees.

6. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including fees, back pay, front pay or any other monetary relief.

7. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that he may have against the District and the Released Parties relating to his employment with the District up to this point in time. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with the District up to this point, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should same become necessary.

8. Notwithstanding Paragraph 7 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving his rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 7, Appellant agrees not to seek or accept any resulting relief whatsoever.

9. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

10. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

11. Appellant understands, agrees to and acknowledges that he is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

12. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

13. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

14. Appellant agrees that he has been fully and fairly represented by his Union, International Union of Operating Engineers Local 68.

15. This Settlement Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey Law.

16. This Settlement Agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective on the District upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: 3-6-17

WAYNE BENNETT
Appellant

Dated: 3-6-17

VIPIN VARGHESE, ESQ.
Attorney for Appellant

Dated: 3-6-17

SAL COSTANZA,
IUOE Local 68

Dated: _____

CHRISTOPHER CERF
State District Superintendent

Dated: 3/6/17

SABRINA STYZA, ESQ.
Attorney for Respondent

CERTIFICATION

I, WAYNE BENNETT, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 3/6/17

WAYNE BENNETT

4/19/17

STATE OF NEW JERSEY

In the Matter of Vernon Boatman
Newark Public School District

CSC DKT. NO. 2016-914
OAL DKT. NO. CSV 16172-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
(CONSOLIDATED CASES)
OAL DKT. NO. CSV 16172-15
AGENCY DKT. NO.2016-914

IN THE MATTER OF VERNON BOATMAN,
NEWARK PUBLIC SCHOOL DISTRICT.

and

IN THE MATTER OF WAYNE BENNETT,
NEWARK PUBLIC SCHOOL DISTRICT.

OAL DKT. NO. CSV 16554-15
AGENCY DKT. NO. 2016-974

Vipin Varghese, Esq., (Pitta & Giblin, attorneys) for appellants, Vernon Boatman and Wayne Bennett

Bernard Mercado, Esq., and **Sabrina Styza**, Esq., (Newark Public School District, attorneys) for respondent Newark Public School District

Record Closed: March 22, 2017 Decided: March 22, 2017

BEFORE **JUDE-ANTHONY TISCORNIA,** ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) from the Civil Service Commission on October 9, 2015 and October 15, 2015 for hearing as a contested cases, pursuant to N.J.S.A.52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties reached an amicable resolution of the matters, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. I have reviewed the record and the settlement terms and **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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.

March 22, 2017
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 3-27-17

Date Mailed to Parties: MAR 27 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent State-operated
School District of the City of Newark

VERNON BOATMAN, Appellant, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV 16172-2015N AGENCY REF. NO.: 2016-914 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Vernon Boatman ("Appellant" or "Boatman") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, his appeal and request for a hearing filed under OAL Docket No. CSV16172-2015N, Agency Ref. No.: 2016-914 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other claims or suits that he may have previously filed against the District that are still pending in any and all other courts and/or before any and all other agencies, with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Appellant up to this point in time.

3. In exchange, the parties agree that the charges set forth in the Final Notice of Disciplinary Action dated August 12, 2015 are sustained but that Appellant's twenty (20) day suspension will be reduced to a ~~ten (10)~~ eight (8) day suspension. The ~~10~~ 8 day reduction in suspension time shall be converted to and recorded as an "Administrative Leave Without Pay". The Final Notice of Disciplinary Action will be amended accordingly.

BM V.V.

BM V.V.P. except for Neglect of Duty charge and other sustained charge

4. Appellant will not receive any back pay as part of this agreement.

5. This Agreement shall not constitute a precedent in any matters involving other employees.

6. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including fees, back pay, front pay or any other monetary relief.

7. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that he may have against the District and the Released Parties relating to his employment with the District up to this point in time. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with the District up to this point, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should same become necessary.

8. Notwithstanding Paragraph 7 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving his rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 7, Appellant agrees not to seek or accept any resulting relief whatsoever.

9. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

10. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

11. Appellant understands, agrees to and acknowledges that he is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

12. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

13. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

14. Appellant agrees that he has been fully and fairly represented by his Union, International Union of Operating Engineers Local 68.

15. This Settlement Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey Law.

16. This Settlement Agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective on the District upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: 3/6/17

VERNON BOATMAN
Appellant

Dated: 3/6/17

VIPIN VARGHESE, ESQ.
Attorney for Appellant

Dated: 3/6/17

SAL COSTANZA,
IUOE Local 68

Dated: _____

CHRISTOPHER CERF
State District Superintendent

Dated: 3/13/17

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, VERNON BOATMAN, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 3/6/17

VERNON BOATMAN

4-19-17

STATE OF NEW JERSEY

DECISION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Luis DeLeon

CSC Docket No. 2017-533
OAL Docket No. CSR 13016-16

ISSUED: MAY 04 2017 (ABR)

The appeal of Luis DeLeon, a Sheriff's Officer with the Camden County Sheriff's Department, of his removal, effective July 22, 2016, on charges, was heard by Administrative Law Judge Joseph Lavery (ALJ), who rendered his initial decision on February 21, 2017. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a review of the testimony, the Civil Service Commission (Commission), at its meeting on April 19, 2017, accepted and adopted the Findings of Fact and Conclusion, as contained in the attached initial decision, and the ALJ's recommendation to reverse the removal.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant provided false and misleading information by failing to disclose his involvement in five prior domestic violence incidents during pre-employment processing, as required. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in his initial decision that the appointing authority required the appellant to complete a Fitness-For-Duty Evaluation in December 2015 after he was involved in a domestic violence incident, charged with simple

assault and had a temporary restraining order (TRO) filed against him. The appellant was suspended following that incident and the Fitness-For-Duty Evaluation occurred after the simple assault charge was dismissed without prejudice for six months and the TRO against the appellant was also dismissed. Jennifer Kelly, Ph.D., ABPP administered the Fitness-For-Duty Evaluation on December 29, 2015 and deemed the appellant to be fit for duty, but noted that the appellant made statements which were inconsistent with his responses during a November 2014 pre-employment psychological evaluation, which was part of the pre-employment process that culminated in his appointment to the title of Sheriff's Officer. In that regard, Dr. Kelly indicated that the appellant, during the December 2015 Fitness-For-Duty Evaluation admitted to his involvement in five domestic violence incidents prior to his employment with the appointing authority, including one where he held down the hands of his child's mother in order to grab his keys out of her hand, and another where his child's mother had threatened to burn him with an iron, grabbed him by his shirt, and pulled him back while holding that iron. Dr. Kelly stated that the appellant failed to disclose those incidents during the pre-employment psychological evaluation. None of the five incidents predating the appellant's employment with the appointing authority involved police intervention or resulted in criminal charges. Based upon Dr. Kelly's assertions in her Fitness-For-Duty Evaluation, the appointing authority conducted an internal investigation of the appellant and removed him for his apparent failure to report past domestic violence during the November 2014 pre-employment psychological evaluation.

The appellant testified that Dr. Kelly's questions during his pre-employment psychological evaluation were derived from his responses to three questionnaires he completed prior to the interview. The appellant stated that Dr. Kelly's "Aggression History" question asked if he had been involved in any fights, using examples of bar fights and similar scuffles. The appellant said that, based upon the way the "Aggression History" question was posed, he told Dr. Kelly that he had not been involved in any fights. The appellant also indicated that he answered "no" to Dr. Kelly's "Relationship History" question, which asked if he had "ever been charged with domestic violence, any restraining orders, or [had] any feuds with anyone?" The appellant testified that he believed his statements to Dr. Kelly were truthful based upon the way she formulated her questions and the rigid nature of the interview. The appellant stated that the Fitness-For-Duty Evaluation was conducted in a different manner, where Dr. Kelly's line of questioning concerning domestic violence was far more specific, with questions that referenced the November 2015 incident. The appellant also indicated that the Fitness-For-Duty Evaluation was more conversational, where Dr. Kelly would ask follow-up questions if she needed him to elaborate or expand upon a statement. As to the incident where he grabbed his child's mother's arm, the appellant testified that he was attempting to leave the premises of his child's mother, but she got hold of his keys and refused to return them. The appellant indicated that he grabbed one of her arms in an effort to recover his keys, but that she then moved them into her other

hand. The appellant stated that he proceeded to grab her other arm and bring it down to her waist, at which point he recovered his keys and left the premises. The appellant maintained that he did not pin her down during this incident and that no physical altercation followed that event. The appellant testified that the incident with the iron merely involved her threatening him.

The ALJ indicated that the case hinged upon whether the appellant's answers during the pre-employment psychological evaluation were truthful. In that regard, the ALJ observed that the appointing authority needed to prove that a reasonable candidate for a Sheriff's Officer position would understand that Dr. Kelly's questions during the pre-employment psychological screening would require those incidents to be disclosed as "domestic violence." The ALJ found that Dr. Kelly's questions, as posed during the pre-employment interview, were more in the nature of "yes" or "no" options and did not invite the detailed responses that the appellant provided during the subsequent Fitness-For-Duty Evaluation. The ALJ observed that the appellant was forthright about his relationship with his child's mother during the Fitness-For-Duty Evaluation, even though his openness could have negatively impacted his employment. The ALJ saw no evidence that the appellant would have concealed the five incidents during the pre-employment psychological evaluation if it had been structured in the same manner as the Fitness-For-Duty Evaluation. The ALJ believed the appellant was truthful in testifying that he perceived the pre-employment psychological evaluation questions concerning aggression to address bar brawls and similar incidents. Accordingly, the ALJ found the appellant's demeanor and the persuasiveness of his testimony concerning the nature of the pre-employment psychological interview, including his belief that he answered Dr. Kelly's questions to the extent required, to be credible. The ALJ also found that the appointing authority failed to demonstrate that Dr. Kelly's questions during the pre-employment were formulated in a way that made it reasonably clear that the appellant was required to disclose the five incidents which predated that interview, particularly since there was no written evidence in the record which spoke to the content of Dr. Kelly's questions.

In its exceptions, the appointing authority, represented by Catherine Binowski, Assistant County Counsel, argues that its removal of the appellant should be sustained as the ALJ erred in requiring it to prove its definition of "domestic violence" and in concluding that the appellant was not untruthful during the pre-employment psychological evaluation. It maintains that the ALJ erred in requiring it to prove its definition of "domestic violence" because the appellant never claimed that he did not understand what that term meant and he was the one who characterized the five underlying incidents as "domestic violence" during the Fitness-For-Duty Evaluation. As to the appellant's untruthfulness, the appointing authority contends that the ALJ did not accord proper weight to Dr. Kelly's testimony that she asked the appellant about prior intimate relationships and whether he had a history of domestic violence or physical violence during the pre-

employment psychological evaluation. The appointing authority argues that there is no basis in the record to support the ALJ's finding that the appellant believed he was obligated to report only domestic violence involving police intervention, formal charges, or convictions during the pre-employment psychological interview with Dr. Kelly. It notes that the appellant stated on direct examination that he was asked during the pre-employment psychological evaluation whether he had "ever been involved in domestic violence." The appointing authority emphasizes that Dr. Kelly's questions about domestic violence incidents during the pre-employment psychological evaluation were not limited in scope to events involving criminal charges. It maintains that the only instance where a question was limited to the appellant having "ever been charged with or convicted of any domestic violence offense," was in the pre-employment application, not the pre-employment psychological evaluation with Dr. Kelly. The appointing authority also observes that both the appellant and Dr. Kelly confirmed that the appellant was asked during the pre-employment psychological evaluation if he was involved in any physical altercations after turning age 18. It maintains that the appellant was untruthful in denying such a history because the incidents he described to Dr. Kelly during the Fitness-For-Duty Evaluation and before the ALJ were physical altercations. Accordingly, the appointing authority argues that its removal of the appellant should be sustained, as the appellant's failure to disclose those prior domestic violence incidents was false, misleading and violated its rules regarding truthfulness.

In the instant matter, the principal issue is whether the appellant was untruthful in the answers he provided to Dr. Kelly during his pre-employment psychological evaluation in November 2014. As such, the Commission must ascertain whether it was reasonable for the appointing authority and Dr. Kelly to expect the appellant to have disclosed the five incidents at issue during the pre-employment psychological evaluation based upon Dr. Kelly's questions. While the record includes Dr. Kelly's written summaries of the appellant's answers during the evaluation questions, it does not contain any documentation with the exact questions Dr. Kelly asked the appellant during either the pre-employment psychological evaluation or the Fitness-For-Duty Evaluation. Consequently, the testimony of the appellant and Dr. Kelly constitute the only significant evidence of Dr. Kelly's questions to the appellant during those sessions. This necessarily requires a determination of the credibility of both the appellant's and Dr. Kelly's accounts of the interviews. 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 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 the credible evidence or was otherwise arbitrary. Nevertheless, upon review of the entire record, including the testimony provided at the hearing, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). The Commission finds that in this case, this strict standard has not been met.

In the instant matter, the ALJ provided explicit detailed reasons for his credibility determinations and the Commission agrees with those determinations. The appellant testified that the November 2014 pre-employment psychological evaluation was more rigid and less conversational in nature than the December 2015 Fitness-For-Duty Evaluation. The appellant noted that Dr. Kelly asked him to elaborate on some of his responses during the Fitness-For-Duty Evaluation, but did not recall her doing so during the pre-employment psychological evaluation. That account appears to be consistent with Dr. Kelly's testimony that her pre-employment psychological evaluation and Fitness-For-Duty Evaluation interviews with the appellant were structured differently. It is noted that Dr. Kelly explained that her pre-employment psychological evaluation interview with the appellant was more structured and her questions mirrored those contained in a written Personal Background Questionnaire completed by the appellant prior to their session. Dr. Kelly stated that the Fitness-For-Duty Evaluation, in contrast, was a "semi-structured interview," where she formulated her questions in response to his statements, rather than planning them ahead of the interview. She indicated that her questions during the Fitness-For-Duty Evaluation were more pointed, as they referenced the events which transpired during the underlying 2015 domestic violence incident.

When Dr. Kelly asked the appellant about domestic violence incidents in the November 2014 pre-employment psychological evaluation, the appellant had not yet been hired or formally trained by the appointing authority. There is no indication that police had ever been called to respond to a domestic violence incident involving

the appellant as of that date. The only altercation in the record involving the appellant making physical contact with his child's mother prior to his employment with the appointing authority was an incident where she took his keys in an attempt to prevent him from leaving her and he "grabbed her arm and grabbed [his] keys," without pinning her down, and proceeded to walk out. Prior to his pre-employment psychological evaluation, the appellant had completed a pre-employment application which asked if he had "ever been charged with or convicted of any domestic violence offense." Both Dr. Kelly and the appellant maintain that the physical altercation examples Dr. Kelly provided during the pre-employment psychological evaluation were bar fights and similar brawls. Against this backdrop, the Commission believes that the ALJ could reasonably conclude that Dr. Kelly's examples of bar fights and brawls and the pre-employment application's reference to criminal charges did not reasonably put the appellant on notice that he would need to disclose the five aforementioned incidents, including one where he recovered his keys from his child's mother's arm. The ALJ's conclusion is bolstered by the fact that Dr. Kelly's questioning during the pre-employment psychological evaluation did not appear to employ questions which were meant to elicit detailed responses from the appellant or expand upon the answers he provided in the way that the Fitness-For-Duty Evaluation did.

One final comment is warranted. The Commission notes that its decision is based on the testimony and evidence in this matter regarding whether the appellant's answering of the questions asked regarding "domestic violence" were truthful. In this regard, the testimony and evidence demonstrates that his answers comported with his understanding of what that phrase meant during both evaluations. Thus, the actual definition of that phrase is immaterial since the substantive issues were the content of Dr. Kelly's questions, the appellant's responses to those questions, and the truthfulness of his answers.

Accordingly, the Commission agrees with the ALJ's conclusions and dismisses the disciplinary charges against the appellant. As such, the appellant is entitled to immediate reinstatement and back pay and benefits for the period of his separation from employment. *See N.J.A.C.* 4A:2-2.10. Additionally, since the appellant's disciplinary charges were dismissed, he is entitled to reasonable counsel fees pursuant to *N.J.AC.* 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, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and/or counsel fees is finally resolved.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing Luis DeLeon was not justified. Therefore, the Commission reverses the appellant's removal and orders that the appellant be granted back pay, benefits and seniority for the period of his separation from employment. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. The appellant is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of mitigation and 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:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay and/or counsel fees dispute.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF APRIL, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 13016-16

IN THE MATTER OF LUIS DE LEON,
CAMDEN COUNTY.

Andre A. Norwood, for appellant Luis DeLeon

Catherine Binowski, Assistant County Counsel, for respondent Camden County (Christopher A. Orlando, attorney)

Record Closed: January 5, 2017 Decided: February 21, 2017

BEFORE **JOSEPH LAVERY,** ALJ t/a:

Luis DeLeon, appellant, brings this appeal before the Civil Service Commission, asking for reinstatement following his removal for cause. The appointing authority has terminated him on charges of giving "false and misleading" information during a psychological examination undertaken on November 25, 2014 by not disclosing incidents of "domestic violence" later revealed in a Fitness-For-Duty assessment on December 29, 2015.

Respondent Sheriff's Office of Camden County, **appointing authority,** contests the appeal, and asks that appellant's removal be upheld as the proper penalty

for untruthfulness, in violation of those regulations cited in its final notice of disciplinary action dated July 22, 2016 (Exhibit J-3).

Today's Initial Decision reverses the penalty of removal and restores appellant to his position of Sheriff's Officer, County of Camden.

PROCEDURAL HISTORY

This is an appeal filed in the Office of Administrative Law (OAL) on August 23, 2016, pursuant to L. 2009, c. 16, supplementing Title 40A of the New Jersey Statutes (N.J.S. 40A:14-200 through -212) and amending N.J.S. 40A:14-150 and N.J.S. 40A:14-22.

Originally, this case was assigned for hearing to Honorable Robert Bingham, II, by the Acting Director and Chief Administrative Law Judge. Following the judge's appointment to the Superior Court, the case was calendared with the undersigned. On January 5, 2017, plenary hearing convened and concluded, thus closing the record.

STATEMENT OF THE CASE

Background:

Many of the material facts are not in dispute:

Following a conditional offer of employment in November of 2014, appellant, previously a State employee with the Department of Transportation and a veteran of service in Iraq as a National Guardsman, underwent what the appointing authority, Camden County Sheriff's Office, refers to as a "post-offer psychological screening." The screening occurred on November 25, 2014. This process is standard in the Sheriff's Office, and results in a rating by the psychologist/examiner of "qualified," "unqualified," or "indeterminable" for the duties of a sheriff's officer. An appointment to this position

occurs only after a candidate's success in this psychological examination. The police psychologist, Jennifer Kelly, Ph.D., ABPP conducted appellant's interview, which was not recorded. In her report, she certified appellant as "qualified" (Exhibit R-1). The doctor's decision permitted appellant's unfettered appointment.

To reach her conclusion that appellant was qualified for the position, Dr. Kelly's report shows that she made use of a number of "assessment techniques," which were listed therein: the California Psychological Inventory (CPI) and Personality Assessment Inventory (PAI), both utilizing the Public Safety and Selection Report; the Psychological History Questionnaire (PsyQ) (Exhibit R-10); the Comprehensive Clinical Interview, and a review of agency-provided background records.

Dr. Kelly also resorted to use of "psychological screening dimensions," which allowed her to estimate the "anticipated degree of risk of performance problems on essential job elements for public safety positions." These estimates were gauged as "high," "mod" [moderate], or "low" (Exhibit R-1, at 1-2). In the case of appellant, Dr. Kelly found that all the dimensions placed him at "low" anticipated degree of risk, except in "Cluster D: Work Attitudes." In a subsection thereof, set apart by the introduction: "Integrity/Ethics," the dimension to be measured was described as:

> Integrity/Ethics: Maintains high standards of personal conduct; exhibits attributes such as honesty and trustworthiness; conforms to laws and personal commitments etc.
>
> [Exhibit R-1, at. 2; emphasis added]

She assessed appellant's likelihood of performance problems with respect to the foregoing characteristics as being of "moderate" risk.

Also pertinent in this report are Dr. Kelly's comments on page 4, quoted here:

Aggression History:

Mr. DeLeon denied involvement in any physical altercations since turning 18.

Relationship History:

Mr. DeLeon is single with one child who resides with the child's mother. He denied a history of Division of Child Protection and Permanency involvement and indicated he pays child's support based on a mutually agreed upon amount. He denied a history of having a restraining order filed against him or a history of perpetration of domestic violence. Mr. DeLeon currently lives alone. He does not feel there is anything about his current relationship that would negatively interfere with the prospective position.

[Ibid. Emphasis added]

Dr. Kelly characterized this first session with appellant as a "clinical interview." Her professional conclusions arose from that interaction. She also gained insight from appellant's completion of a psychological history questionnaire, as well as by review of the collateral materials provided by the Sheriff's Office. Dr. Kelly specifically listed the topics of discussion and testing, with short summaries of what appellant divulged. The topics addressed were "Education;" "Employment;" "Military Service;" "Previous Public Safety Psychological Assessments;" "Previous Public Safety Employment;" "Driving Record;" "Financial History;" Legal History;" "Substance Use;" "Aggression History;" "Relationship History;" Mental Health History and Provider Contact;" and "Recreation." [Id., at 3-4].

Dr. Kelly concluded over all:

In consideration of the assessment information available to me at this time, I conclude that Mr. DeLeon satisfies the minimum standard for psychological qualification as a Sheriff's Office [sic] with the Camden County Office of the Sheriff. No specific deficits in essential job elements were identified in the present evaluation and Mr. DeLeon was found to possess the full range of psychological competencies and traits known to be associated with successful performance as a law enforcement officer.

[Id., at 5]

Appellant, thus cleared by Dr. Kelly, was appointed to the position of sheriff's officer pending successful performance at the New Jersey Police Training Academy[1].

Appellant's time on the force thereafter was not marked by any negative incident of record until November 2015. At that point, specifically on November 14, 2015, he was the subject of a complaint-summons in Pennsauken Township, initiated by his child's mother, charging simple assault. A temporary restraining order issued on that date. Appellant was suspended from his law enforcement duties and was required to surrender his weapons. On December 8, 2015, the order was eventually dissolved, and replaced by a consent order. The simple assault charge was dismissed without prejudice, for six months (Exhibits R-2, R-3).

As a consequence of this event and its resolution, the appointing authority, pursuant to Attorney General Guidelines for dealing with domestic disputes, requested that Dr. Kelly administer a "Fitness-For-Duty" psychological examination (Exhibits R-2, R-3). It took place on December 29, 2015. The examination differed from appellant's post-offer evaluation, being concerned only with his fitness to return to full-job performance, rather than with exploring his pre-employment psychological state. The tests administered were also not the same as in appellant's first screening. They were: the Minnesota Multiphasic Personality Inventory, the State Trait Anger Inventory, and the Substance Abuse Subtle Screening Inventory.

The interview of appellant with Dr. Kelly, which again was not recorded, was in-depth, and during it the child's mother, A.E., who had brought the complaint on November 14, 2015, was telephoned for questioning. This attempted inquiry was not successful:

> [A.E.] was contacted by myself and asked if she would be willing to speak about her relationship with Mr. DeLeon as well as the domestic incident in question. [A.E.] indicated that she was not interested in speaking to me or

[1] Begun in August 2015 according to Dr. Kelly's Fitness for Duty Report (Exhibit R-3, at 4).

> answering any questions as she did not want to be responsible for negatively impacting Mr. DeLeon's job.
>
> [Exhibit R-3, at 3]

Dr. Kelly in her questioning of appellant explored the incident of November 14, 2015, which had prompted the Fitness-For-Duty evaluation. She summarized in her report her version of the information provided by appellant describing what had occurred (Exhibit R-3, at 4, full paragraphs 1-4]. Additionally, Dr. Kelly offered her further summation of what appellant told her regarding another, earlier incident in February 2015. [Id., at 5, first full paragraph]. Both events happened after her post-offer psychological evaluation in the prior year, on November 25, 2014.

However, beyond these two events, Dr. Kelly, in this same Fitness-for-Duty Report, declared that her examination on December 29, 2015, had unearthed "inconsistencies" in appellant's statements from the year before in the post-offer evaluation:

> Mr. DeLeon denied all accusation that her [sic] pushed or kicked [A.E.] and also denied ever pulling her hair in the past as was alleged by her. Nonetheless, Mr. DeLeon indicated that he and [A.E.] have known each other since 2005 and lived together for three years but he ultimately had her move out when she threatened to burn him with an iron in 2012. On occasion he indicated that she had grabbed him by the shirt and pulled him back with the iron in her hand. During their relationship, Mr. DeLeon stated they have had five domestic violence incidents, including one in which he grabbed her arms and held them down in order to get his keys from her hand. He stated that none of the prior domestic incidents were reported to the police. The fact that the couple had numerous domestic incidents in the past was inconsistent with what Mr. DeLeon had reported to me one year prior when his [sic] was evaluated for hire with the Camden County Office of the Sheriff.
>
> [Id., at 4-5; emphasis added]

Because of this assertion of "inconsistency" by Dr. Kelly, the Camden County Sheriff's Office conducted an internal investigation. Relying on the Fitness-For-Duty

suggestion of failure to report past domestic violence in the post-offer interview, the sheriff at the time removed appellant from his position. Appellant brought an appeal, and these proceedings followed.

Arguments of the Parties:

The appointing authority's charge:

The Office of Sheriff, Camden County, as the appointing authority, presented its case through documentary exhibits and testimony. The foremost exhibits pertaining to the final notice of disciplinary action (FNDA) (Exhibits J-2, J-3) specifications which are offered as factual evidence and supplemented by the testimony of their author, Dr. Kelly, are: the Post-Offer Evaluation Report (Exhibit R-1), the Fitness-For-Duty Report (Exhibit R-3) and the Camden County Office of the Sheriff Application For Employment (Exhibit R-4). The appointing authority maintained that, in total, they show by a preponderance of the evidence that appellant in his first interview with Dr. Kelly intended to, and did, withhold information disclosing aggression and domestic violence.

In her testimony, **Dr. Jennifer Kelly, Ph.D., ABPP**, stated that she had been a board certified, licensed psychologist with a concentration in law enforcement pre- and post-employment evaluations for the past ten to eleven years. During that time she had completed over 2,000 such post-offer interviews weekly and perhaps a total of 200 Fitness-For-Duty interviews. In her testimony, Dr. Kelly essentially reiterated what she had conveyed in her two reports.

Dr. Kelly stated that, in the first, post-offer report, appellant had answered that he had never been involved in any "altercations" or "scuffles" after the age of eighteen. She recalled that she had probed further with the additional standard question of whether he had been involved in, or had a history of, interpersonal domestic "violence," or "physical violence," including such as would have the police called to the home because of "interpersonal contact," or "aggression," or whether a restraining order for such behavior

had ever been issued. His answer, according to Dr. Kelly, was that none of these things had ever occurred (Exhibit R-1, at 4, "Aggression History;" Id., "Relationship History."). She noted that he completed a "very detailed" psychological history questionnaire, which covered the same topic, inquiring as well whether there had ever been "slapping, hitting, interpersonal conflict relationships" (Exhibit R-10). The questionnaire warned each examinee that lack of honesty in answering could result in not being qualified for the position. Appellant signed, Dr. Kelly recalled, attesting that he understood his need for total honesty.

In December 2015 (Exhibit R-3), Kelly further observed that appellant had again been asked about "incidents of domestic violence" with his child's mother, A.E., which had precipitated the need for this evaluation. However beyond this, and because of his long-standing relationship with this woman, appellant described other "incidents" which took place which had not been disclosed during the earlier post-offer examination. Dr. Kelly said she summarized their conversation in her report (Id., at 4-5).

Dr. Kelly stated that during their three years together there were five physical altercations. One involved A.E.'s threat with the hot iron in 2012, another involved appellant pinning her down because she had taken his keys. She was "absolutely" certain that appellant had indicated that these incidents pre-dated her first, post-offer evaluation, and that this behavior was not unusual between the two. This, despite his earlier denial at that time of any such conduct. This, Dr. Kelly felt, was an inconsistency. Therefore, she concluded, appellant had been untruthful. Lack of veracity would have been sufficient grounds for her to not recommend appellant for employment, had she known during the earlier post-offer interview. Domestic violence is a critical element particularly relevant to self-control in police work, she emphasized. For that reason, she brought it to the attention of the appointing authority (Exhibit R-3, at 5).

However, Dr. Kelly added, because of the American With Disabilities Act (ADA), only a finding of underlying psychiatric condition would have allowed her to find lack of

fitness to be restored to his job. In contrast, lack of truthfulness, was an administrative, not a medical, problem.

Dr. Kelly agreed that her summary (Ibid.) was not a quotation. She conceded that her questions during the Fitness-For-Duty examination were more pointed and detailed than in the post-offer evaluation, now that more information was in place to draw on. On the other hand, she was certain that the general questions she asked in the second interview were also asked during the first evaluation. Dr. Kelly explained that she had made more expansive inquiries in the second interview only because she had learned more from appellant. She believed the headings in her reports were not "relevant" to what were the actual questions she had asked during each interview about physical violence.

Sergeant Corinne Mason, the sergeant-in-charge of the internal investigations for the Camden County Sheriff's Office, testified that appellant's psychological examination inconsistencies, as found by Dr. Kelly, proved he had been dishonest. She recalled that this same report showed that appellant had held down the hands of the mother of his child in order to retrieve his keys. This was assault as defined in the "2C," the "Criminal Code" and the "Domestic Violence Act." Sergeant Mason stated that she could not be expected to recite the specific titles and content of these legal references from memory. In any event, she stated, "anyone" would recognize this incident as an altercation which should have been disclosed to Dr. Kelly in the post-offer examination in answer to the questions concerning Aggression History and Relationship History (Exhibit R-1, at 4).

Camden County Sheriff Gilbert Wilson testified that, though only in the office for one year, he was familiar with the case. He confirmed that dishonesty in police work warranted removal from the position, since honesty is the foundation of police work. His office's Manual of Rules and Regulations assesses untruthfulness as a Class 1 offense, thus requiring dismissal (Exhibit R-6, at 3, Rule 3.14.19, at 30). The sheriff concluded

from review of Dr. Kelly's reports that there were clear discrepancies in appellant's answers to the questions in issue.

The County argued in summation that the facts confirm appellant's failure to disclose, on his application (Exhibit R-4) and during the post-offer phase, five domestic violence events occurring earlier than appellant's pre-employment application. This document and the psychological assessments together prove by a preponderance that appellant was dishonest. In the view of the Sheriff's Office, untruthfulness warrants removal.

Appellant's case in reply:

Relying entirely on his own testimony, appellant denied that he had been untruthful during the post-offer interview with Dr. Kelly. He maintained that during this first interview with her the question-and-answer session had been more direct. No elaboration was possible. With respect to aggression, he interpreted these questions as referring to bar fights and the like. He had engaged in none. As to relationship history, Dr. Kelly had asked whether he had experienced a restraining order or been in any feuds with others.

The second interview (Exhibit R-3), he recalled had been more conversational and open-ended, in his recollection. Dr. Kelly typed as they talked and asked follow-up questions, appellant said. This allowed him to be voluntarily more descriptive of the history with the baby's mother, which had included friction, at times physical, which marked their relationship. He gave Dr. Kelly more detailed replies, including dates and times. She had asked that he elaborate. During the first interview, appellant insisted, he was telling the complete truth in answer to the questions in the form that they had been asked. In appellant's memory, she had only asked if he had been involved in domestic violence or had been under a restraining order.

In sum, appellant declared, the first interview called for more of "yes-or-no" answers, while the second interview had been more "loose" and "relaxed." In neither instance had he been untruthful, appellant stated. Appellant thought it significant that none of the incidents Dr. Kelly had described in the Fitness-For-Duty report had been assigned specific dates or times.

On cross-examination, however, appellant acknowledged that, pre-employment and prior to the post-offer interview, he had been involved in what had been characterized as "domestic violence" incidents. He agreed that he had not reported them during this first evaluation. Nonetheless, he did not agree that he had been untruthful by not disclosing them, since they did not involve outside intervention. For the same reasons, he had not divulged these incidents on his application for employment, which also asked about domestic violence (Exhibit R-4, at 18).

Addressing the later Fitness-For-Duty interview, appellant recalled voluntarily telling Dr. Kelly of some domestic incidents involving himself and the baby's mother. He believed these outbursts centered on A.E.'s fear that he would leave her. He recalled that on one occasion she had grabbed his shirt and pulled him back. On another occasion, he added, she had made threats with a hot iron, without physical involvement. During an argument in which she had been shifting his keys from hand-to-hand to prevent his departure, appellant was certain he had done no more than hold down her arms to retrieve the keys. "I grabbed her arms and grabbed my keys."[2] He denied "pinning her down" and stated that his intent was to remove himself from the house.

In closing statement, appellant argued that he believed that he had been asked whether he had been charged or convicted of domestic violence on his application. He knew he had not. During the post-offer interview, his answer responded to the questions posed, e.g., whether he had been in aggressive and violent altercations, such as bar fights, in which he had never been a participant. Dr. Kelly's questions were yes-

[2] Office of Administrative Law sound recording, DeLeon OAL Dkt. No. CSR 13016-17, at 11:59.14 a.m., January 5, 2017.

or-no in nature, appellant insisted. There had been no invitation to expand or explain. During the post-offer interview he did not think that he was being asked about more than formal domestic charges and conviction. When questioned in detail and at length in the Fitness-For-Duty interview, he maintained that he had been completely honest and open. Further, he had never "threatened, assaulted or harassed" another person, as asked in his application. Finally, appellant argued, it is not actually known what exactly was asked in either unrecorded interview, and this information is fundamentally necessary to determine whether he had been truthful.

Burden of proof:

The burden of persuasion falls on the agency in enforcement proceedings, such as those in which it is sought to prove an employee has engaged in violations susceptible to removal as a penalty, under controlling regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975).

Findings of fact:

To resolve disputes of material fact I make the following **FINDINGS:**

1. Appellant and the mother of his child, A.E., during the three years they lived together engaged in five angry "domestic incidents"[3] which at times turned physical to an unknown degree. These incidents predated appellant's post-offer interview Dr. Kelly.

2. The extent of violence, if any, inherent in these five instances of argumentative physicality is not of record, with the exception of: (a) A.E'.s threat against appellant with a hot iron, (b) an occasion when A.E. pulled him by the shirt, and (c) the event when appellant held A.E.'s arms in order to retrieve his car keys which she had taken and was withholding to prevent his leaving.

3. Appellant never pushed, kicked or pulled the hair of A.E.[4]

4. In the Post-offer interview with Dr. Kelly, Appellant did not disclose any of the foregoing history of five disputes with A.E.

5. In the post-offer interview, appellant believed he was obliged only to report domestic violence which had involved police intervention, formal charges, or convictions for that offense. Questions on aggression he interpreted as referring to bar fights and the like.

6. In the post-offer interview, Dr. Kelly questioned appellant more narrowly than in the Fitness-For-Duty interview. These questions invited only brief, constrained answers.

7. In the post-offer interview, appellant filled out a Psychological History Questionnaire. The questions within it are not in the record, and only the penciled entry-marks on an answer sheet are in evidence (Exhibit R-10)

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[3] See, Exhibit R-3, at 4-5, Dr. Kelly's Fitness-For-Duty Report.

[4] Ibid.

ANALYSIS AND CONCLUSION

Analysis:

The charges and specifications:

The appointing authority, in its amended final notice of disciplinary action (FNDA) dated May 3, 2016 provided the specifics for its action:

> **Incidents(s) giving rise to the charge(s) and the date(s) on which it/they occurred:**
>
> On December 29, 2015, during a Fitness for Duty Examination, which stemmed from a domestic violence incident, Camden County Sheriff's Officer DeLeon disclosed he had been involved in five (5) domestic violence incidents in the past, one in 2012. This contradicted statements he made one year earlier in a psychological examination.
>
> On November 25 2014, in accordance with Attorney General Guidelines Internal Affairs Policy & Procedures relative to (Pre-Hire Screening and Investigation), Appendix Q.V.B & Q.IV.C, S/O Luis DeLeon #659 was given a psychological examination as a post-conditional offer of employment. During his psych screening, S/O DeLeon provided false and misleading information, relative to his personal history, indicating he had no history of domestic violence.
>
> [Exhibit J-1]

The appointing authority in this same document charges that appellant's conduct was in violation of Civil Service Rules (N.J.A.C. 4A:2-2.3(a)6 Conduct Unbecoming a Public Employee; N.J.A.C. 41:2-2.3(a)12 Other Sufficient Causes); Attorney General Guidelines Internal Affairs Policy and Procedures relative to (Pre-Hire Screening and Investigation), Appendix Q.IV.C and Appendix Q.V.B.; and finally, Camden County Sheriff's Rules and Regulations: Rule 3.4.19 Truthfulness.

It must be emphasized that, because this is a case seeking imposition of penalty, analysis of the facts of record herein must be restricted to their import when measured against the exact wording of the specifics in the FNDA. Similarly, scrutiny of the regulatory violations of which appellant is accused in the FNDA are also limited to only the foregoing citations listed by the appointing authority. There can be no determination in this tribunal that criminal laws or domestic violence statutes have, or have not, been violated. This tribunal is without authority to do so. Collectively, the FNDA charges and specifications are all that appellant had official notice of to prepare his defense. Consequently, these alone must form the boundaries from within which findings of fact and conclusions of law may be sought.

Untruthfulness is the sole offense to be decided:

This case is about appellant's truthfulness, or lack of it, in his efforts to become a sheriff's officer. The appeal does not call for an adjudication of domestic violence as defined in the law, nor can this tribunal supply its own meaning to the appointing authority's term: "domestic violence." That is the obligation of respondent. Today's Initial Decision resolves the charges as they stand in the appointing authority's final notice of disciplinary action (FNDA). That document (Exhibit J-3) presupposes that appellant engaged in five undefined and largely undescribed episodes of "domestic violence." Its central charge turns on whether he was untruthful in his answers during the post-offer psychological assessment by the police psychologist.

Sworn law enforcement officers are special public officers held to higher standards:

It is important to recall while examining the proofs that well-settled law has established the special nature of sworn law enforcement positions. Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)]. In the case of In re Carter, 191 N.J. 474, 485-486 (2007) affirming removal of a police officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

With the foregoing in mind, if appellant were to be found to have committed an offense of dishonesty, as charged here, it is unlikely that any penalty short of removal would be appropriate. In The Matter of Angelo Reillo, Camden County Police Department, OAL Dkt. No. 1477-14 (June 26, 2014); adopted Civil Service Commission (October 1, 2014).

However, for the reasons outlined below, there is no preponderating evidence that appellant untruthfully "provided false and misleading information, relative to his personal history, indicating he had no history of domestic violence." (Exhibit J-3). This conclusion derives from the facts of record. Today's decision is not in any way intended to suggest that dishonesty during a psychological evaluation conducted by a police psychologist could not be a chargeable offense. Neither are the rules and regulations cited in the FNDA by the Office of Sheriff, Camden County inapposite when untruthfulness is established.

The proofs necessary:

Thus informed by the law, it must now be said that the record is replete with discussion of appellant's domestic disputes with his child's mother. However, what the appointing authority must show with preponderating evidence for its charges to be

upheld is (a) the facts, time-frames and level of seriousness of the five occurrences in issue to establish "domestic violence;" (b) what the appointing authority defines as "domestic violence;" and (c) whether the questions as posed by Dr. Kelly during the post-offer interview could be understood by any reasonable sheriff's officer applicant to demand disclosure of these occurrences as "domestic violence," within the meaning of the FNDA (Exhibit J-3).

The proofs presented:

On the facts of this record, the appointing authority has not shown that appellant could not reasonably maintain that, during the first post-offer interview, he lacked understanding that he had committed "domestic violence," as charged in the FNDA, on five occasions. Further, the appointing authority has not proven that appellant intentionally withheld information of such incidents from Dr. Kelly at that time. Without that intention proved, there can be no finding of untruthfulness. It is fatal to the charge that neither Dr. Kelly nor the appointing authority has precisely defined the FNDA's concept of "domestic violence." This term is the crucial element underlying appellant's termination. Further, it cannot be discerned from this record whether the incidents of "domestic violence" confessed by appellant during the instant hearing were of a nature reasonably expected to compel disclosure to Dr. Kelly during the post-offer interview. It is believable that he did not think they were, as he answered the questions as posed. There are but three instances of angry contact conceded by appellant at hearing as predating the post-offer interview. None involved police intervention or worse, which is what appellant presumed was intended when discussing domestic violence.

More specifically, the reasons for the foregoing conclusions are, first, that "domestic violence" is the term the appointing authority employs, but it is unclear whether the term is meant to embrace: (a) any relationship argument, (b) conflict involving a police call, an arrest, or an adjudication pursuant to applicable law, or (c) some other generally understood personal clash between romantic partners. As an example, Sergeant Mason from Internal Affairs, for example, whose Internal Affairs

office conducted the appointing authority's investigation believed that appellant's restraining of A.E.'s arms to recover his keys and leave the house to avoid angry confrontation amounted to "assault." She believed it was assault as defined by unspecified statutory sections of criminal law or of the Domestic Violence Act. As such, the sergeant felt that not reporting this to Dr. Kelly was dishonest. Yet, the FNDA makes no comparable accusation. In any event, this tribunal has neither authority nor data from the record to reconcile the two, nor may this tribunal unilaterally supply the lack in either.

Second, on the present record, it is not a persuasive argument that appellant should have been alerted to his duty to disclose a stormy relationship with A.E. when faced with the "same general questions" in the first interview as were asked in the second, according to Dr. Kelly. We do not know what those general questions were. Appellant stated with credible demeanor that, whatever their content, the questions as posed then invited only cursory reply. In his recollection, they were more in the nature of "yes" or "no" options. Absent adequate rebuttal, and taking into account the record, it must be concluded that the testimony of appellant is the more believable.

Finally, Dr. Kelly testified that a psychological history questionnaire which appellant had completed in this first post-offer interview contained detailed questions. She stated that they pertained to behavior of a type which appellant freely described at length in the Fitness-For-Duty examination. This questionnaire, in her view, should have elicited admission of the five domestic events of which he later spoke. Not finding those answers led her to believe that appellant had consciously withheld the information. Yet, while the pencil-marked answer sheet to those questions was provided at hearing (Exhibit R-10), the questionnaire itself was not. As a result, neither its content nor appellant's choice of answers to its questions are known. With a serious penalty at stake, far more than mere reference to questions and answers not provided in the record of hearing is needed. Thus, the reference can be afforded scant evidentiary weight. It is the appointing authority which has the burden of persuasion, not appellant.

In contrast, for his part, appellant in his demeanor and in the persuasiveness of his testimony emerged as credible. His testimony was direct and forthright. He did not deny a turbulent relationship with A.E. What was clear to him and ultimately to this tribunal after full assessment of the proofs, is that he believed he had answered Dr. Kelly's post-offer questions to the extent she had required. He had no intention to dishonestly omit information. He viewed the five domestic occurrences in issue as part of his rocky relationship with his child's mother. Additionally, it is believable that appellant perceived questioning during the post-offer interview concerning aggression to address bar brawls and the like in the former and violence prompting police intervention in the latter.

Appellant's contention is likewise credible that the post-offer questions of Dr. Kelly did not invite the depth of response encouraged in the later Fit-For-Duty evaluation. In the latter interview, all agree, he was unfiltered and forthcoming even though his openness concerning the relationship with A.E. could well have prompted adverse employment consequences. There is nothing in this record to persuade that he would have been less honest in the first interview, which had its own element of employment risk. His testimony is at least as supported by the proofs as Dr. Kelly's. Where the evidence is in equipoise, the proofs do not preponderate. Liberty Mut. Ins. Co. v. Land, 186 N.J. 163, 169 (2006).

The Post-offer report's assessment of Integrity/Ethics:

Respondent's highlighting of Dr. Kelly's psychological screening dimension "Integrity/Ethics"[5] affords very little evidentiary weight. Her psychological assessment of appellant's "moderate" risk of not adhering to "honesty," among other virtues listed therein, is essentially a prediction. It was not sufficient a forecast to prevent Dr. Kelly from rating him "qualified." More to the point, prediction of a risk of "moderate" psychological propensity to be dishonest cannot serve to confirm actual wrongdoing. It

[5] (Exhibit R-1, at 2, Cluster D: Work Attitudes, Integrity/Ethics

does not prove that appellant provided "false and misleading information." That is the heart of the FNDA charges.

In the same vein, if reference to this predictive element of the post-offer report is meant to cast doubt on appellant's character, it fails (Cf. N.J.R.E. 404(b) and (c)). There is no concrete evidence in this record of dishonest disposition. The Sheriff's Office has not proffered an official discipline record of any kind. It must be presumed therefore that appellant has not been disciplined for dishonesty in his past public employment. Further, his military record ended in honorable discharge, without qualification, after deployment to the war zone of Iraq. From an evidentiary perspective, this data counterweighs and exceeds the predictive "moderate" risk of dishonesty brought forward in the post-offer report.

The application for employment:

Finally, the appointing authority's claim that appellant was dishonest in his application for employment will not be considered, per se. It was not part of the charges in the FNDA. As noted above, the charges in a penalty case must be strictly limited to those offenses stated. However, to the extent that appellant's employment application answers were to be considered as further suggesting untruthful proclivities, the effort has not succeeded. Consistent with the findings and conclusions stated herein, and evaluating the employment application on its own terms (Exhibit R-4), **I FIND** further that the application contains no preponderating evidence of dishonesty. First, because no proofs offered have shown that appellant "threatened, assaulted or harassed" A.E.[6] Secondly, because that application's inquiry concerning domestic violence clearly refers to offenses involving formal charge or conviction, neither of which occurred.[7]

Conclusion:

[6] Exhibit R-4, at 18, question 8.

[7] Id., question 9

I CONCLUDE, therefore, that appellant was not untruthful by reason of providing false and misleading information relative to his personal history, as charged in the final notices of disciplinary action, 31-B and 31-C, both dated July 22, 2016 (Exhibits. J-2, J-3).

ORDER

I ORDER, therefore, that the removal of appellant be **REVERSED,** and that appellant be **REINSTATED** to his position of sheriff's officer, County of Camden.

I ORDER further that appellant be awarded back pay and counsel fees pursuant to N.J.A.C. 4A:2-2.10 and -2.12

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. 40A:14-204.

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.

February 21, 2017
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 2/21/17

Date Mailed to Parties: 2/21/17

mph

LIST OF WITNESSES:

For appellant:

Luis DeLeon

For respondent:

Corinne Mason
Jennifer Kelly

LIST OF EXHIBITS:

Joint Exhibits:

J-1 Amended Preliminary Notice of Disciplinary action (31-A), dated May 3, 2016
J-2 Final Notice of Disciplinary Action (31-B), dated July 22, 2016
J-3 Final Notice of Disciplinary Action (31-C), dated July 22, 2016

For appellant:

None

For respondent:

R-1 Psychological Screening: Certification of Rating Report, by Jennifer Kelly, Ph.D., ABPP, dated November 25, 2014.

R-2 Memo: Sergeant Corinne Mason #202 to Dr. Jennifer Kelly, dated December 23, 2015.

R-3 (b) Letter: Jennifer Kelly, Ph.D. to Sheriff Wilson, dated January 26, 2016, accompanying (b) a Psychological Fitness-For-Duty Evaluation by Dr. Kelly dated December 29, 2015

R-4 Application For Employment, Camden County Sheriff's Office, dated October 2, 2014; vouchers and affidavit and certification applicant, 10-2-2014

R-5 Internal Affairs Policy and Procedures, revised July 2014

R-6 Office of the Sheriff Manual of Rules and Regulations, January 1, 2011

R-7 Curriculum Vitae, Jennifer Kelly, Ph.D., ABPP

R-8 Post-Offer Psychological Evaluation Disclosure and Informed Consent Statement, dated 11-25-2014

R-9 Authorization To Use and Disclose Protected Health Information, dated 11-25-2014, Luis DeLeon

R-10 Psychological History Questionnaire, Luis DeLeon November 25, 2014

R-11 Psychological Fitness-For-Duty Evaluation: Employee Disclosure and Informed Consent Statement, Luis DeLeon, dated December 29, 2015

R-12 Authorization To Use and Disclose Protected Health Information, dated 12-29-2015, Luis DeLeon

4/19/17

STATE OF NEW JERSEY

In the Matter of Icylin Ellington
Essex County, Department of Citizen Services

CSC DKT. NO. 2017-232
OAL DKT. NO. CSV 12787-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 24, 2017 BW

The appeal of Icylin Ellington, Family Service Worker, Essex County, Department of Citizen Services, release at the end of the working test period, was heard by Administrative Law Judge Ellen S. Bass, who rendered her initial decision on March 24, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 19, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Icylin Ellington.

Re: Icylin Ellington

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 12787-16
AGENCY REF. NO. 2017-232

IN THE MATTER OF ICYLIN ELLINGTON, ESSEX COUNTY DEPARTMENT OF CITIZEN SERVICES.

David Weiner, Union Representative, appearing pursuant to N.J.A.C. 1:1-5.4(a)6 for appellant

Keisha Clark, Esq., and **Jill Caffrey**, Esq., for respondent

Record Closed: March 20, 2017 Decided: March 24, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Icylin Ellington, a former Family Service Worker employed by the Essex County Department of Citizen Services (the County), appeals her dismissal at the conclusion of her working test period. She alleges that she was terminated in bad faith. The County replies that Ellington was unable, despite being given ample training and assistance, to properly fulfill her job responsibilities.

PROCEDURAL HISTORY

Via letter dated July 1, 2016, Ellington was notified that she did not successfully complete her working test period. The letter noted that since her evaluation resulted in an unsatisfactory rating, her last day of employment would be Friday, July 8, 2016. Ellington appealed the County's action on July 13, 2016. The contested case was transmitted to the Office of Administrative Law (OAL) on August 23, 2016. A hearing was conducted on February 27, 2017. Written summations were filed by the parties on March 20, 2017, at which time the record closed.

STATEMENT OF FACTS

The essential underlying facts are not in dispute, and I **FIND** as follows:

After successfully completing the civil service examination in January 2016, Ellington secured employment with the County. Her working test period began on April 11, 2016, and extended for ninety days. Previously, Ellington had served as a kinship navigator. She felt she was quite successful in her prior employment, which entailed doing home visits and assessments as part of making guardianship arrangements for children.

Ellington was hired as a Family Service Worker; in that role, her job was to assist clients in applying for public welfare benefits. She spent the first thirty days of the working test period in a classroom setting. Lisa Maddox-Douglas is the training supervisor. Newly hired Family Service Workers are introduced to the substantive regulations that will guide their work, and to the computer programs that are used to input client data and calculate benefit entitlements. A day and a half is spent training to use the Universal Applications Processing System (UAP), a computer program. Along the way, trainees are tested on their knowledge in eight different modules; a final test is administered at the end of the first month. A perfect score would be 100; a score of 80 must be achieved to pass.

Maddox-Douglas twice talked with Ellington about her progress during the training period. Her test scores were low. Ellington passed a test of her substantive knowledge

about the General Assistance program, and a test about her knowledge of the Emergency Assistance and SNAP (food stamps) programs. But on a test of her knowledge of the Temporary Assistance for Needy Families (TANF) program, Elllington only achieved a score of 75. She received the same score relative to her knowledge of Medicaid. And her scores in areas that asked her to master computer technology were particularly low. FAMIS is a computer program used to determine benefit entitlements; Ellington received a score of 36.[1] Likewise, "coding" and "calculations" pertain to use of the computer and the calculation of benefits; Ellington received scores of 67 and 58 respectively in these critical areas. Maddox-Douglas met with Ellington on April 25, 2016, and alerted her that in order to pass the training month of her working test period, she would have to do well on the final examination. Ellington achieved a score of 74.

A thirty-day evaluation completed by Maddox-Douglas on May 10, 2016, gave Ellington unsatisfactory scores in the area of quality and quantity of work. This resulted in an average rating of 1.6; Maddox-Douglas explained that a score of 2 was needed to satisfactorily complete the first month of training. She emphasized that the computer was a particular challenge for Ellington, noting that she even had difficulty with the passwords needed to access the necessary programs, and locked herself out on at least two to three occasions. Ellington was contrite when advised that she had not passed, indicating that she was sorry that she had "let them down." Maddox-Douglas told her to work hard in the next phase of training; to make her proud. To promote Ellington's success, she was assigned to a unit that handled food stamp benefits for one-adult households. Clients in this unit were typically disabled or elderly, with few if any changes in their income. The work was described as more straightforward and slower paced than that in other units.

Maddox-Douglas and Loy Tenyhwa, the Supervisor of Ellington's new unit, described the work of the Family Service Worker, and the output that was expected of a typical worker. Family Service Workers process a case from start to finish. They meet with a client; obtain needed information and verifications; input data into the computer; and calculate and determine benefits. A Family Service Worker typically processes 10-

[1] FAMIS and UAP are related computer programs that Family Service Workers need to master to do their jobs.

12 cases a day. A worker in training typically completes 5-6 cases a day. Ellington completed only one or two cases during the sixty-day period she was assigned to the food stamps unit.[2]

Ellington was not expected to work without assistance or supervision. Indeed, Tenyhwa detailed the support Ellington received during the first thirty days in her unit. She was asked to shadow experienced workers, and she was asked to complete interim reports (IRF's). Even these were completed quite slowly; only three a day and with help. Ten a day would be a more typical output. Her coaches were expected to give Ellington cases of their own to complete under their mentorship. They became quite frustrated because she was unable to do so, and thus, their own work fell behind. At the end of the sixtieth day of her working test period, Ellington was told that she was not performing to expectations. She should have been able to complete cases independently. She should have already been a "member of the unit." Ellington's difficulty in completing the work seemed primarily caused by her lack of facility with the computer. Ellington's evaluation on June 10, 2016, again was unsatisfactory. Tenyhwa told Ellington that moving forward she would meet with her once per week to review her ongoing progress and attempt to assist her. Ellington urges that Tenyhwa did not directly supervise her work, but the fact that they met weekly, and both worked together in a small unit of only five to six workers demonstrates otherwise.

But Ellington's problems persisted during the final thirty days of the working test period. Tenyhwa indicated that a typical client interview would take about thirty minutes; Ellington spent as much as two and a half hours interviewing a client. Ellington urged that her difficulty stemmed from the fact that the client was not English speaking; but Tenyhwa explained that interpreters were available to assist workers who were not fluent in a client's language. There were almost daily password issues; Ellington was locked out of her computer repeatedly because she could not properly enter her password. The frustration of Ellington's co-workers mounted. On July 7, 2016, at the end of the ninety-

[2] At her final evaluation meeting Ellington pointed out that a case was ready for Tenyhwa's review in her office bin. Tenyhwa stated that she acknowledged this by changing her evaluation to reflect that one case had been completed. Ellington urged that she had completed two cases. This disagreement is of no moment; either way, Ellington's output was woefully inadequate.

day probationary period Ellington and Tenyhwa met again, and she again received an unsatisfactory rating.

Ellington's testimony only served to bolster the credibility of the witnesses who described her as struggling during the working test period. Ellington was a soft-spoken, polite and deferential witness; this is how her supervisors described her as well. She admitted to her many difficulties during the working test period, and her description of the relevant events differed from Tenyhwa's only to the extent that Ellington repeatedly blamed others for her problems.

She claimed that she received insufficient training. Ellington confirmed that she was directed to shadow three more experienced co-workers, but she urged that she found them, with one exception, less than eager to help. One co-worker loudly urged that others should not assist Ellington; on another occasion a co-worker gave her an assignment and timed her. Ellington felt humiliated. She suggested that these co-workers were not supervisors and should not have assigned work to her. But the record makes it clear that the workers she shadowed were peer coaches and never were assigned to supervise Ellington's work. I thus **FIND** that notwithstanding Ellington's perception that she was being asked to hit the ground running, she in fact had little or no work of her own during the probationary period, and instead, was only asked to work alongside her peers in a continuation of her training.

Ellington confirmed that the computer systems, most specifically UAP, were hard to master. When she asked for help Tenyhwa told her to work with a co-worker because as a supervisor she did not use the program in quite the same way, and had not done so for many years. This became a focal point for Ellington, who urged repeatedly that Tenyhwa's lack of facility with UAP should somehow excuse her own. While Ellington disputed the assertion that she could not enter a computer passcode correctly, she was aware, apparently from experience, that after several tries the computer locks the user out. Ellington urged that in her three months of employment she was never tardy, and never reprimanded for misconduct on the job. This was not disputed by the supervisory personnel who testified at the hearing.

As for Ellington's assertion that her termination was in bad faith, I heard no factual support for this allegation. Both Tenyhwa and Maddox-Douglas appeared to genuinely like Ellington, and the record reflects ongoing efforts by both during the working test period to assist her; to include the very purposeful assignment to the food stamp office; weekly meetings with her; and access to peer shadows. The assertion that Division Head Jeanette Page-Hawkins somehow bore Ellington ill-will was particularly spurious. Although Page-Hawkins was one of several signatories to Ellington's final evaluation form, I was offered no evidence that Page-Hawkins even really knew Ellington, much less sought to terminate her for proscribed reasons. Page-Hawkins was subpoenaed to appear at the hearing and then was asked nothing of any substance. Instead, Ellington's representative simply established that Page-Hawkins expressed extreme aggravation when she was served with the subpoena and even went so far as to thrust the requisite fee back at him. But this testimony only established that Page-Hawkins was irritated by the prospect of having to attend a hearing; not that she or her agency were somehow "out to get" Ellington.

It is uncontroverted and I **FIND** that notice that her employment would be terminated was served on Ellington on Friday, July 8, 2016, when the July 1, 2016, letter was handed to her. Her employment terminated effective July 8, 2016. The ninety-day working test period was to end on July 10, 2016.

CONCLUSIONS OF LAW

The Civil Service Act (Act), N.J.S.A. 11A:1 to 9, reflects the public policy of the State of New Jersey to encourage and reward meritorious performance by employees in the public service and to retain and separate employees on the basis of the adequacy of their performance. N.J.S.A. 11A:1-2(c). In furtherance of this public policy, the Act and the regulations of the Civil Service Commission place an obligation on the appointing authority to monitor a probationary employee during a working test period as part of the examination process. It is designed to permit an appointing authority to determine whether the employee can satisfactorily perform the duties of the title. N.J.S.A. 11A:4-15; N.J.A.C. 4A:4-5.1(a). The purpose of a working test period is to furnish an additional test of efficiency. Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954). The court held in

Dodd v. Van Riper, 135 N.J.L. 167, 171 (E. & A. 1947), that "a basic condition of permanent appointment for any civil service employee is the favorable opinion of the employee's fitness as formed by the appointing authority during the probationary period." Termination at the end of the working test period may occur for unsatisfactory performance. N.J.S.A. 11A:2-6(a)(4); N.J.A.C. 4A:2-4 and N.J.A.C. 4A:4-5.4(a).

An employee who seeks to challenge her termination at the end of a working test period faces a heavy burden of proof. She must establish that "the action was in bad faith." N.J.A.C. 4A:2-4.3(b); Dodd, supra, 135 N.J.L. at 172. In Briggs v. N.J. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), the court stated that the only issue in such a case is whether the appointing authority exercised good faith in determining that the employee was not competent to satisfactorily perform the duties of the position.

Although the courts have not defined "good faith" or "bad faith" specifically in the context of a working test period case, "good faith" has generally been defined as meaning honesty of purpose and integrity of conduct with respect to a given subject. Smith v. Whitman, 39 N.J. 397, 405 (1963). Hence, if the decision to terminate an employee at the end of the working test period lacks integrity of conduct, then the decision was rendered in bad faith. "Bad faith" is the antithesis of good faith and must be a thing done dishonestly; it contemplates a state of mind affirmatively operating with a furtive design or some motive of interest or ill will. Schopf v. Dep't of Labor, 96 N.J.A.R.2d (CSV) 853, 857.

I **CONCLUDE** that Ellington has not met her burden of proof. I heard no evidence that her termination was for any reason other than her inability to master the skills needed to perform the duties of a Family Service Worker. I **CONCLUDE** that her petition of appeal should be dismissed.

In accordance with N.J.A.C. 4A:2-4.1(c), notice of termination must be served not more five working days prior to or five working days following the last day of the working test period. Here the working test period was to conclude on July 10, 2016, a Sunday; the notice was served on July 8, 2016. Accordingly, notwithstanding the fact that the

letter of termination is dated July 1, 2016, I **CONCLUDE** that its service was timely and compliant with the requirements of the regulation.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED**.

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

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

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

March 24, 2017
DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

March 24, 2017
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

MAR 27 2017

APPENDIX

WITNESSES

For Appellant:

Icylin Ellington
Jeanette Page-Hawkins

For Respondent:

Lisa Maddox-Douglas
Loy Tenyhwa

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Letter dated July 1, 2016
R-2 Evaluations
R-3 Test scores
R-4 Human Resources Policy

4/19/17

STATE OF NEW JERSEY

In the Matter of Kendra Hall
Judiciary,
Monmouth Vicinage

CSC DKT. NO. 2016-4019
OAL DKT. NO. CSV 07825-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 24, 2017 BW

The appeal of Kendra Hall, Judiciary Clerk 4, Judiciary, Monmouth Vicinage, removal effective February 25, 2016, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders, who rendered her initial decision on March 27, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 19, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Kendra Hall.

Re: Kendra Hall

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07825-16
AGENCY DKT. NO. 2016-4019

IN THE MATTER OF KENDRA HALL,
SUPERIOR COURT OF NEW JERSEY,
MONMOUTH VICINAGE.

Franceline Ehret, CWA Staff Representative, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6) for appellant

Susanna J. Morris, Esq., for respondent, Superior Court of New Jersey, Monmouth Vicinage

Record Closed: March 1, 2017 Decided: March 27, 2017

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

STATEMENT OF THE FACTS

Appellant Kendra Hall appeals the action by the Superior Court of New Jersey, Monmouth Vicinage, terminating her from her position as a Judiciary Clerk 4, on grounds of conduct unbecoming, neglect of duty, misuse of public property, and other sufficient cause related to personal use of confidential Judiciary systems. Ms. Hall contends that she is not guilty of the actions attributed to her.

PROCEDURAL HISTORY

Hall was suspended without pay on February 26, 2016, effective February 25, 2016, pursuant to N.J.A.C. 4A:2-25(a)(1). On March 6, 2016, she was served with a Preliminary Notice of Disciplinary Action. She waived her right to a departmental hearing, and on May 4, 2016, a Final Notice of Disciplinary Action sustaining the charges was issued. Her removal from employment was effective as of February 26, 2016. On May 9, 2016, Hall filed an appeal with the Civil Service Commission, which determined to transmit the contested case to the Office of Administrative Law (OAL), where it was filed on May 25, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. It was heard on January 30, 2017, and the record left open to March 1, 2017, for closing statements. The record then closed.

FACTUAL DISCUSSION

Some facts are not in dispute. Appellant, who had worked for the Judiciary for approximately nine years in February 2016, had started in the Middlesex Vicinage, eventually accepting a promotion into the Judiciary Clerk 4 position in the Finance Division of the Monmouth Vicinage. She was the lead worker in the Mechanic Street Office, which accepts payments from the public for probation and for child support. In general, persons working in the first-floor Cashiers Office have access to the NJ Kids Child Support data system, which they use to ensure that child support payments are attached to the correct cases. They also have access to the Automated Complaint System and the Automated Traffic System. From August 2015 to February 2016, appellant also had access to the Judiciary's Promis/Gavel database, as the plan was to eventually undertake some reporting on open bail.

Judy Fread, administrative supervisor in the Finance Division, had six direct-reports, one of them Appellant. She testified that Hall primarily worked upstairs in the Mechanic Street office, but opened the safe downstairs if someone needed change, and was in charge of closing down the cash register at 2 p.m., getting the tape from the register, ensuring the tally was correct, and removing the cash to a safe. To her

knowledge, in February 2016, Hall was not yet assigned to actually undertake an open bail report, and had no work-related reason to be in Promis/Gavel, ATS, or ACS.

Fread also testified to the Judiciary policy concerning Information Technology Security, which is provided annually to all Judiciary employees, who are required to acknowledge that they received and read the policy and agree to abide by it. The policy states in Section 3 that "except for the incidental personal use, users shall not use (the computer, computer networks, E-mail and other electronic communications systems of the Judiciary) for personal use, and have no reasonable expectation of privacy regarding this equipment." (R-1.) Further, employees are required to respect the confidentiality of the resources in the Judiciary's databases. Section 4 states that, "Such information is to be accessed and used solely for legitimate Judiciary business purposes." (Ibid.) The Code of Conduct for Judiciary Employees states in Canon 2A that "A court employee may not disclose to any unauthorized person for any purpose any confidential information acquired in the course of employment, or knowingly acquired through unauthorized disclosure by another." (R-2.) Hall's learning transcript shows that she acknowledged receipt of the Information Security Policy in August of 2013, July 2014, and August 2015. She similarly acknowledged receipt of the Code of Conduct in 2013, 2014, 2015, and on January 27, 2016. She received three hours of in-person training on the code in 2007 and 2010. (R-7.)

Eileen McEneny, Finance Division Manager, testified that she assigned Hall to be her "eyes and ears" at Mechanic Street because the appellant had done well and was eager to grow in her positon. McEneny created a training schedule to ensure that Hall would feel comfortable in her new role as lead worker. In addition to the end-of-day close-out work, Hall was responsible for ensuring the cashier's office had coverage at 8:30 a.m., when it opened, and that funds were transferred properly. She also was responsible for delegating modifications, which are changes to child support agreements, which must be entered correctly in the NJ Kids system. On some occasions, Hall was the highest-ranking person at the location.

Various witnesses referenced the Judiciary's various databases. A certification from John Stewart, Administrative Supervisor 3a, lists the Comprehensive Automated

Probation System (CAPS), Promis/Gavel, the Automated Complaint system (ACS) and the Automated Traffic Complaint system (ATS). (R-10.) The certification explains that Promis/Gavel "captures information concerning defendants who have been charged with indictable offenses and tracks the processing of those defendants from initial arrest through appellate review." (R-3.) The ACS tracks "all the pertinent incident and defendant data" from the municipal courts. (R-4.)

Esperanza Rangel, a Judiciary Clerk 3, testified that at 3:15 p.m. on February 11, 2016, she went to the cashier's room to cover another employee's regular break time. Entering through a back door into the room, she noticed that Hall was on the CAPS database on the computer. She testified that this caught her attention, because she knew of no reason Hall would need to be in that database. Rangel was concerned that she might have made an error in posting a payment to CAPS, and asked Hall if something was wrong. Hall replied that there was nothing wrong, that she was looking up the case of someone she knew who had been stopped by the police, and she thought there was an issue with identity theft. Hall got her cell phone out, and while talking to someone on it, sent something to the printer, which she then picked up. After the other employee returned from break, Rangel went back upstairs. At 4:15 p.m. she came down to do the day's second cash out. On leaving, she noticed papers that said "Hamilton," laying on the counter. Hall grabbed the papers, which she put into her purse, and Hall, Rangel, and the other employee all left work together. Rangel decided to tell a supervisor the next day because she said they had all been told many times that they could not access a computer for private business, and had been directed that if they saw something, they were to report it. She acknowledged that she did not have a good relationship with Hall, who she thought picked on her, but she had never filed a report with anyone complaining about mistreatment.

Rangel reported to management through an email to Dalia Hyppolite, a supervisor, on the next day, February 12, 2016. (R-6.) The email indicated that when she entered the cashier room, she noticed that Hall had the CAPS system open at a time when "we had finished proving out." (R-6.) On February 12, Hall's supervisors requested a review of Hall's computer access logs. John Stewart, an administrative supervisor at the Judiciary, stated in a certification that on February 16, 2016, he

accessed the logs, which showed activity in all three systems between 12:41:29 and 15:50:50. For example, they showed that on 3:04:44 p.m., Hall logged into ACS/ATS, leaving it again at 3:05:59. She was also logged into Promis/Gavel twice, once around 3 p.m. and again around 3:24 p.m. She was in CAPS from 15:09:51 to 15:15:03. (R-10.)

On February 17, 2016, McEneny and Terry Mapson-Steed, a Human Relations liaison, interviewed Rangel, and on February 18, 2016, Hall. McEneny testified to the content of the interview notes, both of which she had prepared. Rangel told the two questioners that Hall had said she was looking up someone she knew who had been pulled over by police. Hall mentioned that the individual received a DUI ticket and that the individual did not realize the magnitude of the ticket. Additionally, Hall said the individual believed (he or she was) being charged for someone else's charges, someone with the same name. (R-8.)

In the McEneny and Mapson-Steed interview, when Hall was asked whether she remembered having a conversation with Rangel about a DUI, Hall replied, that she "did not remember, possibly." (R-9.) She did not remember making a comment about identity theft. Asked more directly about a "very concerning" incident about a DWI, and whether that rang a bell, Hall replied "possibly." Given details about the alleged conversation with Rangel, Hall "was quiet for a brief period, then responded that she may have had a conversation with (the other employee, Veronica), but the conversation was private." (Ibid.) Asked if she went in to any system to research information, she was silent briefly then replied, "Oh My Goodness." (Ibid.) When the interviewers inquired about folding and placing papers in her personal bag, she stated they were recipes and research and things like that.

The Judiciary also produced a copy of a video of the cashier's room made between 3 p.m. and 4:26 p.m. on February 11, 2016, which did not show Hall on a cell phone in the time frame that Rangel described. (J-1.) However, it did show that Rangel entered the cashier's room at about 3:15 p.m., walked over to Hall, and engaged in conversation with her briefly. It also showed that Hall was on and off the cell phone for much of the next half-hour. (J-1 and R-11.)

Hall testified on her own behalf. She stated that at no point was she improperly accessing Judiciary databases for her own purposes. She said she did have a friend who knew someone that police had first stopped for a tail light, then alleged he was driving on the revoked list, which caused a big problem. However, she did not access the man's records. Her comment of "Oh My Goodness," in the interview was caused by her sudden realization of what exactly she was accused of doing. Her recollection is that she was in CAPS because she had received a call earlier in the day from the mother of a probationer who thought she may have made a double payment. As per normal procedures, Hall had transferred the woman to the probation officer, but she had still pursued the question in the data base in an attempt to be helpful. She did not tell this story during her interview, because during the interview with management, her mind went blank. She did acknowledge that on February 11, 2016, she had been using the Judiciary internet access to look up and print recipes and other information, because her sister was getting married, and she was trying to help with a choice of venues, party favors, and things like that. She said those were the papers Rangel saw.

Asked about the annual request by the Judiciary to review and sign the Code of Conduct, Hall acknowledged receiving them, but said she just signed them. She never read them. She had not been trained on the Code in many years.

Essentially, the evidence comes down to two conflicting stories. The appellant contends that Rangel was a disaffected employee, who found a way to cause trouble for a higher-level employee she did not like. She had additional incentive in that removal of Hall would open a pathway for promotion from her position as Judiciary Clerk 3 bi-lingual. Her testimony is unreliable because Rangel said she saw Hall on CAPS, which is the probation system, which would not have carried traffic ticket or municipal court information, and therefore would not have been useful to the friend she alleged Hall was helping. She also said Hall was talking on the cell phone when she approached her, which the video does not support. The respondent argues that Rangel's story is generally true, and Hall, who is a year short of vesting, is desperately trying to save her career. The determination of factual findings thus requires a weighing of the credibility of the witnesses, i.e., "an overall assessment of the story of a witness in light of its

rationality, internal consistency, and manner in which it 'hangs together' with other evidence." Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Here, supporting evidence tends to corroborate Rangel's version of events. Her recollection of the timing of her entrance into the cashier's room aligns with the video, which also shows a conversation between the two shortly after her entrance. Although Hall is not on the phone at the moment Rangel pinpointed in testimony, Hall did use the cell phone twice while Rangel was still in the room, once at 3:24 p.m. and again at 3:28 p.m. Moreover, while Rangel was there, Hall twice printed things. (J-1 and R-11.) Further, the Judiciary's log-in tracking system shows Hall in and out of the system Rangel recalled at about the time Rangel recalled it. Hall was in CAPS from 15:09:51 to 15:15:03 (R-10), which is consistent with the 3:11 time of Rangel's arrival in the room. Further, the Judiciary's system shows that at 3:04:44 p.m., Hall logged into ACS/ATS, leaving it again at 3:05:59. She was also logged into Promis/Gavel twice, once around 3 p.m. and again around 3:24 p.m.

Hall's testimony, on the other hand, was improbable. Even if the story of the child support double-payment call is true, Hall had no legitimate business reason to be poking around once she followed the proper procedure and transferred the call to Probation. Similarly, she may have been using the Judiciary's equipment to research wedding-related things for her sister. But she said nothing about the child support double payment in her initial interview with her employer, and little beyond "recipes, research" about what she was printing. She attempted to explain those omissions with the statement that her brain went blank with the shock of the accusation. The "Oh My Goodness," may well have reflected surprise at the accusation, but it was more likely tied to knowledge of its core of truth than to confidence the allegation could not be proven.

Thus, based on Rangel's credible testimony, which in general was supported by other objective evidence, I **FIND as FACT** that Hall was accessing the various computer systems that day for personal use, which is prohibited by both the Judiciary's Code of Conduct and its Information Technology policy. I further **FIND** that although Hall elected not to read them, she had been repeatedly provided with copies of the policies, and that she signed that she had read and understood them.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Here, the appellant is charged with conduct unbecoming, neglect of duty, misuse of public property and other sufficient cause, namely violating the Judiciary Code of Conduct. Conduct unbecoming is a term that encompasses actions adversely affecting the morale or efficiency of a governmental unit or having a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In her position, Hall had access to sensitive, private information, which is available only because of the court's role in enforcing financial orders. If citizens begin to believe that the Judiciary's systems are being manipulated for private purposes, that loss of respect threatens a central element of our three-pronged system of government. Therefore, I **CONCLUDE** that the respondent has proved the charge of conduct unbecoming.

Neglect of duty is not defined under the New Jersey Administrative Code, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of his or her job title. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186

(App. Div. 1977). It has been applied both to not fully carrying out duties and to acting incorrectly. See, e.g., In re Marucci, CSV 07241-09, Initial Decision (January 1, 2010), modified, CSC (March 6, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-3607-09T1 (App. Div. January 3, 2012), <http://njlaw.rutgers.edu/collections/courts/> (removal of a police officer with no disciplinary record where he failed to remove drugs from under a sewer grate and then lied about his actions). Here, the neglect of duty charge here is supported by the finding that she was conducting personal business "on company time." While doing so, she was not performing the duties with which she was charged. Therefore, I **CONCLUDE** that the neglect of duty charge has been proved. Similarly, respondent has proved misuse of the Judiciary's equipment. Finally, there is no question that respondent has shown other sufficient cause, as the access violated both the Judiciary's Code of Conduct, and its Information Technology Policy.

Progressive discipline is the general rule for civil service cases. W. New York v. Bock, 38 N.J. 500 (1962). Typically, the Civil Service Commission considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Nonetheless, progressive discipline is not a fixed and immutable rule to be followed without question. Carter v. Bordentown, 191 N.J. 474, 484 (2007). Some infractions are serious enough on their own to warrant termination. In re Herrmann, 192 N.J. 19, 33 (2007).

In Herrmann, our Supreme Court affirmed the removal of a worker from the Division of Youth and Family Services (now known as the Child Protection and Permanency Agency) who had waved a lit lighter in front of a child's face, while asking about how the child set a fire. The Court noted DYFS's need to rely on the demonstrated good judgment of its workers to protect the integrity of its system. Similarly, here, even though the evidence showed that Hall had excellent performance evaluations on top of a discipline-free record, the Judiciary's dependence on the good judgment of its employees means that termination is the appropriate penalty.

ORDER

The Judiciary's action terminating appellant is hereby **AFFIRMED** and her appeal **DISMISSED** with **PREJUDICE**.

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, P.O. 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.

March 27, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: March 27, 2017

Date Mailed to Parties: March 27, 2017

/caa

WITNESSES

For Appellant:

Kendra Hall

For Respondent:

Judy Fread
Esperanza Rangel
Eileen McEneny

EXHIBITS

Joint Exhibits

J-1 Video of Cashier's Room dated February 11, 2016 (stipulation that time counter is one hour ahead in the video)

For Appellant, Kendra Hall:

A-1 Annual Performance Advisory for Calendar Year 2012
A-2 Annual Performance Advisory for Calendar Year 2013
A-3 Annual Performance Advisory for Calendar Year 2014
A-4 Annual Performance Advisory for Calendar Year 2015

For Respondent, Superior Court of New Jersey, Monmouth Vicinage:

R-1 Judiciary Information Technology Security Policy dated June 29, 2015
R-2 Code of Conduct for Judiciary Employees, adopted 2014
R-3 Description of Promis/Gavel, downloaded from Judiciary's Infonet on January 6, 2017

R-4 Description of the Automated Complaint System, downloaded from Judiciary's Infonet on January 6, 2017

R-5 Email from Eileen McEneny to Terry Mapson-Steed explaining responsibilities and draft training schedule for Kendra Hall, dated March 31, 2016

R-6 Email from Esperanza Rangel to Dalia Hyppolite, dated February 12, 2016

R-7 Learning Transcript for Kendra Hall downloaded March 31, 2016

R-8 Notes of interview of Esperanza Rangel, dated February 17, 2016

R-9 Notes of interview of Kendra Hall, dated February 18, 2016

R-10 Certification of John Stewart and logs for Kendra Hall, signed January 25, 2017

R-11 Timeline from video camera

R-14 Final Notice of Disciplinary Action served on May 4, 2016

4/19/17

STATE OF NEW JERSEY

In the Matter of Terrance Harrison
Township of Clark

CSC DKT. NO. 2017-230
OAL DKT. NO. CSV 11606-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11606-16
AGENCY REF. NO. 2017-230

IN THE MATTER OF TERRANCE HARRISON,
TOWNSHIP OF CLARK,

Ashley V. Whitney, Esq., for appellant (Gina Mendola Longarzo, LLC)

Joseph J. Triarsi, Esq., for respondent (Taris, Bentancourt, Wikovits & Dugan, LLC)

Record Closed: March 20, 2017 Decided: March 20, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on August 1, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted wherein the parties agree on a hearing date of January 13, 2017. The January hearing was adjourned at the request of appellant's counsel due to discovery. The matter was rescheduled for April 10, 2017. Prior to that date the parties reached a resolution in this matter.

On March 20, 2017 the parties submitted the fully executed settlement agreement which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

3-20-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: 3-27-17

Date Mailed to Parties: MAR 27 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

400 Main Street
Chatham New Jersey 07928

Gina Mendola Longarzo, Esq.*
Kara A. MacKenzie, Esq.*
Ashley V. Whitney, Esq.*

LAW OFFICES OF
GINA MENDOLA LONGARZO, LLC

*ADMITTED NJ & NY BARS

March 16, 2017

Via Facsimile & Regular Mail
Honorable Kimberly A. Moss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102-3011

Re: I/M/O Officer Terrance Harrison/Township of Clark
OAL Docket No. CSV 11606-2016 N

Dear Judge Moss:

As Your Honor may recall, we represent Appellant Officer Terrance Harrison with regard to the above-captioned matter which is currently scheduled for trial on April 10, 2017. Please be advised that the parties have reached a settlement in this matter. Accordingly, we enclose herein a copy of the fully executed Settlement Agreement in this matter for the Court's review and approval.

Accordingly, the parties hereby respectfully request that the Court mark this matter as settled and adjourn of the April 10, 2017 trial date. We thank the Court for its courtesy and diligent consideration of this matter.

Respectfully submitted,

ASHLEY V. WHITNEY

AVW:hs
Enclosure
cc: Richard D. Huxford, Esq.

OAL DKT. NO. CSV 11606-2016N

AGENCY DKT. NO. 20 – 2017-230

SETTLEMENT AGREEMENT

IN THE MATTER OF

TERRANCE HARRISON

AND

TOWNSHIP OF CLARK, DEPARTMENT OF PUBLIC SAFETY

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated July 12, 2016 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	3:1.10 Insubordination	21-day suspension	TBD
2.	3:3.6 Criticism of Official Acts or Orders	21-day suspension	TBD
3.	3:10.5 Radio Discipline	21-day suspension	TBD
4.			
5.			

B. The Appellant Terrance Harrison withdraws his/her appeal and request for a hearing, and the Respondent Department of Township of Clark agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	3:1.10 Insubordination	Dismissed with Prejudice	
2.	3:3.6 Cristicism of Official Acts or Orders	Dismissed with Prejudice	

3. 3:10.5 Radio Discipline Dismissed with Prejudice

4.

5.

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Township of Clark (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of _____ will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Terrance Harrison 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Township of Clark, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age

Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the CIVIL SERVICE COMMISSION. Any disapproval by the CIVIL SERVICE COMMISSION shall not interfere with the rights of either party to pursue the matter further.

2/22/17
DATE

Appellant, Terrance Harrison

DATE

Respondent, Township of Clark

2/22/17
DATE

ON BEHALF OF Appellant
Ashley V. Whitney, Esq.

2/24/17
DATE

ON BEHALF OF Respondent
Joseph J. Triarsi, Esq.

CERTIFICATION

I, Terrance Harrison, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2/22/17
DATE

NAME TERRANCE HARRISON

4/19/17

STATE OF NEW JERSEY

In the Matter of Jacqueline Herrera
Passaic County,
Department of Public Safety

CSC DKT. NO. 2016-4301
OAL DKT. NO. CSV 8920-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 8920-16
AGENCY DKT. NO. 2016-4301

IN THE MATTER OF JACQUELINE HERRERA,
PASSAIC COUNTY,
DEPARTMENT OF PUBLIC SAFETY.

Matthew Curran, Esq., for appellant (Sciarra and Catrambone, attorneys)

Steven Siegler, Esq., for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: March 17, 2017 Decided: March 17, 2017

BEFORE **DANIELLE PASQUALE,** ALJ:

This matter concerns the appeal of Jacqueline Herrera from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on June 14 ,2016 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 17, 2017
DATE

DANIELLE PASQUALE, ALJ

3-21-17

Date Received at Agency:

Date Mailed to Parties: MAR 21 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr
Enc.

OAL DKT. NO. CSV 08920-16
AGENCY DKT. NO. 2016 - 4301

SETTLEMENT AGREEMENT

IN THE MATTER OF

Jacqueline Herrera

~~AND~~ v.

The City of Passaic, Dept. of Public Safety

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated May 18, 2016 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	4A:2-2.3(a)(2)	Insubordination (30)	5/18/16 - 6/26/16
2.	4A:2-2.3(a)(6)	Conduct Unbecoming (30)	"
3.	4A:2-2.3(a)(7)	Neglect of Duty (30)	"
4.	4A:2-2.3(a)(12)	Other Sufficient Cause (30)	"
5.			(30 days total)

B. The Appellant Ms. Herrera withdraws his/her appeal and request for a hearing, and the Respondent appointing authority City of Passaic agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	4A:2-2.3(a)(12)	Other sufficient cause	15 days
2.			
3.			
4.			
5.			

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 30 days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 15 days.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. City of Passaic (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority City of Passaic will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ms. Herrera 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, City of Passaic, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 08920-16

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/17/17
DATE

Appellant

3-17-2017
DATE

Respondent

DATE

ON BEHALF OF

DATE

ON BEHALF OF

OAL DKT. NO. CSV 08920-16

CERTIFICATION

I, Jacqueline Herrera, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/17/17
DATE

NAME

4/9/17

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of Marjorie Londregan

CSC Docket No. 2015-2336
OAL Docket No. CSV 4716-15

REMAND TO THE OFFICE OF ADMINISTRATIVE LAW

ISSUED: APR 24 2017 (NFA)

The appeal of Marjorie Londregan, a Graduate Nurse with Passaic County, Preakness Healthcare Center, of her removal, effective January 15, 2015, was before Administrative Law Judge Joann LaSala Candido (ALJ), who rendered her initial decision on March 31, 2017, dismissing the appeal. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on April 19, 2017, did not adopt the recommendation to dismiss the appeal. Rather, the Commission remanded the matter to the Office of Administrative Law (OAL).

DISCUSSION

The pertinent procedural history of this matter is detailed in the ALJ's initial decision. In this regard, the ALJ, based on myriad issues, adjourned the matter several times until ultimately scheduling a peremptory hearing date of March 31, 2017, where the appellant failed to appear. However, the ALJ also noted that, as confirmed in the appellant's exceptions, that there was a possibility that the matter could be settled. While the Commission does not find the appellant's exceptions otherwise particularly persuasive, and does not condone the appellant's lack of appearance in this matter, it finds that the matter should be remanded to the OAL. Specifically, the policy of the judicial system strongly favors settlement. *See Nolan v. Lee Ho*, 120 *N.J.* 465 (1990); *Honeywell v. Bubb*, 130 *N.J. Super.* 130 (App. Div. 1974); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472 (App. Div. 1961), *cert. denied,* 35

N.J. 61 (1961). This policy is equally applicable in the administrative area. Accordingly, since it appears that there is still a possibility that this matter can be amicably resolved, the Commission is inclined to afford the appellant that opportunity.

Accordingly, the Commission remands this matter to the OAL to allow the parties to explore further efforts at settling the matter. In this regard, the OAL should schedule one last peremptory hearing date as soon as possible where the hearing will proceed absent a settlement. The Commission notes that, should the appellant fail to appear on that date, the appellant ***will not*** be afforded another opportunity.

ORDER

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19TH DAY OF APRIL, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. CSV 04716-15

MARJORIE J. LONDREGAN,

Petitioner,

v.

PASSAIC COUNTY PREAKNESS HEALTHCARE CENTER,

Respondent.

Samuel Wenocur, Esq. on behalf of petitioner (Oxfeld Cohen, PC)

Jose Santiago, Esq. on behalf of respondent (Assistant County Counsel)

Record Closed: March 31, 2017 Decided: March 31, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Petitioner, Marjorie Londregan, appealed her termination as a graduate nurse by respondent, the Passaic County Preakness Healthcare Center, by Final Notice of Disciplinary Action dated January 22, 2015.

Petitioner requested a hearing on the matter, and it was transmitted as a contested case to the Office of Administrative Law (OAL), and filed on April 7, 2015. N.J.S.A. 52:14B-2(b); N.J.A.C. 4A:2-2.8. Hearings were scheduled and adjournments were requested by petitioner as follows:

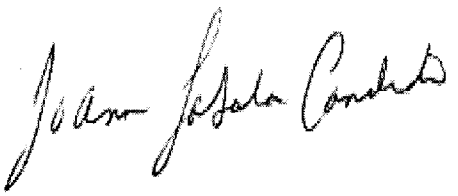
Petitioner requested an adjournment of the September 24, 2015 hearing date for medical reasons; petitioner requested an adjournment of the February 16, 2016 hearing date and waived back pay; petitioner requested an adjournment of the May 2, 2016 hearing date because she was ill; petitioner requested an adjournment of the September 21, 2016 hearing date because she would be out-of-state; the January 10, 2017 hearing date was adjourned because the parties reached a settlement. Petitioner's counsel anticipated having a written agreement signed within the next few weeks; on February 16, 2017, a telephone conference was conducted requesting status of the settlement. No settlement was reached and on March 2, 2017 another telephone conference was conducted to obtain the status of settlement. No settlement was reached; petitioner requested an adjournment of the March 16, 2017 hearing date because she was out-of-state and her home needed emergency repair. Petitioner's counsel stated that there is still a likelihood of settlement, although petitioner still has not provided him with an original or signed copy of the settlement agreement and is working on signing and returning the document; a peremptory date was scheduled for March 31, 2017 and petitioner failed to appear at the peremptory hearing.

Because petitioner failed to appear for the peremptory hearing date and has had many opportunities to present her case, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that this matter be **DISMISSED** for failure to appear.

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.



March 31, 2017

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: March 31, 2017

Date Mailed to Parties:

ljb

4/19/17

STATE OF NEW JERSEY

In the Matter of David McAdoo
Atlantic County,
Department of Public Safety

CSC DKT. NO. 2016-558
OAL DKT. NO. CSV 13698-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13698-2015

AGENCY DKT. NO. 2016-558

IN THE MATTER OF DAVID MCADOO, ATLANTIC COUNTY, DEPARTMENT OF PUBLIC SAFETY.

Marcus King, President, Teamsters Local 331, for appellant, David McAdoo, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(6)

Alan J. Cohen, Assistant County Counsel, for respondent, Atlantic County, Department of Public Safety (James F. Ferguson, County Counsel, attorney)

Record Closed: March 22, 2017 Decided: March 24, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on September 3, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

3/24/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 4/3/17

Date Mailed to Parties: 4/3/17

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on March 22, 2017

Atlantic County
Department of Law

Dennis Levinson
County Executive

James F. Ferguson
Department Head
County Counsel

609/343-2279 FAX: 343-2373
TDD: 348-5551

Office of the Adjuster
609/343-2361 FAX: 343-2322

March 21, 2017

Hon. John S Kennedy, OAL
Office of Administrative Law
1601 Atlantic Avenue, Suite 601
Atlantic City, NJ 08401

Re: McAdoo, David v. Atlantic County, Dept. of Public Safety
OAL Docket. No.: CSV 13698-2015 S
Agency Ref. No.: 2016-558

Dear Judge Kennedy,

Enclosed please find two (2) copies of the *Memorandum of Agreement* in this matter. If the forms of settlement meet with your approval, would you kindly sign them and send me back one signed copy for my records. I will copy Mr. King with that document when received.

Thank you.

Respectfully submitted,

Alan J. Cohen
Assistant County Counsel

Enc.
cc: Mr. Marcus King
Teamsters Local 331
1 Philadelphia Ave.
Egg Harbor City, NJ 08215
AJC/@

Memorandum of Agreement
Between the County of Atlantic Department of Administration and
David McAdoo

1. This Agreement is to address the pending departmental appeal filed by David McAdoo and his Union, Teamsters Local #331, and representative Marcus King. That appeal was scheduled for a trial on March 30, 2017 in the OAL under Docket No. CSV 13698-2015S.

2. McAdoo was appealing his termination from the position of "Animal Shelter Employee." The Notice of Termination was based upon alleged misconduct and violation of a previous workplace performance agreement occurring on or about March 22, 2015.

3. Prior to the commencement of the OAL hearing, all parties have voluntarily resolved all disputed matters and entered into the following settlement which fully disposes of all issues and controversies between them.

4. The Appellant McAdoo withdraws his appeal and request for a hearing and, along with the Respondent appointing Authority County of Atlantic Department of Human Services, agrees that his removal from the position of Animal Shelter Employee will be recorded as a Resignation in Good Standing, effective April 13, 2015. In full consideration of this resolution and settlement thereof, McAdoo promises and agrees that he will never again apply for or be granted any employment by or with the County of Atlantic, its agencies or subsidiaries.

5. The County of Atlantic (Respondent) shall amend Mr. McAdoo's personnel records available for review to non-licensing non-credentialing, health care authorities or other inquiries, and not connected to reporting obligations under N.J.S.A. 26:2H-12.2c, to conform to the terms of this settlement by reflecting that McAdoo resigned in "Good Standing."

6. McAdoo waives any and all other claims against Respondent Atlantic County, its agents, officers, departments and employees with regard to this matter, including any award of back-pay, counsel fees or other monetary relief, except as may be otherwise provided herein.

7. Nothing in this Agreement is an admission by either party of any violation of the law. Employee knowingly and voluntarily releases and forever discharges for himself, his heirs, executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, as a result of the filing of the charges and separation from employment, including, but not limited to, any alleged violation of:

   - The National Labor Relations Act;
   - Family Medical Leave Act (Federal and State);
   - Title VII of the Civil Rights Act of 1964;
   - Sections 1981 through 1988 of Title 42 of the United States Code;
   - The Employee Retirement Income Security Act of 1974;
   - The Immigration Reform and Control Act;
   - The Americans with Disabilities Act of 1990;
   - The Age Discrimination in Employment Act of 1967;
   - The Fair Labor Standards Act;
   - The Occupational Safety and Health Act;
   - New Jersey State Wage and Hour Law;
   - The New Jersey Law Against Discrimination;
   - The New Jersey Workers' Compensation Act and laws;
   - The Conscientious Employee Protection Act;
   - New Jersey Civil Service Statutes;
   - any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;
   - any public policy contract (whether oral or written, expressed or implied), tort or common law;

- any allegation for costs, fees or other expenses including attorney's fees incurred in these matters.

8. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey and venue of this matter is Atlantic County, New Jersey.

9. This Agreement constitutes the entire agreement between the parties. This Agreement supersedes all prior and contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this Agreement shall be binding unless in writing and executed by the parties. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provisions, whether or not similar. Nor shall any waiver constitute a continuing waiver. The Parties have negotiated the terms of this Agreement through and by their counsel and/or union representation of their choosing. Accordingly, this Agreement shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

11. Employee waives his rights to the following:
    i. Right to a departmental hearing challenging the modified termination in this Agreement or the Agreement itself;
    ii. Right to file a petition with the Civil Service Commission to challenge the modified termination in this Agreement, or the Agreement itself; and
    iii. Right to challenge the modified termination in this Agreement, or the Agreement itself, in any court of competent jurisdiction.

12. This Agreement may be executed in counterparts, and all counterparts so executed will together constitute one (1) binding agreement. The Agreement shall be validly executed and delivered by exchange of executed counterparts by regular mail, facsimile or e-mail.

13. Without, in any way, limiting the scope or effect of the preceding paragraphs:

[FOR EMPLOYEE TO READ CAREFULLY PRIOR TO SIGNING]

A. Employee represents that he is able to read the English language and understands the meaning and effect of this Agreement.

B. Employee understands that the above **paragraphs include a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected**, which Employee may have as a result of any act that has occurred

arising out of the filing of the Notices of Discipline of April 13, 2015 and his ultimate separation from employment.

C. Employee understands and agrees that he has sought and received the advice of counsel and/or union representation of his own choice prior to executing this Agreement and General Release. **Employee acknowledges having had ample time to do so, he has reviewed its terms, understands them and that he has freely and voluntarily decided to release all claims against Respondent Atlantic County as set forth herein after thoroughly reviewing this Memorandum of Agreement, and the general release terms included therein, with his counsel/representative**.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names, indicating agreement to the terms of this document:

David McAdoo
(Employee)
Dated: 3/17/17

On behalf of Atlantic County
(Employer)
Dated: 3/21/17

Marcus King
(On behalf of Teamsters Local #331)
By
Dated: 3/17/17

Approval by Civil Service Commission or OAL Judge as appointed.

Dated:

4/19/17

STATE OF NEW JERSEY

In the Matter of Hope Nelson
Rowan University

CSC DKT. NO. 2017-1452
OAL DKT. NO. CSV 18421-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 18421-16

AGENCY DKT. NO. 2017-1452

IN THE MATTER OF HOPE NELSON,
ROWAN UNIVERSITY.

Daryl W. Winston, Esq., for appellant (Winston Law Firm, LLC, attorneys)

Henry Oh, Labor Relations Manager, for respondent, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: March 17, 2017 Decided: March 20, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Hope Nelson, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 7, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 20, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 3/23/17

Date Mailed to Parties: 3/23/17

/nd

Hope Nelson Employee and ROWAN UNIVERSITY Employer	)	**SETTLEMENT AGREEMENT**

The parties hereto agree to settle this matter in accordance with the following terms:

1. Rowan University (the "University") agrees to withdraw the Probationer's Status Report for Hope Nelson ("Ms. Nelson") for the period ending October 19, 2016.

2. Ms. Nelson agrees to resign her employment from her position of Professional Services Specialist 3, effective October 17, 2016. Ms. Nelson's resignation will be a general resignation, as it occurs prior to the completion of her four month probationary period, and will be for personal reasons. Rowan University accepts Ms. Nelson's resignation.

3. Ms. Nelson agrees to withdraw with prejudice her appeal with respect to her probationary assessment in the New

Jersey Office of Administrative Law, Docket No. CSV 18421-2016 S (Nelson, Hope v. Rowan University).

4. Rowan University will notify the Civil Service Commission of this change in status of Ms. Nelson's probationary review, with the result of Ms. Nelson's probationary review to be changed to general resignation on the PMIS system due to voluntary resignation prior to the end of the probationary period.

5. The parties stipulate that this Agreement shall fully dispose of all issues in controversy between them with regard to these matters.

6. Ms. Nelson will not receive any back pay, benefits, counsel fees, costs or any other monetary relief as a result of this settlement.

7. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

8. All internal records of Rowan University will be kept intact. However, nothing herein shall preclude Rowan University from releasing information on this matter to any prospective employer who has a release executed by Ms. Nelson or consistent with the law.

9. Any inquiries of an official reference by a prospective employer made to the University shall consist solely of Ms. Nelson's time of employment, her job title(s) and duties, and her salary history.

10. Nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Ms. Nelson or Rowan University, including any subsequent incidents or occurences during Ms. Nelson's time of employment at Rowan University in her probationary period.

11. If any provision of this Agreement is deemed unenforceable as a matter of law, the remainder of the Agreement shall be deemed enforceable.

12. Ms. Nelson waives all claims which she may have against State of New Jersey, Rowan University, their employees, agents, or assigns, including the withdrawal of any appeal(s) thereto. Ms. Nelson waives all claims, demands, damages, causes of action or suits which have been or could have been brought. Ms. Nelson waives all claims, including those of which she is not aware and those not mentioned in this Settlement Agreement. Ms. Nelson waives all claims resulting from anything which has happened up to now. This waiver includes, but is not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, the Equal Pay Act, the Conscientious Employee Protection Act, the Family and Medical Leave Act, the New Jersey Family Leave Act, the Civil Service Act, 42 USC § 1981, 42 USC § 1983, New Jersey wages and hour laws, retaliation claims under workers compensation laws, the U.S. Constitution, the New Jersey

Constitution, tort law or contract law. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claim.

13. The parties have read this Settlement Agreement and freely and voluntarily agree to its provisions. Ms. Nelson explicitly acknowledges that she was given the opportunity to review the terms of this settlement agreement with her own legal counsel or any other entities of her own choosing and enters into this settlement agreement free of any undue coercion, duress, or any other force against her will.

3/9/2017
Dated:

Employee
Hope Nelson

3/17/17
Dated:

Rowan University -
Labor Relations
Henry Oh

From the desk of:

Hope A. Nelson

104 Bunker Hill Drive

Swedesboro, NJ 08085

To whom it may concern,

This correspondence serves as notice that I, Hope A. Nelson, hereby resign from my position of Professional Services Specialist 3 at Rowan University, Card Services Deparment for person reasons, and that my last day of employment is October 17, 2016.

Sincerely,

Hope A. Nelson

4/19/17

STATE OF NEW JERSEY

In the Matter of Gilberto Reyes
Hudson County,
Department of Corrections

CSC DKT. NO. 2016-3180
OAL DKT. NO. CSV 04380-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04380-16

AGENCY DKT. NO. 2016--3180

IN THE MATTER GILBERTO REYES, HUDSON COUNTY, DEPARTMENT OF CORRECTIONS

Jeffrey S. Ziegelheim, for appellant, (Alterman & Associates, attorneys)

Angelo Auteri, Esq., for respondent, (Scarinci Hollenbeck, attorneys)

Record Closed: March 27, 2017 Decided: March 28, 2017

BEFORE **EVELYN J. MAROSE**, ALJ:

On March 21, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for February 17, 2017 and during that time the parties agreed to settle the matter. A Settlement Agreement indicating the terms of settlement was signed by the parties and forwarded to the OAL on March 28, 2017. A copy of the Settlement Agreement is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** my initial decision settlement 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.

March 28, 2017
DATE

EVELYN J. MAROSE, ALJ

3-30-17

Date Received at Agency:

Date Mailed to Parties: MAR 30 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 17th day of February, 2017 between the County of Hudson (hereinafter referred to as the "County") and Gilberto Reyes (hereinafter referred to as "Reyes" or the "Employee").

WHEREAS, the Employee is employed with the County as a Corrections Officer; and

WHEREAS, the County instituted a disciplinary action against Reyes in a Preliminary Notice of Disciplinary Action dated September 25, 2015, ("hereinafter referred to as the Disciplinary Action"), and charging the following violations: conduct unbecoming a public employee; neglect of duty; insubordination and other sufficient cause; and

WHEREAS, the Employee requested a departmental hearing on the Disciplinary Action which occurred on December 2, 2015 and January 26, 2016; and

WHEREAS, the charges of conduct unbecoming a public employee; neglect of duty; insubordination and other sufficient cause were sustained by the Hearing Officer at the conclusion of the departmental hearing; and

WHEREAS, the Hearing Officer set forth a penalty of a forty-five (45) day suspension on Reyes; and

WHEREAS, a Final Notice of Disciplinary Action dated February 23, 2016 was issued to the Employee following the outcome of the departmental hearing; and

WHEREAS, Reyes filed an appeal of the Hearing Officer's determination to the Office of Administrative Law, Docket No. CSV 04380-2016 N; and

WHEREAS, the County and Reyes desire to resolve all outstanding issues with respect to the Disciplinary Action and the appeal filed in the Office of Administrative Law;

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the County and Reyes agree as follows:

1. **DISCIPLINARY ACTION**

   a. Reyes agrees that he is guilty of the charge of failure to provide requested information during the course of an investigation in violation of the Rules and Regulations of the Hudson County Department of Corrections. The remaining charges contained in the Preliminary Notice of Disciplinary Action dated September 25, 2015, are withdrawn.

   b. The County agrees to reduce the disciplinary penalty from a forty-five (45) day suspension to a twenty (20) day suspension. Reyes agrees to accept a disciplinary penalty of a twenty (20) day suspension, without pay which shall be recorded as such with the New Jersey Civil Service Commission.

   c. As Reyes has already served a forty-five (45) day suspension, Reyes will receive twenty-five (25) days of back pay, which shall be subject to all applicable withholdings.

   d. Except as set forth above in Paragraph 1.c., Reyes agrees to waive any and all claims to back pay, benefits, and any and all other monetary claims

including, but not limited to, attorney's fees with respect to the Disciplinary Action.

2. **COMPLETE RELEASE**

In further consideration of the settlement herein above, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD)

which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition

and any claim, cause of action, demand or complaint arising out of or under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NON ADMISSION OF LIABILITY.**

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the County, by whom any such obligation or liability is expressly denied.

4. **CONSULTATION WITH ATTORNEY.**

Releasor has consulted with an attorney, with respects to this Agreement and reviewed with his attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

5. **REASONABLE PERIOD OF TIME.**

Releasor agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

6. **COMPLETE AGREEMENT.**

This Agreement contains the entire agreement between the Employee and the County, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the County to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

9. **EMPLOYEE ATTESTS**

Releasor represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that she enters into this Agreement voluntarily, of her own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

10. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to Director Ronald Edwards, at the Hudson County Department of Corrections. This seven (7) day revocation period may not be waived by the Employee.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Gilberto Reyes, executed the foregoing Agreement this ____ day of February 2017.

GILBERTO REYES

Sworn and Subscribed to before me
this ____ day of _____, 2017.

_____
Notary Public
State of New Jersey

EMPLOYEE'S COUNSEL

Dated: 2-17-17

BY: _____

COUNTY OF HUDSON

Dated: 2-21-17

BY: _____

RONALD P. EDWARDS
DEPUTY DIRECTOR

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 day period referred to in the 5th recital on page 7 of this Agreement.

_____

GILBERTO REYES

4-19-17

STATE OF NEW JERSEY

In the Matter of Ivan Rodriquez
City of Newark,
Department of Water and Sewer

CSC DKT. NO. 2016-2122
OAL DKT. NO. CSV 02382-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 19, 2017 BW

The Civil Service Commission, at its meeting of April 19, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 02382-16
AGENCY DKT. NO. 2016-2122

IN THE MATTER OF IVAN RODRIQUEZ, CITY OF NEWARK, DEPARTMENT OF WATER AND SEWER.

Vipin P. Varghese, Esq., for appellant Ivan Rodriquez (DeCotiis, Fitzpatrick & Cole, attorneys)

France H. Casseus, Assistant Corporation Counsel, for respondent City of Newark (Kenyatta Stewart, Acting Corporation Counsel)

Record Closed: March 29, 2017 Decided: March 30, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Ivan Rodriquez filed an appeal from a Final Notice of Disciplinary Action dated December 11, 2015. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on February 9, 2016, for determination as a contested case. Following prior adjournments of the hearing, the hearing was scheduled on October 13, 2016. Prior to the commencement of the hearing, the parties engaged in discussions toward an amicable resolution of the

matter. On March 29, 2017, counsel for respondent forwarded the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

March 30, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 4-3-17

Date Mailed to Parties: APR 3 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

jb

IVAN RODRIGUEZ, Appellant, v. CITY OF NEWARK, Respondent	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 02382-2016 N** **SETTLEMENT AGREEMENT**

2017 MAR 29 P 12:46

IT IS HEREBY AGREED by and between the City of Newark ("City"), International Union of Operating Engineers, Local 68 ("Union/Local 68"), and Employee Ivan Rodriguez[1] ("Rodriguez"), to resolve the disciplinary matter as it relates to the Final Notice of Disciplinary Action ("FNDA") dated December 11, 2015. Rather than continuing further with the appeal of Rodriguez's termination at the Office of Administrative Law on the charges of inability to perform duties; conduct unbecoming of a public employee; and other sufficient causes, as codified at N.J.A.C. 4A:2-2-3, the City, the Union and Rodriguez (collectively referred to hereinafter as the "Parties") have determined to resolve this matter by this Agreement, and agree as follows:

1. The Parties hereby agree that all charges associated with the FNDA issued on December 11, 2015 will be upheld. The City will amend the disciplinary action in the FNDA from removal/termination to suspension based on the charges and Rodriguez will execute a new "Letter of Conditional Employment".
2. The amended FNDA will reflect Rodriguez served a three (3) month suspension, effective December 11, 2015, for the above stated offenses.

[1] On the date which gave rise to the incident noted in the Final Notice of Disciplinary Action, Mr. Rodriguez was employed as a Plumber, in the Department of Water and Sewer Utilities, City of Newark, New Jersey.

3. Any additional days exceeding his three (3) month suspension will be accredited as an accepted unpaid leave of absence.
4. Rodriguez acknowledges he will be subject to immediate termination for any violation of the terms of the "Letter of Conditional Employment".
5. Rodriguez's return to work is subject to his performance of all obligations and conditions that are set forth in this Agreement.
6. Rodriguez's return to work is subject to the review and approval of the NJ Department of Community Affairs (DCA).
7. Rodriguez shall waive and will not be entitled to any back pay from the date of his initial removal until the date of his return to work.
8. Rodriguez shall be subject to random drug testing pursuant to the Letter of Conditional Employment, which is attached hereto and is incorporated and made a part of this Agreement.
9. The Parties acknowledge under N.J.A.C. 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.
10. Rodriguez further waives any and all rights or claims which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
11. Rodriguez and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
12. Rodriguez and the Union each further agree that there is no consideration due Rodriguez, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising

from his employment and/or the execution of this Agreement, except as otherwise provided herein.

13. Except for the assessment of Rodriguez's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

14. Rodriguez and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

15. Rodriguez is bound by this Agreement. Anyone who succeeds to Rodriguez's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

16. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

17. Rodriguez and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

18. This Agreement contains the sole and entire agreement between Rodriguez, Local 68 and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Rodriguez specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall

be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

19. Rodriguez agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
20. Rodriguez agrees and acknowledges that he has had full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.
21. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
22. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.
23. By signing this Settlement Agreement, Rodriguez states that:
    a. He has read it;
    b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
    c. He agrees with everything in it;
    d. His representative negotiated this Agreement with his knowledge and consent;

e. He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f. He has been given at least 21 days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g. He understands that for a period of 7 days following the execution of this Agreement he may revoke this Agreement and the Agreement shall not become effective or enforceable until the revocation period has expired; and

h. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

3/13/17
Date

BY: _____
City of Newark Department of Water and Sewer Utilities

2-27-17
Date

BY: _____
Union Attorney/Representative

2-27-17
Date

_____
Ivan Rodriguez

Approved as to Form and Legality:

3/13/17
Date

_____
Law Department

CERTIFICATION

I, Ivan Rodriguez, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

2-27-17
DATE

Ivan Rodriguez
NAME
IVAN RODRIGUEZ

CITY OF NEWARK

v.

LETTER OF CONDITIONAL EMPLOYMENT

IVAN RODRIGUEZ

On October 7, 2015, Ivan Rodriguez, hereinafter identified as "you," was served with a Preliminary Notice of Disciplinary Action, which provided for your Removal from duties of employment as a "Plumber" with the City of Newark ("City"). You did not request a hearing. On December 11, 2015 a Final Notice of Disciplinary Action was executed. The matter went before the Office of Administrative Law on October 13, 2016. During a conference, you and the Department of Water and Sewer reached an agreement. You have expressed your willingness to participate in a substance abuse rehabilitation program, and have entered a rehabilitation program administered by the City of Newark's Employee Assistance Program ("EAP"). As a result of these representations, it is the decision of the City's Department of Water and Sewer ("Department") to adjust the Major Disciplinary Action as indicated in the settlement agreement. In addition, you will be subjected to the following conditions as terms for your continued employment with the City of Newark:

1. You must participate in and successfully complete an EAP substance abuse rehabilitation program and present confirmation of completion of same in writing to the Department and to the City's Personnel Department within seven (7) calendar days of completion. You will comply with all conditions set forth by the EAP program for your continued rehabilitation. Further, you will describe the conditions for continued rehabilitation set forth by the EAP program. You must submit written proof of your enrollment in said EAP program to the Department within seven (7) calendar days of your execution of this document.

2. Failure to provide proof of enrollment **and** successful completion of substance abuse rehabilitation program, as stated above, shall be deemed sufficient reason for terminating the employment of Rodriguez with the City.

3. You must attend any/all aftercare sessions and/or outpatient treatment sessions of continued rehabilitation pursuant to the EAP program. If you fail to attend any of the continued rehabilitation sessions or treatments, you must substantiate your reason for not attending. On each occasion you are unable to attend said appointment(s) for continued rehabilitation, you will make arrangements within twenty-four (24) hours of missing said appointment(s) to reschedule said appointment(s) and you shall provide to the Department written confirmation of the new appointment(s).

INITIALS 

For all aftercare sessions and/or outpatient treatment sessions of continued rehabilitation, you must submit written proof of your attendance at each to the Department within seven (7) calendar days of the completion of your last continued rehabilitation aftercare and/or treatment appointment.

4. You will refrain from the use of illegal drugs, any mood altering substance and the abuse of alcohol for the duration of your career with the City. Further, you will refrain from the abuse of any prescription pharmaceuticals for the duration of your career with the City.

5. In the event you take internally, at the direction of a physician, any medicine or drugs, you will advise the Department of Child and Family Well-Being Medical Director's Office that you are taking such medication prior to its use or immediately thereafter. As described in paragraph three (3) hereinabove, you will refrain from the abuse of any medicine or drugs prescribed to you by a physician.

6. When absent for reasons stated or identified as personal illness, you will continue to advise your supervisor personally, via telephone, of the circumstances surrounding your absence and submit the appropriate documentation of same, when required.

7. You will continue to perform your job to satisfactory levels expected of all City employees. Any irregular work behaviors or failure to notify your supervisor of an absence (no call/no show) will result in termination.

8. From this point forward, you will submit to unannounced mandatory drug testing when ordered to do so. Failure to submit to testing or testing that results in a positive reading will result in termination.

9. The terms of this Letter of Conditional Employment shall supersede any prior Letter of Conditional Employment.

The conditions outlined above are designed to assist you in your rehabilitation effort. If there is any evidence that you have returned to the cause of your problem or you violate the conditions stated above, you will be subject to immediate discharge.

Signature: Andrea Hall Adebowale 3/13/17

Andrea Hall Adebowale, Director — Date
Water and Sewer Department

INITIALS: LRD

I have read and understand the forgoing conditions for continued employment. I understand that failure to adhere to these conditions will result in my immediate discharge.

Ivan Rodriguez — Date: 2-27-17

Witness/Union Representative or Counsel — Date: 2-27-17

ORIGINAL TO BE RETAINED BY DEPARTMENT, COPIES TO EMPLOYEE AND EAP COUNSELOR

~~4/9/17~~

4-19-17

STATE OF NEW JERSEY

In the Matter of Paul Serdiuk
Department of Military and Veterans Affairs

CSC DKT. NO. 2013-739
OAL DKT. NO. CSV 13685-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 24, 2017 BW

The appeal of Paul Serdiuk, Personnel Assistant 2, Department of Military and Veterans Affairs, removal effective April 25, 2012, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on March 2, 2017. Exceptions were filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on April 19, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Paul Serdiuk.

Re: Paul Serdiuk

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
APRIL 19, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13685-12
AGENCY DKT. NO. 2013-739

IN THE MATTER OF PAUL SERDIUK,
MILITARY AND VETERANS' AFFAIRS.

David B. Beckett, Esq., for appellant (Law Offices of David Beckett, attorneys)

John F. Regina, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: September 1, 2016 Decided: March 2, 2017

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Respondent, the State of New Jersey, Department of Military and Veterans' Affairs (MVA. Agency) removed Personnel Assistant 2 (PA2), Paul Serdiuk (appellant, Serdiuk) for Insubordination, Conduct Unbecoming a Public Employee, and Other Sufficient Cause, specifically, violation of Departmental Directive 230.05 - Insubordination. Respondent alleges appellant failed to carry out a reasonable order to destroy all copies of outdated workbooks entitled "Prevention and Response Strategies to Workplace Violence" from the basement storage area in a timely manner.

PROCEDURAL HISTORY

Appellant requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on October 3, 2012, for a hearing as a contested case. A hearing was held on March 10, 2016. The record was held open to allow for the submission of written summations. The record closed on April 26, 2016. The record was reopened on June 29, 2016 to allow the parties to address what appeared to be a discrepancy in the record of the case and an alleged fact as described in one party's closing submission. The record closed again on September 1, 2016. Orders were entered in this matter to allow for the extension of time in which to file the initial decision.

FACTUAL DISCUSSION AND FINDINGS

Loreta P. Sepulveda (Sepulveda) testified on behalf of the Agency. She is employed by the Department of Health as Director of Human Resource Services (DHS). She has held this position for three years, and was a Director of Human Resources until April 2013 at the Department of Military and Veterans Affairs. In that role, she supervised mandated-State training, and any other training offered. Sepulveda supervised the training unit, mentored the appellant and nurses in nursing homes, as well as supervised other employees. The appellant was a Personnel Assistant under her supervision in the training unit. Serdiuk's job is to make sure that employees are given mandated-training, and to provide on-site training.

Sepulveda reviewed a memo dated January 12, 2012 (R-3), which she stated she wrote to the appellant, and referenced a December 8, 2011 memo (R-5) from the appellant, regarding the supplying of training. She also referenced another memo, authored by appellant (R-5, page 3). In the memo, the appellant was expressing concern about the online learning management system (LMS), stating his preference for in-person, instructor-led training. He was the instructor who provided such training. LMS involves web-based webinars, which reduces the need for instructors. Sepulveda complied with a directive from the Civil Service Commission (CSC) in implementing LMS. The appellant had no discretion in implementing LMS, but repeatedly made clear that he did not believe that the LMS was

best-practice. Sepulveda's reply to his communication was her January 12, 2012 memo, which directed him to proceed with assigning the training.

Appellant was instructed that he would be the administrator and that he would no longer go out and provide instruction-led training on-site. Sepulveda was troubled that the appellant continued to show reluctance to follow the State-adopted procedures. She repeated her instructions to assign the prevention of workplace-violence training to central office staff by January 20, 2012. Sepulveda had previously assigned this task, and the appellant had not completed it. She told him to assign it to three veterans' homes, and that it should be assigned by February 3, 2012. Sepulveda told the appellant that he no longer needed to provide in-person training, and should destroy all workbooks and recycle them by January 20, 2012. She further ordered him to enhance online-training and Microsoft PowerPoint training, as well as to create a PowerPoint training module by February 27, 2012. She noted that this was her third request to assign the training, and indicated that she would treat any further delay as insubordination. She asked to be informed promptly of any barriers to completion of the task.

Sepulveda did not remember if the appellant assigned training to central office or nursing home staff. She did not recall if he ever created the PowerPoint module. The destruction of the workbooks was not completed, and Sepulveda noted that she ordered their destruction because she was concerned that they would continue to be used. She went to the supply closet after the deadline she had given, and saw that the workbooks were still present. Sepulveda reviewed six photographs of the supply closet that she took with her camera that were date- and time-stamped, five pictures were on February 3, 2012, and one on March 1, 2012. When the task was not completed, she pursued discipline, although she noted that previous charges were pending against the appellant at that time. The appellant never reported any barrier that he could not perform due to any injury.

On cross-examination, Sepulveda acknowledged that she did not know the number of boxes that contained workbooks. She believed it was eight to ten. She noted appellant's memo dated October 26, 2011, (R-5, page 3), which was a weekly report identifying what the appellant was working on. Item number four of appellant's weekly report indicated: "spoke to

Director of Training, the Department of Human Services, willing to discuss with you the need for instruction with training." Sepulveda did not recall if she called the DHS Director. She did not recall anyone telling her that DHS had any concern, and she was not aware of the issue of care workers for whom English is a second language.

Sepulveda is aware of appellant's concern that not everyone is proficient with computers. She did review an email from the Director of IT, who identified limited computer access at certain facilities. She stated that the current charges were only brought for the failure to complete the workbooks assignment. Sepulveda knows that the shredding bin does get full, but the workbooks were to be recycled not shredded. She also knows that the appellant was the department's representative to the Governor's Task Force for Recidivism. Sepulveda signed and reviewed the Preliminary Notice of Disciplinary Action (R-2). She acknowledged that the appellant never expressed any objection to destroying the books, and that no document indicates any earlier request by her to complete this task.

Sepulveda was aware that the appellant objected to the implementation of LMS, but was not aware that the appellant filed a discrimination charge against her.

The next witness was Susan Sautner (Sautner), who works for the Department of Military and Veterans Affairs, which handles union matters and is the final arbiter of discipline. Sautner is Administrator of Employee Relations, a position she assumed in August 2015. She was not employed by the Department at the time of the events of this matter. She stated the policy on discipline has not changed from 2012 through the present, and discussed progressive discipline as a theory of discipline. She reviewed the Final Notice of Disciplinary Action (FNDA) (R-1), which were the charges in the matter, noting that at the time the FNDA (R-1) was filed, there were previous charges against appellant. Serdiuk did have a pending charge for conduct unbecoming, and insubordination, at the time of the FNDA (R-1) being filed. Those charges were sustained, and a 180-day suspension was imposed. Reviewing the "New Jersey Department of Military and Veterans Affairs Corrective and Disciplinary Action Policies and Responsibilities" (R-7), Sautner noted that number nine on page two stated that a first offense ranges from counseling to removal, and a second offense ranges from a five-day suspension to a removal, noting that

the next step available after a 180-day suspension is removal. The second charge of conduct unbecoming is undisputed. Sautner noted that the guidelines do not state that if the first offense receives sixty-days, that the second offense has to be more, but that is her understanding of progressive discipline.

The appellant then called Michael Bobinis (Bobinis), who also worked at the Department of Military and Veterans Affairs from June 2001 to March 2015, and is currently employed elsewhere. At the time, Bobinis was the Chief Technology Officer. He noted that the Division has 100 employees, ten of whom sit at desks, and that there are more personnel than there are computers. Bobinis supplied computers and accounts for personnel, so he believes he would know of these details. He stated that shredders were used for destruction of documents and hard drives, and that the documents that came to him were shredded, not recycled. Bobinis stated that the appellant did come to him with a large number of documents that were ultimately disposed of, but he did not remember the exact date. He stated a contractor would come once a month to perform shredding, and stated that he was never asked about disposing of the workbooks by Sepulveda. The contractor would come every thirty days, on a specific day of the month, every month. On cross-examination, Bobinis stated that he did provide and administer training to his own personnel. He stated that the appellant came to him, and said that he had a lot of boxes that were in the way, and his supervisor told him to get rid of. Bobinis told him to put what he could into the shredding bins, and store some of the overflow in one of his areas until the bins were empty again.

Appellant Paul Serdiuk testified on his own behalf. He has been employed by the Department of Military Veterans Affairs for twenty-one years, and is also a member of the Governor's Task Force on Reduction of Recidivism, which started just after the holidays of the year in question. Serdiuk updated his supervisor on this activity which required attendance two days a week, or eight days a month, in Trenton, New Jersey, representing the Department. He toured many of the prisons in the State in January and February of that year, of which his supervisor was aware. He acknowledged that he wrote the October 26, 2011 Weekly Report to Sepulveda (R-5, page 3). Serdiuk stated that he had spoken with the individual from DHS because he knew that they had similar levels of computer

access. He said that DHS would not implement LMS, and he told his supervisor because he thought it was not mandatory, but recommended. To the best of his knowledge, Sepulveda did not follow-up with DHS. He acknowledged that he also sent a copy to his supervisor's supervisor, and to an attorney representing him in another matter, because he always keeps him informed. Serdiuk understands what orders are as he was in the military. He understands that Sepulveda's January 12, 2012 memo (R-3) directed him to get the program up and running.

Appellant never had a prior conversation about workbooks, and had no objection to their destruction. He spoke to Bobinis because he knew he was in charge of the shredding. Serdiuk believes that he approached Bobinis one- to two-days after receiving the January 12, 2012 memo (R-3), although he did not do so in writing. When removed from work, Serdiuk lost the opportunity to check his email, so he could not say if he had sent one. He did not recall exactly how many boxes had workbooks, but believed the number was more than ten. Serdiuk took one to two boxes down to the shredding bins, and then got busy with the task force. Bobinis was to inform him when the truck would be there.

Serdiuk stated that he never used the materials after he was told to destroy them. Sepulveda did not come to talk to him about those documents after February 3, 2012. Appellant never approached her about barriers, and she never informed him that he failed to implement the training. The appellant stated that boxes were in the Human Resources supply room, and then were moved to Bobinis's area. He did not understand the threat of insubordination charges to include destruction of the workbooks, and thought it only meant assigning the training and completing the PowerPoint. In reviewing Sepulveda's January 12, 2012 memo (R-3), he agreed as to the goals and duties and signed the document. He made notes on the last page because he did not believe that he was to personally shred the documents. Serdiuk had a difficult relationship with the supervisor.

In the present matter, the testimony of appellant's witness Bobinis was directly in conflict and inconsistent with, that of appellant in that Bobinis testified that he had told appellant where to leave the boxes of workbooks, and how to arrange for their shredding

while appellant testified that he was waiting to hear back from Bobinis. Accordingly, the credibility of this conflicting testimony must be ascertained.

Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

> Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances.
> [Ibid. at 522]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Bobinis did not appear to have a particular axe to grind with anyone involved, nor did he seem to have any palpable interest in the outcome of these proceedings. Appellant's testimony, on the other hand, serves to place any responsibility for delay on Bobinis having not gotten back to him. Given the relative disparity in the respective interest in the outcome of these proceedings, I give greater weight to Bobinis's testimony, and deem the credibility of appellant's testimony to be undermined.

Given the foregoing, and having also considered the documentary and testimonial evidence in the record, I **FIND** that on January 12, 2012, Sepulveda directed appellant to destroy all copies of the "Prevention and Response Strategies to Workplace Violence," by January 20, 2012. I further **FIND** that as of March 1, 2012, that task had not been completed.

I do not **FIND** that the failure to complete this task was a result of appellant waiting to hear from Bobinis concerning when the shredding contractor was expected to be on-site.

LEGAL ANALYSIS AND CONCLUSIONS

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, respondent has charged appellant with Insubordination, Conduct Unbecoming a Public Employee, and Other Sufficient Cause, specifically, violation of Departmental Directive 230.05 - Insubordination.

With regard to the charge of a violation of N.J.A.C. 4A:2-2.3(a)2 - insubordination. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> 'Insubordination' is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, the record reflects that appellant was given a directive by his supervisor on January 12, 2012. Specifically, he was directed to destroy the workbooks previously described. He was given a deadline of January 20, 2012. By March 1, 2012, the task had not been completed and the record is devoid of attempts by appellant to update or inform his supervisor why the task had not been completed. Appellant's argument that the directive was not coupled with a threat of discipline is unpersuasive. The directive was given, and it was not complied with. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that petitioner has violated N.J.A.C. 4A:2-2.3(a)2. The charge of Incompetency is **SUSTAINED.**

Appellant was charged with "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429

(1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. Emmons, supra, 63 N.J. Super. at 140.

In the present matter, appellant failed to carry-out an order to destroy copies of workbooks. While such behavior is not to be encouraged, as evinced by the sustaining of the charge of insubordination, it can hardly be said to "offend publicly accepted standards of decency" or to otherwise undermine public confidence in the carrying-out of the public's business. I **CONCLUDE** that the record does not support the sustaining of a charge of Conduct Unbecoming, and that charge is hereby **DISMISSED.**

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with a violation of Departmental Directive 230.05 - Insubordination, which includes "Intentional disobedience or refusal to accept reasonable order" (R-7). To the extent that this charge overlaps with the analysis for the regulatory violation of insubordination addressed and sustained above, such charge is also **SUSTAINED**.

PENALTY

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

In the present matter, the record reflects that appellant has a previous charge of insubordination sustained which resulted in a 180-day suspension. The presence of the present, additional subsequent charge leaves little room for any other conclusion but the imposition of the penalty of removal and such penalty is **SUSTAINED.**

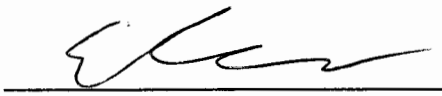
ORDER

I **ORDER** that the charge of Insubordination and Other Sufficient Cause be **SUSTAINED**. I further **ORDER** that the charge of Conduct Unbecoming be **DISMISSED.** I finally **ORDER** that respondent's removal of employee also be **SUSTAINED**.

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.

March 2, 2017 — 

DATE — **ELIA A. PELIOS**, ALJ

Date Received at Agency: March 2, 2017

Date Mailed to Parties: March 2, 2017

nd

APPENDIX

LIST OF WITNESSES

For Appellant:

Paul Serdiuk

Michael Bobinis

For Respondent:

Loreta Sepulveda

Susan Sautner

LIST OF EXHIBITS

For Appellant:

A-1 Email Correspondence from David S. Snedeker to Loreta Sepulveda and Paul Serdiuk, et al., Regarding OLT Training dated January 13, 2012, through January 27, 2012

A-2 Email Correspondence from Lisa Puglisi to Paul Serdiuk, et al., Regarding the Contact List, dated February 16, 2012

A-3 Performance Assessment Review for Paul Serdiuk, Rating Period of September 1, 2011 to August 31, 2012

A-4 Discrimination Complaint Processing Form

For Respondent:

R-1 Final Notice of Disciplinary Action, dated August 10, 2012

R-2 Preliminary Notice of Disciplinary Action, dated February 23, 2012

R-3 Interoffice Memorandum to Paul Serdiuk, dated January 12, 2012

R-4 Photographs

R-5 Interoffice Memorandums by Paul Serdiuk

R-6 Paul Serdiuk Disciplinary Action Inquiry

R-7 New Jersey Department of Military and Veterans Affairs, Corrective and Disciplinary Action Booklet

R-8 Final Administrative Action of The Civil Service Commission, CSC No.: 2012-3316, OAL No.: CSV 7323-112, dated December 4, 2014, and Initial Decision, dated October 30, 2013

R-9 Personnel Assistant 2, Job Spécification 63254

5-3-17

STATE OF NEW JERSEY

In the Matter of Pamela Estes
City fo Newark,
Department of Public Safety

CSC DKT. NO. 2017-1426
OAL DKT. NO. CSV 17749-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17749-16

AGENCY REF. NO. 2017-1426

IN THE MATTER OF PAMELA ESTES, CITY OF NEWARK DEPARTMENT OF PUBLIC SAFETY,

---

Arnold S. Cohen, Esq., for appellant (Oxfeld Cohen, P.C.)

Andy Jong, Esq., for respondent (Kenyatta Stewart, Acting Corporation Counsel)

Record Closed: March 31, 2017 Decided: March 31, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on November 21, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted wherein the parties agree on March 22, 2016 for a hearing date. On the date of the hearing the parties resolved all issues in dispute. On March 31, 2017 OAL received a copy of the fully executed settlement agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

3-31-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

4-6-17

Date Mailed to Parties: APR 6 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CITY OF NEWARK
Mayor Ras J. Baraka

Department of Law

A City We Can All Believe In

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Dir: (973) 733-8908

March 28, 2017

VIA First Class Mail

The Honorable Kimberly Moss, ALJ
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

RE: IMO Pamela Estes v. City of Newark
OAL Docket No.: CSV 17749-2016 N
Settlement Agreement & General Release

Dear Judge Moss:

Attached is a signed copy of the agreement in the above-captioned matter. Thank you.

Sincerely,
KENYATTA STEWART, ESQ.
ACTING CORPORATION COUNSEL

By: _____
ANDY JONG
ASSISTANT CORPORATION COUNSEL

Enclosures

PAMELA ESTES,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
	:	
	:	
v.	:	**OAL DOCKET NO.: CSV 17749-2016 N**
	:	
	:	
CITY OF NEWARK,	:	
	:	**SETTLEMENT AGREEMENT AND**
Respondent.	:	**GENERAL RELEASE**
	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Communications Clerk Pamela Estes ("Estes" or "Appellant"), the SEIU Local 617 ("Local 617" or "Union") and the City of Newark ("City" or "Respondent") (Estes, the Union and the City, are collectively referred to hereinafter as the "Parties"). The Parties in this matter have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

The Final Notice of Disciplinary Action and Specifications dated September 27, 2016 (the Final Notice of Disciplinary Action and Specifications are referred to hereafter as "FNDA"), contained the following charges for which Estes was suspended one hundred twenty (120) work days beginning November 02, 2016 and ending April 19, 2017, with an additional two (2) months held in abeyance for a one year probationary period, along with job retraining:

a. Official Inefficiency or Incompetency, in violation of Newark Police Department Rules and Regulations Chapter 18:29.1 and New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3(a)1;

b. Neglect of Duty, in violation of Newark Police Department Rules and Regulations Chapter 18:6 and New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3(a)7;

c. Disobedience of Orders in violation of Newark Police Department Rules and Regulations Chapter 18:14.

In consideration of the promises contained herein, it is agreed as follows:

1. The charges listed in the FNDA will be upheld.
2. Estes is to be suspended ninety (90) work days beginning November 02, 2016.
3. Estes shall be retrained at the Communications Division on the use of 911 and Call Taking Systems.
4. Estes is entitled to back pay for any suspension days she has served beyond the ninety (90) work day suspension from the Appointing Authority pertaining to this matter.
5. The parties acknowledge that Estes will be credited with pension and seniority time for any of those days which she is entitled to back pay.
6. Estes further waives any and all right or claim which she has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
7. Estes and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
8. Estes and the Union each further agree that there is no consideration due Estes, her counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.
9. Except for the assessment of Estes's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

10. Estes and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

11. Estes is bound by this Agreement. Anyone who succeeds to Estes's rights and responsibilities, such as heirs or the executor of her estate, shall also be bound.

12. In consideration for the terms in this Agreement, the City agrees issue to Estes a Final Notice of Disciplinary Action as provided for herein.

13. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

14. Estes and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

15. This Agreement contains the sole and entire agreement between Estes, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Estes specifically represents and acknowledges in executing this Agreement that she has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the

Parties, and expressly stated to be a modification of the Agreement.

16. Estes agrees and acknowledges that she has been fully and fairly represented by her Union in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.

17. Estes agrees and acknowledges that she has had a full opportunity to review this Agreement with her counsel and/or union representation and she enters into same knowingly and voluntarily.

18. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

19. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

20. By signing this Settlement Agreement, Estes states that:

a) She has read it;

b) She understands it and knows that she is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c) She agrees with everything in it;

d) Her representative negotiated this Agreement with her knowledge and consent;

e) She has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) She has been given at least 21 days within which to review and consider this Agreement, although she may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) She understands that for a period of 7 days following the execution of this Agreement he may revoke this Agreement and the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

3/28/17
Date

BY: _____
City of Newark Police Department

3/22/17
Date

BY: _____
Union Representative/Attorney

3/22/17
Date

_____
Pamela Estes

OAL DKT. NO. CSV 17749-2016 N

Approved as to Form and Legality:

5/23/17
Date

Law Department

CERTIFICATION

I, Pamela Eses, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/22/17
DATE

Pamela Eses
NAME Pamela Estes

5-3-17

STATE OF NEW JERSEY

In the Matter of Nkem Felix
Essex County,
Department of Citizen Services

CSC DKT. NO. 2017-231
OAL DKT. NO. CSV 14352-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 14352-16

AGENCY DKT. NO. 2017-231

IN THE MATTER OF NKEM FELIX, ESSEX COUNTY DEPARTMENT OF CITIZEN SERVICES.

David H. Weiner, President, CWA Local 1081, for appellant Nkem Felix pursuant to N.J.A.C. 1:1-5.4(a)(6)

Robin Magrath, Assistant County Counsel, for respondent Essex County (Courtney M. Gaccione, County Counsel)

Record Closed: March 31, 2017 Decided: April 3, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Nkem Felix filed an appeal from a disciplinary action issued by the Department of Citizen Services. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 21, 2016, for determination as a contested case. The hearing scheduled for March 2, 2017, was adjourned at the parties' request to provide more time toward finalizing a settlement. Subsequently, under cover letter dated March 29, 2017, counsel for respondent

forwarded the attached Stipulation of Settlement and General Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 3, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

4-6-17

Date Received at Agency:

APR 6 2017

Date Mailed to Parties:

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
BY: ROBIN MAGRATH, DIRECTOR OF LABOR RELATIONS
HALL OF RECORDS - ROOM 535
NEWARK, NEW JERSEY 07102
973-621-2558
Attorney for the County of Essex

OFFICE OF ADMINISTRATIVE LAW
OAL DKT NO. CSV-14352-2016N
AGENCY DKT NO. 2017-231

NKEM FELIX	**: STIPULATION OF SETTLEMENT**
v.	**: AND GENERAL RELEASE**
	:
ESSEX COUNTY, DEPARTMENT OF CITIZEN SERVICES	**:**

It is hereby stipulated and agreed to by and between the parties hereto that the above-captioned matters be and same is hereby settled upon the following terms and conditions:

1. The employee hereby acknowledges that she was released at the end of her Working Test Period effective July 8, 2016.

2. A hearing was scheduled before the Honorable Michael Antoniewicz, A.L.J., on March 2, 2017, and the parties ultimately settled before the scheduled date.

3. In lieu of the County pursuing termination against this employee, the employee will be returned to work on March 20, 2017 at 8:30 a.m. and shall meet with Patricia Simpson of the Office of Human Resources for the Division of Family Assistance and Benefits, Department of Citizen Services, located at 18 Rector Street, 9th

floor, Newark, New Jersey 07102, pursuant to the following:

(a) The employee will be placed back into a three (3) month Working Test Period as a Probationary employee.

(b) If the employee successfully completes the three (3) month Working Test Period, she will become permanent in the position of Family Service Worker at the conclusion of said period, which begins March 20, 2017 and ends June 19, 2017.

(c) In the event that the employee does not successfully complete the working test period, her employment with the County will immediately be terminated.

(d) The employee acknowledges that she is not entitled to back pay.

(e) The employee acknowledges that she will attend orientation and undergo individual training as required by the Department of Citizen Services, Division of Family Assistance and Benefits during the Working Test Period described above.

(f) The employee acknowledges that she will be assigned to a unit different than previously assigned during the Working Test Period described above.

(g) The employee's salary upon her return to work will be $47,984.00, which is the starting salary for the Family Service Worker title.

4. The employee and the County agree that the terms and conditions of this Stipulation of Settlement and General Release and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public unless compelled to do so by judicial process. However, the employee may make disclosures to the members of her immediate family, her

attorney, her union representative and as may be required by her accountant in connection with the discharge of the latter's duties in preparation of tax returns or financial statements. Employee's failure to comply with the confidentiality provisions of this program may result in the dissolution of the within Stipulation of Settlement and General Release at the sole and exclusive option of the County.

5. In the event that an action is brought by the County for the employee's breach of the confidentiality conditions set forth in paragraph four (4) hereof, in addition to such other relief as is appropriate, the County shall be entitled to reasonable attorney's fees and costs.

6. This Stipulation of Settlement and General Release is not, and shall not in any way be construed, as an admission by the County of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person. The parties have entered into this Stipulation of Settlement and General Release for the sole purpose of resolving employee's claims concerning his employment with the County, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

7. Employee agrees that this Stipulation of Settlement and General Release

shall operate as a complete and final disposition of this matter. In consideration for the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims she has now to any relief of any kind from the County, whether or not she now knows about those rights, arising out of her employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all possible claims against the County from the beginning of employee's employment with the County to the date this Stipulation of Settlement and General Release is executed by employee.

8. Employee represents and certifies that she has carefully read and fully understands all of the provision of and effects of this Stipulation of Settlement and

General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with her union representative. Further, the employee certifies that she is voluntarily entering into this Stipulation of Settlement and General Release and that the County has not made any representations concerning their terms of effects of this Stipulation of Settlement and General Release, other than those contained herein.

9. This Stipulation of Settlement shall neither set a precedent nor constitute a past practice.

10. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Stipulation of Settlement and General Release, shall, in all cases, be construed as a whole, according to its fair meaning and not strictly for or against any of the parties.

11. Should any provision of this Stipulation of Settlement and General Release be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

12. This Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by the County Administrator.

13. The foregoing constitutes a full and final disposition of this matter.

14. Employee shall not institute an appeal in this matter.

15. Employee shall not request relief with respect to this matter, in any forum, beyond that which is contained herein.

16. This Stipulation of Settlement may not be modified, altered, or changed, except upon the prior, express written consent of both parties.

17. This Stipulation of Settlement and General Release is the result of negotiations with employee and employee's representative, with whom employee had an opportunity to consult prior to signing same.

DATED: 3/6/17

ROBIN MAGRATH, ESQ.
DIRECTOR OF LABOR RELATIONS

DATED: 3/21/17

ROBERT JACKSON
ESSEX COUNTY ADMINISTRATOR

DATED: 3/16/17

ANIBAL RAMOS
DIRECTOR, DEPARTMENT OF
CITIZEN SERVICES

DATED: 3/10/17

JEANETTE PAGE-HAWKINS
DIVISION HEAD, DIVISION OF
FAMILY ASSISTANCE AND
BENEFITS

DATED: 3/3/17

DAVID WEINER
EMPLOYEE REPRESENTATIVE

DATED: 3/6/17

NKEM FELIX
EMPLOYEE

5-3-17

STATE OF NEW JERSEY

In the Matter of Barasa Kukubo
City of Union City,
Department of Public Safety

CSC DKT. NO. 2017-1279
OAL DKT. NO. CSV 17083-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 17083-16
AGENCY REF. NO. 2017-1279

IN THE MATTER OF BARASA KUKUBO, CITY OF UNION CITY, DEPARTMENT OF PUBLIC SAFETY.

Barasa Kukubo, appellant pro se

Michael Garcia, Esq., appearing for respondent City of Union City (O'Toole Fernandez, Weiner, Van Lieu, attorneys)

Record Closed: March 30, 2017 Decided: April 4, 2017

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action dated September 14, 2016, and made effective July 26, 2016, City of Union City, Department of Public Safety removed appellant Barasa Kukubo (appellant) from his civil service position as an Emergency Medical Technician (EMT) for insubordination and other sufficient cause, namely that he failed to comply with orders and requirements to maintain current certification as an EMT in New Jersey. Appellant filed a request for a hearing appealing his removal, which appeal was filed with the Office of Administrative Law by the Civil Service

Commission for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on November 10, 2016.

The matter was assigned to me on November 14, 2016. On November 30, 2016, I convened a telephonic case management conference. Among other issues discussed, a hearing date for February 21, 2017, was scheduled. In light of appellant's pro se status, I also deferred ruling on a Motion for Summary Decision, explaining that a de novo hearing was required and that the evidentiary hearing date would stand.

At the scheduled plenary hearing, the parties set forth the outline of a settlement on the record and the hearing was adjourned. The parties were given the opportunity to reduce the settlement to writing. Under cover of March 30, 2017, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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.

April 4, 2017
DATE

Gail M Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: April 7, 2017

Mailed to Parties: April 7, 2017
id

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THE SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Agreement") is entered into by and between BARASA KUKOBO ("Kukobo"), and THE CITY OF UNION CITY (the "City") in settlement of Kukobo's employment with the City and to settle all claims that Kukobo may have against the City, any related entities, and any of its subsidiaries, affiliated companies, benefit plans or their respective predecessors, successors and assigns, as well as their respective past or present officers, directors, agents, representatives or employees.

Parties

"Barasa Kukobo" or "Kukobo" as used herein, means his estate, heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest. "The City of Union City," or "the City" as used herein, means the City of Union City its parent corporation, subsidiaries, related, affiliated and predecessor entities, the present and former trustees, present and former directors, officers, attorneys, employees or agents of all of them, in their official and individual capacities, and any pension, welfare or other benefit plan applicable to the employees or former employees of the City as defined herein, and the current and former trustees and administrators of any and all such plans. Kukobo and the City are collectively referred to herein as the "Parties".

1. Assignment of Claims

Kukobo and the City hereby warrant that they have not assigned any claims that any of them may have against each other to any other person or entity.

2. Settlement

In full and complete settlement of its obligations under the terms of Kukobo's employment with the City and any other causes of action between the Parties, the Parties agree as follows:

WHEREAS Kukobo was certified Emergency Medical Technician by the State of New York;

WHEREAS Kububo was hired as an Emergency Medical Technician by the City under a reciprocity agreement between New Jersey and New York;

WHEREAS the City has issued two Final Notices of Disciplinary Action ("FNDA") on September 14, 2016 alleging violations of various sections of N.J.A.C. 4A:2-2.3(a);

WHEREAS Kukubo filed an appeal with the New Jersey Civil Service Commission of one of the FNDAs which was scheduled to be heard by the Honorable Gail S. Cookson, A.J.L. on February 21, 2017; and

WHEREAS Kukuobo and the City have agreed, on record, to enter into this Settlement Agreement whose terms have been agreed upon on the Court's record on February 21, 2017;

THE PARTIES THEREFORE AGREE:

(1) Kukubo will withdraw his appeal and agree not to pursue any further appeals of either of these two FNDAs;

(2) The City shall withdraw its FNDAs seven (7) days after the execution of this Agreement;

(3) Kukobo shall resign his commission in *good standing* as Emergency Medical Technician for the City of Union City; and

(4) Kukobo shall not seek future employment with the City of Union City.

3. Release

a. In consideration of the mutual promises and other consideration set forth in the Agreement, Kukobo waives, releases and gives up any and all claims and rights which he may have against the City or its parent and any of its subsidiaries, affiliated companies, benefit plans

or their respective predecessors, successors and assigns, as well as their respective past or present officers, directors agents, representatives or employees (hereinafter referred to as "Releasees") from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known and unknown, suspected or unsuspected, vested or contingent, which Kukobo ever had or now has against the Releasees arising out of Kukobo's employment relationship with the City or any affiliated or related public or private entities or for any other reasons which were asserted or could have been asserted by Kukobo under any state or federal statute, city ordinance, constitution, contract or the common law, including without limitation the following:

i. Any claims of retaliation or harassment based upon any alleged acts of whistle blowing and any claims of retaliation under the New Jersey Conscientious Employee Protection Act ("CEPA");

ii. Any claims of discrimination or harassment based upon race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, medical condition, disability or atypical hereditary cellular or blood trait, or genetic information and any claims of retaliation under the New Jersey Law Against Discrimination;

iii. Any claims for violation of Title VII of the Civil Rights Act; the Civil Rights Act of 1991; the Americans with Disabilities Act; Sections 1981 through 1988 of Title 42 of the United States Code;

iv. The National Labor Relations Act; the Employee Retirement Income Security Act; the Fair Credit Reporting Act; the Immigration Reform Control Act; the Rehabilitation Act; the Age Discrimination in Employment Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Rights Act; the Federal Family Medical Leave Act; Worker Adjustment and Retraining Notification Act; the Employee Polygraph Protection Act; the Ledbetter Fair Pay Act; the Federal and State Equal Pay Acts;

v. Any and all claims pursuant to the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 *et seq.*; New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq.*, New Jersey Wage and Hour Laws; New Jersey Equal Pay Act, New Jersey Laws Regarding Political Activities of Employees, Lie Detector Tests, Jury Duty, Employment Protections and Discrimination; any other federal, state or local civil rights law, whistleblower law or any other local, state or federal law, regulation or ordinance.

vi. Kukobo expressly understands and acknowledges that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Kukobo expressly accepts and assumes the risk of such unknown or underestimated losses or claims and acknowledges and agrees that the benefits to be provided to his pursuant to this Settlement Agreement and General Release fully compensate his for such risks. Kukobo acknowledges that none of the benefits given to his pursuant to the Settlement Agreement and General Release have been assigned or are subject to alienation (i.e. personal

bankruptcy).

b. The Settlement Agreement and General Release contains a waiver of claims that Kukobo knows about and claims that he may not know about relating to his employment with the City up to the date of this Settlement Agreement and General Release.

c. Kukobo agrees not only to release and discharge the City from any and all claims to the extent enforceable by law and that Kukobo could make on his own behalf, but also those that may have been or may be made by any other person, organization or administrative agency on Kukobo's behalf regarding any acts or events occurring before the execution of the Agreement. Kukobo waives any right to become, and promises not to become, a member of any class in a case in which a claim or claims are asserted against the City involving any act or event occurring before the execution of the Agreement. If any claim is brought on behalf of Kukobo against the City involving any events occurring before the execution of the Agreement, or if Kukobo is named as a member of any class in a case, which any claim or claims are asserted against the City and that relate to events prior to the execution of the Agreement, Kukobo agrees that he will immediately notify the City, in writing, of the same to Juan C. Fernandez, Esq., O'Toole Fernandez Weiner Van Lieu, LLC, 60 Pompton Avenue, Verona, New Jersey 07044. Kukobo agrees that if he is compelled to testify through a valid subpoena or order of a court of competent jurisdiction in any pending or future matter filed by anyone other than Kukobo (or other than any person, organization or administrative agency on behalf of Kukobo) he will immediately notify the City, in writing, of the same to Juan C. Fernandez, Esq., O'Toole Fernandez Weiner Van Lieu, 60 Pompton Avenue, Verona, New Jersey 07044.

4. Covenant Not to Sue

Kukobo hereby represents and warrants to the City that he has not: (A) filed, caused

or permitted to be filed any pending proceeding (nor has Kukobo lodged a complaint with any governmental or quasi-governmental authority) against the City, nor has Kukobo agreed to do any of the foregoing; (B) assigned, transferred, sold, encumbered, pledged, hypothecated, mortgaged, distributed, or otherwise disposed of or conveyed to any third party any right or Claim against the City that has been released in this Agreement; or (C) directly or indirectly assisted any third party in filing, causing or assisting to be filed, any Claim against the City. In addition, Kukobo represents and warrants that he shall not encourage or solicit or voluntarily assist or participate in any way in the filing, reporting or prosecution by herself or any third party of a proceeding or Claim against the City.

Kukobo agrees not to assert any claims, charges or other legal proceedings against the City in any forum, based on any events, whether known or unknown, occurring prior to the date of the execution of this Settlement Agreement and General Release, including, but not limited to, any events related to, arising out of, or in connection with his employment with the City.

5. Non Disparagement

Kukubo and the City mutually agree that neither will disparage or encourage or induce others to disparage the either party in any way. For purposes of this Agreement, the term "disparage" includes without limitation, comments or statements to the press and/or media, and/or to any individual, customer, client or entity with whom the City or Kukubo have a business, employment or professional relationship, if such statement would adversely affect in any manner the conduct of business of the City or the reputation of the City, its officers, employees and/or former employees, as applicable, or Kukobo. Nothing in this paragraph is intended to prohibit or restrict Kukubo or the City from providing truthful information to any government, regulatory or self-regulatory agency or pursuant to a valid subpoena issued by a court of competent jurisdiction.

6. Entire Agreement

The Settlement Agreement, Non-Disparagement Agreement and Mutual General Release contain the entire agreement between the parties. This document completely and fully supersedes and replaces any and all prior contracts, agreements, discussions, representations, negotiations, understandings and any other communications between the parties pertaining to the subject matter hereof. Kukobo represents and acknowledges in executing the Agreement that he has not relied upon any representation or statement not set forth in the Agreement made by the City or their counsel or representatives with regard to the subject matter of the Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to the Agreement.

7. Successors and Assigns

The Agreement is binding on, and is made for the benefit of, the parties and all who succeed to their rights and responsibilities, such as any successors and/or assigns.

8. Confidentiality/Non-disclosure

The Parties, while acknowledging that this Agreement is a public document, agree that they will not discuss or disclose the facts and terms of this Agreement, except as provided for herein and as provided for by law. The Parties agree not to disclose this document, its contents or subject matter to any person other than their attorneys, accountants or income tax preparers and, where applicable to healthcare providers. This provision shall not prohibit either party from providing information regarding this matter to any person or regulatory body in response to a lawful request for information or government record, or prohibit either party from disclosing such information to the extent required by law.

9. Full Knowledge of Terms and Review Period

The City advises Kukobo to consult with an attorney of his choice and his expense prior to executing this Agreement. Kukobo hereby represents and warrants that, prior to executing this Agreement, he has fully discussed its meaning and effect with an attorney of his choosing, or that he has waived his right to consult with an attorney, and he fully understands its meaning and effect. Kukobo has agreed in open court that he will have three (3) days from the date it is provided to his to consider it before signing it.

10. Severability

The parties agree that if any court declares any portion of the Agreement – except the release in paragraph 3 – unenforceable, the remaining portions shall be fully enforceable.

11. Counterparts and Applicable Law

The Agreement may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret the Agreement shall only be brought in a court of competent jurisdiction of the State of New Jersey.

12. Enforcement

Kukobo agrees that if it is proven in a court of competent jurisdiction by clear and convincing evidence that he has willfully breached the Agreement, he will pay any attorneys' fees and costs expended in enforcing the Agreement. This is a material, bargained for provision of the Agreement.

YOU HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THE SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THE SETTLEMENT AGREEMENT AND GENERAL RELEASE YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS.

13. Announcement to the New Jersey Civil Service

The parties agree that a fully executed and filed copy of this Agreement shall be given to

New Jersey Civil Service Appeals Unit by the Office of Administrative Law to memorialize the parties' agreement.

BY SIGNING THE AGREEMENT, the Parties state that they have carefully read the Agreement, fully understand it and are signing it voluntarily.

THEREFORE, the parties to this Settlement Agreement, General Release and Confidentiality/Non-disclosure Agreement now voluntarily, freely and knowingly execute the Agreement.

Barasa Kukobo — Date

For the City of Union City — Date

The terms of this Settlement Agreement were agreed upon during the February 21, 2017 hearing. A copy of fully executed and filed Settlement Agreement shall be provided to New Jersey Civil Service Commission.

Honorable Gail S. Cookson, A.L.J.

5-3-17

STATE OF NEW JERSEY

In the Matter of Shanda Laberth
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2335
OAL DKT. NO. CSV 01784-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01784-17

AGENCY DKT. NO. 2017-2335

IN THE MATTER OF SHANDA LABERTH,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

John McDonnell, Esq., for appellant (McDonnell & Artigliere, attorneys)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: March 28, 2017 Decided: April 4, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Shanda Laberth, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on February 3, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 4, 2017 

DATE **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 4/5/17

Date Mailed to Parties: 4/5/17

/nd

OAL DKT. NO. CSV 1784-2017
AGENCY DKT. NO. 20 – 2017-2335

SETTLEMENT AGREEMENT

IN THE MATTER OF

SHANDA LABERTH

AND

HUNTERDON DEVELOPMENTAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 1/11/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O. 4:07 Chronic excessive absenteeism	Removal	1/14/2017
2.	NJAC 4A:2.2.3(a)4		
3.	(a)6		
4.	(a)12		
5.			

B. The Appellant SHANDA LABERTH withdraws his/her appeal and request for a hearing, and the Respondent Department of HUMAN SERVICES agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.4.7		
2.	4A:2.2.3(a)4, 6, 12	SUSTAINED	4 months suspension
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 1/14/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

N/A resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ms. Laberth 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I Appellant understands the seriousness of these attendance disciplinary charges and agrees this is a LAST CHANCE AGREEMENT; any future charge of chronic or excessive absenteeism from work without pay will result in her immediate removal.

J. UPON RETURN TO WORK APPELLANT MUST SCHEDULE AN APPOINTMENT WITH THE Employee Advisory Service AND BE SEEN WITHIN ONE MONTH OF HER RETURN TO WORK. APPELLANT MUST FOLLOW ALL RECOMMENDATIONS OF THE EMPLOYEE ADVISORY SERVICE OTHERWISE HER REMOVAL SHALL BE SOUGHT. APPELLANT SHALL INFORM HUMAN RESOURCES OF HER APPOINTMENTS.

K. APPELLANT ACKNOWLEDGES THAT REPORTING TO WORK AS SCHEDULED IS PARAMOUNT TO MAINTAINING HER EMPLOYMENT.

OAL DKT. NO. CSV 1784-2017

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3/28/17	Shanda Lapsett
DATE	Appellant
3/28/17	
DATE	On Behalf of Appellant
	John F. McDonnell, Esq
3/28/17	
DATE	RESPONDENT - DHS
~~DATE~~	~~On Behalf of~~

OAL DKT. NO. CSV 1784-2017

CERTIFICATION

I, Shanda LaBerth, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/28/17
DATE

Shanda LaBerth
NAME

5-3-17

STATE OF NEW JERSEY

In the Matter of Joanne Marino
Department of Children and Families

CSC DKT. NO. 2016-678
OAL DKT. NO. CSV 16936-15

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 04 2017 BW

The appeal of Joanne Marino, Assistant Family Service Worker 2, Department of Children and Families, removal effective June 30, 2015, on charges, was heard by Administrative Law Judge Irene Jones, who rendered her initial decision on March 22, 2017. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 3, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the removal has been modified, the appellant is entitled to back pay, benefits and seniority following her suspension until the date of her reinstatement. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 N.J. *Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the charges were sustained. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

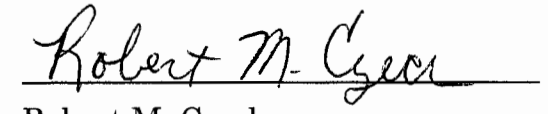
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies the removal to a six-month suspension. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A2-2.10. 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.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16936-15
AGENCY DKT. NO. 2016-678

IN THE MATTER OF JOANNE MARINO,
DEPARTMENT OF CHILDREN AND FAMILIES.

Nancy Mahony, Esq., for appellant Joanne Marino (Law Office of Nancy Mahony, LLC, attorneys)

Elizabeth A. Davies, Deputy Attorney General, for respondent Department of Children and Families (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 7, 2017 Decided: March 22, 2017

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Joanne Marino ("appellant" or "Marino") was employed by the Department of Children and Families ("respondent" or DCF) for more than twenty-four years. On June 29, 2015, she was issued a Preliminary Notice of Disciplinary Action (PNDA) that charged her with incompetency, inefficiency, failure to perform duties, conduct unbecoming a public employee, neglect of duty, violation of Department policy(ies) or procedural violation of Court Order, and other sufficient cause. The PNDA

suspended her with pay but advised that her removal was a possible penalty. On July 20, 2015, a Final Notice of Disciplinary Action (FNDA) was issued wherein appellant was removed from her position, effective June 30, 2015. The appellant timely filed an appeal with the Civil Service Commission.

On October 16, 2015, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. On September 26, 2016, the appellant moved for summary decision. Respondent filed an answer in opposition on September 28, 2016. The respondent's answer was treated by the undersigned as a cross-motion.

On February 3, 2017, respondent's cross-motion for summary decision was **GRANTED** on the issues of neglect, failure to perform duties, incompetency, and conduct unbecoming a DCF employee. However, summary decision was **DENIED** on the penalty of removal. On January 24, 2017, a hearing was held on the penalty issue only. At the hearing, the parties presented witnesses and evidence in support of their respective positions. The parties submitted post-hearing closing statements on February 7, 2017, at which time the record closed.

UNDISPUTED FACTS

Based on the record, I **FIND** the following facts to be undisputed, thus they are adopted as the **FACTS** herein:[1]

1. Appellant was employed by the DCF for more than twenty-four years. At the time of her termination, she held the title of assistant family service worker 2, a position she held since 2007.

2. On December 1, 2014, appellant was assigned to a supervised visitation with "Jamie,"[2] his sister, and their parents. The visitation occurred at a McDonald's in Bayonne, New Jersey, from 1:00 p.m. to 3:00 p.m.

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[1] For a full discussion of the facts, see Order Granting Partial Summary Decision that is attached hereto.

[2] Pursuant to N.J.S.A. 9:6-8.10a, the name of the child is fictitious.

3. In addition to appellant, two other caseworkers were present for part of the visit. A home health aide was also present. At some point, Jamie, who was playing with his sister in the McDonald's play area, fell and hurt his leg. Jamie began to cry and his parents brought him to the appellant, stating that he was hurt.

4. The home health aide and Jamie's parents suggested to the appellant that Jamie be taken to the doctor.

5. The appellant did not see that Jamie was seriously injured and elected not to take him to the doctor or a hospital for examination.

6. The appellant did immediately end the visitation and called Jamie's resource parent to inform him that they were returning to the house.

7. Jamie was carried to the car.

8. The appellant called Jamie's caseworker, the DCF switchboard operator, and her immediate supervisor, Rhonda Johnson. She was only able to speak to the switchboard operator.

9. Jamie's parents called his caseworker and informed her that Jamie had hurt his leg.

10. The appellant did not examine Jamie's leg and/or touch him.

11. It was later revealed that Jamie had broken his leg.

FACTS

The DCF, the appointing authority herein, contends that the penalty of removal is appropriate and just.

In support of its case, the DCF presented the testimony of assistant area director Kristen Pinho ("Pinho"). Pinho testified that the role of an assistant family service worker (AFSW) includes supervising parent-child interactions during visits. If an incident occurs or if there is a problem during a visit, an AFSW is expected to seek supervisory assistance. Supervisory assistance is always available. In cases of immediate need, an AFSW is to act immediately, contact 9-1-1, and contact a supervisor. Appellant was an AFSW 2, and as a senior AFSW she should have had a more advanced skill set. Pinho concludes that the appellant's termination was just because she ignored the pleas of the child's parents to get immediate medical attention. Further, she failed to call 9-1-1. Appellant violated her duties, the duties of an AFSW 2 as set forth in R-1. She failed to assess the situation, conduct an interview, and gather the appropriate information to make a reasoned decision. (R-1.)

Pinho acknowledges that she and the appellant worked together for eighteen years, and she was appellant's supervisor for part of that time. She concedes that prior to this incident the appellant was good at her job. She does not dispute that she applauded the appellant's performance on an unrelated matter that was an extremely difficult case. (R-2.) However, she does not now believe that the appellant can function as an AFSW 2, in spite of her long-term experience with the DCF. Notwithstanding her view that the appellant should be terminated, she considers that the appellant's behavior in this incident was out of character because she is an extraordinarily compassionate person.

Pinho admits that appellant's Performance Assessment Review (PAR) (P-3) reflects a satisfactory rating for September 2014 through August 2015. The incident herein occurred during that PAR rating period. She did discuss the PAR rating with the appellant's direct supervisor, Rhonda Johnson. However, Johnson did not include this incident in the PAR and did not issue a revised evaluation after she spoke to her.

Pinho further acknowledged that the Office of the Public Defender, Law Guardian Section, conducted an investigation into this matter. It did not find substantiated abuse, but did find neglect for the risk of substantial injury. The Hudson County Prosecutor's

Office also conducted an investigation because of the injury and how it was inflicted. The investigation was concluded without any indictment.

Martha Thomas ("Thomas") and Olivia Ahumada ("Ahumada"), the appellant's coworkers, testified on her behalf. Thomas has known the appellant for twenty years. She was her last supervisor. She considers the appellant to be an outstanding AFSW 2, who went above and beyond her duties for her clients. Appellant was very generous, compassionate, and empathetic with her clients. Despite a heavy caseload, she did extra work, such as painting a client's family room. (P-5.)

Ahumada has worked for the DCF since 2002. She is a caseworker supervisor. She knows the appellant and is testifying on her behalf because she values and respects her. Appellant is hard working, organized, dependable, helpful, energetic, and loving. However, Ahumada acknowledged not having any personal knowledge about this incident.

Georgina Anzivino also testified for appellant. Her testimony essentially mirrored that of Thomas and Ahumada. She noted that the appellant has an extraordinary work ethic, but Anzivino conceded that she has no personal knowledge of this incident.

Rhonda Johnson, DCF supervising family service specialist 1, has worked for the DCF since 1999. She supervises three supervisors and their units. She supervised the appellant for two years. After being told about this incident, she spoke to the appellant. Exhibit P-3 is the PAR that she prepared. It included the December 2014 incident timeframe. Johnson stands by her positive PAR evaluation. The appellant was a great AFSW 2. She always did her assignments, and she was one of the best. Appellant did what was asked of her. The kids loved her and she loved them. She worked well with coworkers. Johnson was not consulted about appellant's termination. Under cross-examination, Johnson admitted that appellant did not call her about this incident on the date that it occurred. She did recall speaking to her one or two days after the incident. She admitted that this was unusual, since the appellant would usually call her, even at her home.

Joanne Marino, the appellant herein, testified that she is a high-school graduate. She started with the DCF on November 4, 1989, when she was twenty-nine years old. She was hired as a principal home service worker. She transported students, helped students, and would buy their groceries. A few years ago her title changed to AFSW 2. She loves her job and always wanted to be a case aide.

On December 1, 2014, after learning of Jamie's injury, she immediately ended the visit with the parents. Thereafter, she called the office and spoke to the switchboard operator. She also called Jamie's caseworker and spoke to her. Exhibit P-10 is a copy of her cell-phone records, and it shows that on December 1, 2014, she called the office at 2:32 p.m. Further, she called Mariann Mattia at 201-320-xxxx at least six or seven times. She also called the foster-parent worker in the Bayonne office three times. She never spoke to Rhonda Johnson on that day. However, Johnson's cell number is 201-452-xxxx, and appellant's phone records reveal that she called Johnson two to three times on that day. Prior to the incident, she had one CPR training session and one car-seat training session. She had no medical training.

P-13 is appellant's disciplinary history. She concedes that she has one prior infraction for using a State car improperly. In that incident, she drove a State car to a State training session and was fined $18.00 for the gas expense.

Under cross-examination, she admitted that on December 1, 2014, she called Johnson on her cell phone at 7:00 p.m. in the evening for one minute and at 7:21 p.m. for one minute. She further admitted that she told the prosecutor's office that she should have called her supervisor and should have gotten an ambulance after learning of Jamie's injury.

DISCUSSION AND CONCLUSION

The only issue is whether the penalty of removal is the appropriate penalty. It is well beyond dispute that New Jersey is a progressive-discipline jurisdiction. Town of West New York v. Bock, 38 N.J. 500 (1962). Under the doctrine of progressive discipline, a trier of fact must consider an employee's entire disciplinary history and not

just the incident that lies before it. In re Wilkinson, No. A-2355-11T1 (App. Div. February 24, 2014), <http://njlaw.rutgers.edu/collections/courts/>, affirms that even in the most egregious cases, the doctrine of progressive discipline still attaches. Indeed, the Wilkinson court cited to In re Stallworth, 208 N.J. 182 (2011), wherein our Supreme Court discusses what should be considered when conducting a progressive-discipline analysis:

> To assure proper "progressive discipline," and a resulting penalty based on the totality of the work history, an employee's past record with emphasis on the "reasonably recent past" should be considered. Bock, supra, 38 N.J. at 524. This includes consideration of the totality of the employee's work performance, including all prior infractions. See Carter, supra, 191 N.J. at 484. . . . [P]rogressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that comprise the disciplinary record. The number and remoteness of timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where . . . the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing or seriousness of the previous offenses may make termination the appropriate penalty.
>
> [Wilkinson, supra, No. A-2355-11T1 (App. Div. February 24, 2014), <http://njlaw.rutgers.edu/collections/courts/>, (quoting In re Stallworth, supra, 208 N.J. at 199).]

In imposing the penalty of removal, the court noted that the appellant therein had a record of disciplinary actions.

> [Wilkinson]'s actions are sufficiently egregious and warrant his removal even without consideration of his prior employment record. Nevertheless, in this case [his] employment record also reveals two major disciplinary actions (a 30-day suspension in 2002 for engaging in a verbal and physical altercation with a co-worker and a 53-day suspension in 2004 for . . . leaving his assigned work area without permission, falsification and negligence) and several minor disciplines [sic] since his employment commenced in 1999. Finally, as noted above, even if the

> Commission found that [Wilkinson]'s conduct did not rise to the level of patient abuse and was, rather, inappropriate physical contact, his actions, coupled with this disciplinary history, justify his removal.
>
> [Ibid. (quoting In re Wilkinson, OAL Dkt. No. CSV 8568-09, Final Decision (December 9, 2011)) (citation omitted).]

Likewise, the court most recently affirmed this analysis in In re Knowlden, No. A-4963-11T2 (App. Div. April 30, 2014), <http://njlaw.rutgers.edu/collection/courts/>, where the appellant, a human services technician, was charged with physical abuse of a patient, inappropriate physical contact or mistreatment of a patient, falsification, conduct unbecoming a public employee, and violation of Department of Human Services (DHS) policy and procedures with regard to reporting an incident where the appellant was found to have punched a patient after being attacked. The administrative law judge found the appellant guilty of the charges and removed him from his position, finding the conduct so egregious as to warrant removal in spite of mitigating circumstances and a de minimis disciplinary history. On review, the Civil Service Commission modified the finding and the penalty. The Commissioner found that the punch was a reflexive act in response to the attack by the patient and that there was no intent to harm him. The Commission found the appellant guilty of inappropriate physical contact of a patient, constituting conduct unbecoming a public employee, and reduced the penalty to a six-month suspension.[3]

On appeal, the appellate court affirmed the Commission and held that their review would consist of a three-prong analysis. The first prong, the agency-review test, is whether there was an express or implied violation of legislative policies—whether the decision "was not premised upon a consideration of all relevant factors [or conversely] a consideration of irrelevant or inappropriate factors." Knowlden, supra, No. A-4963-11T2, <http://njlaw.rutgers.edu/collection/courts/> (quoting In re Warren, 117 N.J. 295, 297 (1989) (citations omitted)). The court concluded that one relevant factor was the employee's disciplinary history. Thus, a reviewing court may intervene in an agency's

[3] On reconsideration, the Commissioner acknowledged that Administrative Order (A.O.) 4:08 was amended to eliminate malicious intent, thus, In re Taylor, 158 N.J. 644 (1999), on which the Commission had relied, was not applicable. The Commissioner further acknowledged that Knowlden's action satisfied the DHS definition of physical abuse.

modification of a penalty when the agency fails to consider the significance of the employee's prior record. See Stallworth, supra, 208 N.J. at 200 (remanding where the Commission reduced the penalty without fully addressing employee's extensive record of misconduct).

The court further held that another relevant factor is the severity of the conduct, finding that "[a] reviewing court may intervene when the agency fails to consider the seriousness of the misconduct within the overall context of the work environment as it relates to public safety and the safety of other employees." Knowlden, supra, No. A-4963-11T2, <http://njlaw.rutgers.edu/collection/courts/> (citations omitted).

The Knowlden case also makes clear that although the DHS removed malicious intent from the A.O., the court found that the Commission could reasonably reduce the penalty to something less than termination where there is a lack of prior major discipline and a lack of malicious intent.

In this matter, the record reflects that the appellant does not have a prior major disciplinary history. Her conduct in this instance was isolated and aberrational. Indeed, it is not disputed that appellant was well respected by all her coworkers and supervisors. Her only disciplinary history is for a minor infraction, and it occurred more than twenty years ago. The penalty for the infraction was an $18.00 fine. While there is no doubt that appellant's inattentiveness/neglect conduct was inappropriate, I **CONCLUDE** that the conduct was isolated and no harm was inflicted by the appellant. Even if appellant had taken Jamie straight to the hospital, the outcome would have not been any different.

I **CONCLUDE** that after considering all of the aforementioned factors, a six-month suspension is the appropriate penalty herein. Respondent's removal penalty totally ignores appellant's minimal disciplinary history and her exemplary service to the DCF.

ORDER

Therefore, I hereby **REVERSE** the action of the respondent that terminated appellant from her position.

It is **ORDERED** that appellant is hereby suspended for six months, effective from her date of separation.

It is **ORDERED** that appellant be returned to her position with back pay and seniority.

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.

March 22, 2016

DATE

IRENE JONES, ALJ

Date Received at Agency: March 22, 2017

Date Mailed to Parties: MAR 24 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

sej

APPENDIX

WITNESSES

For Appellant:

Joanne Marino

Martha Thomas

Olivia Ahumada

Georgina Anzivino

Rhonda Johnson

For Respondent:

Kristen Pinho, Assistant Area Director

EXHIBITS

For Appellant:

P-1 Final Notice of Disciplinary Action

P-2 Memo from K. Pinho

P-3 Performance Assessment Review, 9/1/14–8/31/15

P-4 ID only

P-5 Letter dated 7/11/15

P-6 Letter dated 7/14/15

P-7 Letter dated 7/2/15

P-8 Letter dated 7/15/15

P-9 Ledger of calls

P-10 Cell-phone bill

P-11 Petition to return Marino to work

P-12 Letter dated 7/7/15

P-13 Disciplinary history

For Respondent:

R-1 Job description AFSW 2

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING PARTIAL SUMMARY DECISION
OAL DKT. NO. CSV 16936-15
AGENCY DKT. NO. 2016-678

IN THE MATTER OF JOANNE MARINO, DEPARTMENT OF CHILDREN AND FAMILIES.

Nancy Mahony, Esq., for appellant Joanne Marino (Law Office of Nancy Mahony, LLC, attorney)

Elizabeth A. Davies, Deputy Attorney General, for respondent Department of Children and Families (Christopher S. Porrino, Attorney General of New Jersey, attorney)

BEFORE **IRENE JONES**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Joanne Marino ("appellant" or "Marino") was employed by the Department of Children and Families ("respondent" or DCF) as an assistant family service worker for some twenty-four years. On June 29, 2015, she was issued a Preliminary Notice of Disciplinary Action (PNDA) that charged her with incompetency, inefficiency, failure to perform duties, conduct unbecoming a public employee, neglect of duty, and other sufficient cause, violation of Department policy(ies) or procedural

violation of Court Order. The PNDA suspended the appellant with pay but advised that her removal was a possible penalty. On June 30, 2015, a pre-termination hearing was conducted. The hearing officer imposed an immediate suspension, finding that appellant neglected her duties.

Appellant received a second PNDA on July 1, 2015. This second notice was identical to the first except that it indicated that the suspension was effective June 30, 2015, without pay. On July 20, 2015, a Final Notice of Disciplinary Action (FNDA) was issued wherein appellant was removed from her position, effective June 30, 2015.

Appellant filed an appeal with the Civil Service Commission, and on October 16, 2015, the matter was transmitted to the Office of Administrative Law for hearing as a contested case. On September 26, 2016, the appellant moved for summary decision. Respondent filed an answer in opposition on September 28, 2016.[1]

FACTUAL DISCUSSION

Appellant was hired by respondent DCF, Division of Child Protection and Permanency (DCPP) (formerly the Division of Youth and Family Services), on November 5, 1990, as an assistant family service worker 2 (AFSW2). (Resp't's Opp. to Summary Decision at Ex. A.) Appellant was hired on November 4, 1989 as a principal home service worker where she was required to transport and assist clients and with shopping for food, among other duties. She was elevated to an AFSW 2 in April 2007, a title that she held until her removal. According to the DCF, the duties of an AFSW2 may include providing transportation services, setting up medical or dental appointments, and the oversight of visitation between children and families. (Id. at Ex. C.) Appellant's duties included assisting caseworkers in their oversight of the care of children whom the court has placed in the DCPP's custody.

[1] Respondent's opposition is treated as a cross-motion for summary decision, pursuant to N.J.A.C. 1:1-14.6(h), (p).

By Order of the court dated September 8, 2014, the DCF had custody, care, and supervision of two children, four-year-old "Jamie"[2] and his younger sister. The court Order authorized the DCF to provide or secure routine and emergent medical treatment for the children. Supervised visitation between the parents and the children was permitted. The parents' request for unsupervised visitation was specifically denied by the court.

Jamie's case was assigned to the appellant for supervised visitation on December 1, 2014. (App.'s Mot. for Summary Decision at 3.) The supervised visit was to last for two hours, from 1 p.m. to 3 p.m., at a McDonald's located in Bayonne, New Jersey. Both of Jamie's biological parents were present for the visitation.

During the visit, DCF caseworkers Mariam Attia ("Attia"), who was assigned to the family, and Alexandra Troast ("Troast") stopped at the McDonald's. A home health aide was also present. (Resp't's Opp. at Ex. D.DCF33.) According to Attia's Certification, she was there to drop off bus tickets to Jamie's parents. (Id. at Ex. F:2.)

On her arrival, appellant informed Attia that she (Marino) was going to the counter to get coffee. (Ibid.) Appellant explained that it is common for DCF employees to cover for each other while one employee uses the restroom or is briefly indisposed, and that she expected Attia to remain with the family until she returned. (App.'s Mot. at 4). It is undisputed that while appellant was on line at the McDonald's, Attia and Troast approached her to notify her that they were leaving. (Resp't's Opp. at Ex. F:2; App.'s Mot. at 4.) As Attia left she saw Marino heading back to the play area. (Resp't's Opp. at Ex. F:2). The area is separated from the restaurant area by a large glass wall. The play area includes an apparatus that allows children to climb into a tunnel and down to the floor. (Ibid.)

The parties agree that during the visit Jamie somehow fell and hurt his leg. However, it is unclear whether Marino was present when he fell or whether she was still on line at the McDonald's counter.

[2] Pursuant to N.J.S.A. 9:6-8.10a, the name of the child is fictitious.

Marino avers that she did not see Jamie fall, and that his father was holding him in his arms when she approached after getting coffee. (Ibid.) However, the home health aide avers that appellant returned from buying coffee about ten to twenty minutes before Jamie was injured. (Resp't's Opp. at Ex. D:DCF34.) Similarly, the aide further avers that appellant was seated drinking her coffee when his father brought Jamie over crying. (Id. at Ex. D:DCF33.) Appellant recalls that Jamie cried, then smiled and laughed, and then cried again. (App.'s Mot. at 4.) Respondent asserts that Jamie only laughed because his parents were trying to distract him from the pain he was in. (Resp't's Opp. at 5.)

It is undisputed that Jamie said that his leg hurt. (App.'s Mot. at 4). Further, it is undisputed that appellant did not seek or immediately obtain emergency medical care for the child at the time of injury. (Ibid.; see also Resp't's Opp. at 6.) Although the home health aide suggested that Jamie be taken to the doctor, appellant did not see any indication that Jamie was seriously hurt or that he needed immediate medical attention. (App.'s Mot. at 4.) Rather, appellant immediately ended the visit and returned Jamie to his resource parent so he could be monitored to determine whether he needed medical attention. (Ibid.) Jamie was carried to appellant's car. None of the witnesses commented on whether there was any attempt by anyone to see if Jamie was capable of standing on his own.

At or around 2:34 p.m., appellant attempted to call caseworker Attia to notify her about Jamie's injury, but was unable to reach her. (Resp't's Opp. at Ex. F:2.) She left a voicemail explaining that Jamie had hurt his leg and that she (Marino) was going to contact his resource parent. (Id. at Ex. F:2.) Attia stated that appellant's voicemail indicated that she was bringing Jamie home so that his resource parent, M.S., could take him to the doctor. (Ibid.) At or around 2:35 p.m., appellant called a second time and spoke to Attia, reiterating what she had left in her previous voicemail. Attia does not verify that she spoke to appellant at that time. (Resp't's Opp. at Ex. F:2.) However, appellant claims that Attia did not offer her any guidance suggestions or alternatives to taking Jamie home to his resource parent. (App.'s Mot. at 5.)

At or around 2:36 p.m., both of Jamie's biological parents called Attia informing her that Jamie needed to go to the hospital immediately because his injuries were more severe than appellant had described. (Resp't's Opp. at Ex. F:2.) Indeed, Jamie was crying hysterically and was very upset. (Id. at 6.) As a result, Attia immediately contacted appellant to share the parents' concerns. (Id. at Ex. F:3.) Allegedly, appellant thought that the parents were exaggerating and that Jamie could see a doctor the following day. Attia states that despite the parents' concerns, appellant was bringing Jamie back to his resource parent because she was already in-route, she did not know where the nearest hospital was, and she did not have his Medicaid card. (Ibid.) Attia advised appellant that she could find the nearest hospital using her GPS. Attia denies appellant's contention that Attia told her to "use her own judgment" on how to proceed.

Appellant further avers that she attempted to contact her supervisor, Rhonda Johnson ("Johnson") on her cell phone, but that Johnson did not answer the call. (App.'s Mot. at 5, Ex. 12.) Johnson denied having any contact with appellant on December 1, 2014, nor did she receive a voicemail from appellant regarding Jamie's injury.

Appellant alleges that failing to reach Johnson, she attempted to contact her a second time and called the DYFS switchboard operator, Nabile Elraheb ("Elraheb") (Id. at 5), who reported that Johnson was in training and could not be disturbed. (Ibid.) Neither party presented a certification, interview, or affidavit from Elraheb. However, appellant submitted a list of calls she allegedly made and their relevant alleged outcomes. (Id. at Ex. 12).

Johnson asserts that she learned of Jamie's injury on December 2, 2014, through an internal department email. (Resp't's Opp. at Ex. J-2.)

Appellant asserts that on the thirty-minute drive from McDonald's to the resource parent's home in Harrison, Jamie did not cry. (App.'s Mot. at 5.) Appellant claims that upon arriving at the resource parent's residence, Jamie began crying when the caregiver asked him what was wrong. (Id. at 6.) The resource parent believed Jamie

needed immediate medical attention, proceeded to call 911, and sought medical treatment. (Ibid.) She picked up Jamie from his car seat and carried him inside until an ambulance arrived because he was unable to walk. (Resp't's Opp. at Ex. D.DCF36.) The resource parent recalled hearing bones cracking in Jamie's leg. (Id. at 6.) None of the witnesses indicated whether Jamie was asked to walk when he arrived at the residence. At 3:27 p.m., Attia received a hysterical phone call from the resource parent telling Attia that she was waiting for an ambulance to arrive to take Jamie to the hospital. (Id. at Ex. D.DCF31.)

Appellant stayed with the resource parent until the ambulance arrived. (App.'s Mot. at 5.) She offered to accompany them to the hospital, but the resource parent refused. (Ibid.) Jamie was then transported via ambulance to University Hospital in Newark, where he was treated by Dr. Maureen Rickerhauser in the emergency room. It was determined that he had a "significant fracture in his left femur which is the same as a broken leg." (Resp't's Opp. at Ex. D.DCF28.) He was admitted to the hospital at 9:49 p.m. Jamie's injury required surgery and the insertion of two small rods in his leg. (Id. at Ex. D.)

On December 10, 2014, appellant was interviewed at the Hudson South Local Office in Bayonne by investigators from the Office of the Public Defender ("OPD"), Law Guardian Conflict Investigators Unit, at 10:22 a.m. In this interview, appellant recalled that she only called Attia and the resource parent; she admitted that she should have called her supervisor. (Id. at 7.)

Christina Gervasi, the general manager of the McDonald's, stated that management was not informed of Jamie's injury at the time it occurred and that no video was available of the play area. (Id. at Ex. D:DCF35.)

While the DCF was conducting an internal investigation into the incident, appellant was reassigned to the Department's Intake Unit. Respondent now contends that the reassignment was done to prevent Marino from endangering additional children. (Ibid.)

On February 2, 2015, after the instant incident but prior to appellant's removal, appellant received a performance evaluation with an overall rating of "satisfactory." (App.'s Mot. at 7.) This rating was applicable to "problem solving," defined as "identifies and analyzes problems, uses sound reasoning to arrive at conclusions; finds alternative solutions to complex problems; distinguishes between relevant and irrelevant information to make logical judgments." (Ibid.) Appellant contends that because she received this review after the instant incident involving Jamie, the DCF was indicating that her handling of the incident with Jamie was appropriate. (Ibid.) However, the DCF states that the evaluation was performed prior to the completion of the internal investigation, and therefore the December 1, 2014, incident was not included in the evaluation. (Resp't's Opp. at 21). Despite the DCF's assertion, the interim performance evaluation designates the relevant rating period as between September 1, 2014, and August 31, 2015. (App.'s Mot. at Ex. 13.)

On or about February 19, 2015, the OPD, Law Guardian Conflict Investigators Unit, issued a report ("Report") that determined that child abuse was established for neglect of substantial risk of physical injury to the child, and that the appellant was the person responsible for medical neglect of the child. (Resp't's Opp. at Ex. D.DCF44.) It concluded that appellant knew or should have known to promptly obtain medical care for the child, or, at a minimum, seek guidance from a supervisor. As a result of this determination, the DCF asserts that it can no longer rely on the appellant to carry out her job duties and responsibilities as an assistant family service worker. (Id. at 3.)

On July 15, 2015, Johnson wrote a letter stating that the appellant was an asset to the Department. (Id. at 9.) In the letter, Johnson wrote that appellant had never received a complaint regarding her work with families or children and that she always went above and beyond. (App.'s Mot. at Ex. 1). Despite this, Johnson asserts that she had never directly observed the appellant working with families or children. (Resp't's Opp. at Ex. J:2.) In her certification, Johnson clarified that she considered appellant to be an asset because she was punctual and there had been no complaints regarding her work. (Ibid.)

Findings

Based on the above, I make the following **Findings** of **Fact**. On December 1, 2014, the DCF was responsible for the custody, care, and supervision of four-year-old Jamie. Appellant, an assistant family service worker 2, was assigned to accompany Jamie to a supervised visit with his biological parents at a McDonald's restaurant, during which she was responsible for his care. The child was injured during the visit. Appellant did not promptly notify her supervisor of the incident, and she did not seek immediate medical attention for the child. The OPD, Law Guardian Conflict Investigators Unit, issued a report that determined that child abuse was established for neglect of substantial risk of physical injury to the child, and that the appellant was the person responsible for medical neglect of the child. The DCF subsequently brought disciplinary charges against appellant, and removed appellant from her position effective June 30, 2015.

LEGAL ANALYSIS AND CONCLUSIONS

Under the New Jersey Uniform Administrative Procedure Rules, a party may move for summary decision regarding all or any substantive issues in a case. N.J.A.C. 1:1-12.5(a). Motions for summary decision may be granted if the papers and discovery, together with any supporting affidavits, show there is no genuine issue of material fact and that the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b).

A motion for summary decision is almost identical to the standard used for summary judgment under the New Jersey Rules of Court, which provides that summary judgment should be granted if

> 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. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the

> non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 536 (1995) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 251–52, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)), the New Jersey Supreme Court further refined the standard for summary decision, stating that the inquiry is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Thus, a court should deny a motion for summary decision only where the party opposing the motion has come forward with evidence that creates a genuine issue of material fact. Id. at 529. The Court stated:

> [a] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Id. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541.

As a result, for a party opposing summary decision to prevail, that party must file a responding affidavit setting forth specific facts demonstrating the existence of a genuine issue that can only be determined by an evidentiary proceeding. Ibid. The opposing party must demonstrate, moreover, that the disputed issue of fact is material

to the adjudication. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990). The genuinely disputed material fact must be essential to the decision in the case. Ibid. In addition, the opposing party must establish the issue with competent evidential materials. Robbins v. City of Jersey City, 23 N.J. 229, 240–41 (1957). "Bald allegations or naked conclusions" are insufficient to warrant an evidentiary hearing. J.D. v. Div. of Developmental Disabilities, 329 N.J. Super. 516, 525 (App. Div. 2000). If the opposing party fails to raise a material factual issue with competent proofs, then the issue should be resolved on summary decision. Frank, supra, 120 N.J. at 98–99.

In the instant matter, there is no genuine dispute of material fact that Jamie was injured while on a supervised visit during which appellant was ultimately responsible for his care, and that appellant did not report the child's injury to her supervisor or seek immediate medical attention for the child. Based on the facts and the analysis of the law, I **CONCLUDE** that appellant failed to exercise due diligence in determining the extent of Jamie's injury, specifically, whether he required immediate medical attention. I **CONCLUDE** that appellant's conduct constituted neglect, failure to perform duties, incompetency, and conduct unbecoming a DCF employee. Clearly, appellant neglected her duties as a DCF in failing to determine the nature and extent of Jamie's injury. Further, her failure to take Jamie to the hospital for examination also constitutes failure to perform her duties, incompetency and conduct unbecoming a DCF employee. I am persuaded that Jamie's parents and the home health aide alerted the appellant that Jamie was hurt. The appellant choose to ignore them and to simply hand Jamie off to his resource parents for further care.

However, the appropriate penalty is a materially disputed fact.

New Jersey is a progressive-discipline state. The theory underlying progressive discipline provides that "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing West New York v. Bock, 38 N.J. 500, 522 (1962)). An employee's past record includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been

previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

"While a single instance [of misconduct] may not be sufficient, numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Id. at 522. "[P]rinciples of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct." Herrmann, supra, 192 N.J. at 30.

Conversely, In re Carter, 191 N.J. 474, 484 (2007), recognizes that "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." See Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense). Thus, the question for the courts is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Polk License Revocation, 90 N.J. 550, 578 (1982) (considering punishment in license-revocation proceeding) (quoting Pell v. Bd. of Educ., 313 N.E.2d 321 (1974)).

Progressive discipline has also been used to mitigate the penalty for a current offense. Herrmann held that progressive discipline may be used to downgrade the penalty for an employee who has "a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions." In re Herrmann, supra, 192 N.J. at 27–28; see, e.g., Saniuk v. Div. of Youth and Family Servs., CSV 2251-01, Initial Decision (December 20, 2001), modified, MSB (March 18, 2002), <http://njlaw.rutgers.edu/collections/oal/> (Merit System Board reduced forty-five-day suspension to written reprimand because of employee's long record of public service without any major disciplinary infractions). In Stein v. Division of Youth and Family Services ("DYFS"), CSV 4336-01, Initial Decision (May 23, 2003), adopted, MSB (August 22, 2003), <http://njlaw.rutgers.edu/collections/oal/>, an ALJ recommended reduction of a penalty of removal for a DYFS worker who had been charged with improperly divulging confidential information, constituting conduct unbecoming a public

employee under N.J.A.C. 4A:2-2.3(a)(6). The ALJ found the worker's record from years of service in his position to be "more than commendable" and, in fact, "exemplary," and concluded that the employee's high performance ratings and praise from supervisors warranted a suspension instead of removal.

Likewise, it is undisputed that given the sensitive nature of work performed by the DCF, and the importance of the proper care and welfare of children, egregious conduct may demand removal. In In re Herrmann, the Court acknowledged public-policy concerns that the Division faces, including frequent contact with families, remediation of family conflicts, and investigations of abuse and neglect. In re Herrmann, supra, 192 N.J. at 35. DCPP workers are the people trusted to behave appropriately and to use sound judgment when making, at times, on-the-spot decisions about the families they visit and supervise. The DCPP must be able to rely on a worker's demonstrated good judgment from the moment of the initial investigation until the best interests of the child have been secured. Id. at 36.

Here, appellant has not engaged in numerous instances of misconduct during her career with the DCF and, as a result, is not subject to removal on the basis of habitual misconduct. Appellant's only prior disciplinary issue arose when she used a State vehicle for training purposes. (Resp't's Opp. at Ex. D:19). As a result, she was required to reimburse the DCPP the sum of $19.46. (Ibid.) This offense is a minor disciplinary infraction, and the penalty reflected that. However, notwithstanding the appellant's lack of major disciplinary history, it is undeniable that the injury Jamie sustained while under appellant's supervision is far more severe than misuse of a State vehicle. The OPD Report found this to be an isolated incident, meaning that appellant had never had an issue like this before involving Jamie or any other child that had been placed in her care. (Id. at Ex. D:DCF44). Indeed, appellant has the support of her coworkers, who signed a petition, as well as multiple letters from professionals who observed appellant's work with children and families throughout her career. (App.'s Mot. at Ex. 3-10).

Therefore, for the foregoing reasons, I **CONCLUDE** that the issue of the appropriateness of the instant penalty is a materially disputed fact.

ORDER

Based on the above findings and conclusions, summary decision is **GRANTED** to the respondent on the issue of neglect, failure to perform duties, incompetency and conduct unbecoming a DCF employee. Summary decision is **DENIED** on the issue of penalty.

This order may be reviewed by **DIRECTOR OF THE CIVIL SERVICE COMMISSION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

February 3, 2017

DATE

IRENE JONES, ALJ/ta

sej

5-3-17

STATE OF NEW JERSEY

In the Matter of Sabrina Minervini
Hudson County,
Department of Corrections

CSC DKT. NO. 2016-3429 & 2016-3430
OAL DKT. NO. CSV 05941-16 & 05942-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement, as clarified, in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NOs. CSV 05941-16 &
CSV 05942-16
AGENCY DKT. NOs.2016-3429 &
2016-3430

IN THE MATTER OF SABRINA MINERVINI, HUDSON COUNTY, DEPARTMENT OF CORRECTIONS.

Merrick H. Limsky, Esq., (Limsky, Mitolo, attorneys) for appellant, Sabrina Minervini

Chanima Odoms, Esq., (Assistant County Counsel) for respondent Hudson County, Department of Corrections

Record Closed: March 10, 2017 Decided: March 21, 2017

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

On April 15, 2016, the above referenced matters were transmitted to the Office of Administrative Law (OAL) for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for February 6, 2017, and before the hearing the parties agreed to settle the matter. An executed copy of the Settlement Agreement indicating the terms of the settlement was forwarded to the OAL on March 10, 2017 and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

March 21, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: 3-27-17

Date Mailed to Parties: MAR 27 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

lr

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 18th day of January, ~~2016~~ 2017 between the County of Hudson (hereinafter referred to as the "County") and Corrections Officer Sabrina Minervini (hereinafter referred to as "CO Minervini" or the "Employee").

WHEREAS, the Employee has been employed within the Hudson County Department of Corrections for 4.5 years as a Corrections Officer; and

WHEREAS, on February 1, 2016 and February 5, 2016, the County issued a Preliminary Notice of Disciplinary Action charging her with the following violations: incompetency, inefficiency or failure to perform duties; chronic or excessive absenteeism; neglect of duty, and other sufficient cause; and

WHEREAS, the County and Corrections Officer Minervini desire to resolve all outstanding issues with respect to the aforementioned Preliminary Notices of Disciplinary Action (hereinafter referred to as the "Disciplinary Action");

NOW, THEREFORE, in consideration of the premises and conditions set forth herein, the County and Corrections Officer Minervini agree as follows:

1. **DISCIPLINARY ACTION**

a. Corrections Officer Minervini pleads guilty to the above mentioned charge of excessive absenteeism stemming from the incidents giving rise to the charges contained in the Disciplinary Actions dated February 1, 2016 and February 5, 2016, a copy of which is deemed incorporated herein as if set forth at length. Corrections Officer Minervini specifically admits that she was absent no pay on several occasions in November 2015. All other charges are hereby dismissed.

b. Corrections Officer Minervini agrees to accept a disciplinary penalty of forty five (45) working days suspension, without pay, which shall be recorded as such with the New Jersey Department of Personnel.

c. Corrections Officer Minervini has served the forty five (45) days of suspension as ordered by the Hudson County Department of Corrections. Thus, no further suspension is necessary.

2. COMPLETE RELEASE AND COVENANT NOT TO SUE

In further consideration of the settlement hereinabove, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that they have not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of any

matter or thing that has happened, developed or occurred prior to the date of this Agreement related to the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual

orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which,

among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of

law or public policy concerning public health, safety or welfare. The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. NO DISPARAGING STATEMENTS.

Releasor agrees that she will not make any statement(s) that has, have, or can be expected to have the affect of disparaging the County or any of its employees.

4. NON ADMISSION OF LIABILITY.

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by Releasor, except as expressly provided in Paragraph 1 herein, or by the County, by whom any such liability is expressly denied.

5. INDEMNIFICATION.

If Releasor violates this Agreement in any way, Releasor agrees to pay in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the opposing party as a result of such violation, including reasonable attorney's fees.

6. CONSULTATION WITH ATTORNEY.

Releasor has consulted with his/her attorney and /or Union Representative with respect to this Agreement and has reviewed with his/her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

7. REASONABLE PERIOD OF TIME.

Releasor agrees that he/she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

8. COMPLETE AGREEMENT.

This Agreement contains the entire agreement between Releasor and the County, and each of them, with respect to the subject matter and supersedes all prior agreements, understandings and/or dealings

whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the County to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey. It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice.

9. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or

invalid part, term, or provision shall be deemed not part of this Agreement.

11. **ATTESTATION.**

Releasor represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that he enters into this Agreement voluntarily, of his own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

12. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to the

Hudson County Corrections Department, addressed to Deputy Director Ron Edwards, at 30-35 Hackensack Ave. South, Kearny, NJ 07032.

This seven (7) day revocation period may not be waived by Releasor.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Corrections Officer Sabrina Minervini, executed the foregoing Agreement this 18th day of January, 2016.

Sabrina Minervini

Employee Signature

Sworn and Subscribed to before me
this 18th day of ~~Jan~~, ~~2015~~. 2017

Notary Public of the
State of New Jersey

MERICK H. LIMSKY, ESQ.
ATTORNEY-AT-LAW
STATE OF NEW JERSEY

COUNTY OF HUDSON

Date:

By: Ronald P. Edwards

~~Chanima K. Odoms, Esq.,~~ DEPUTY DIRECTOR OF CORRECTIONS

~~Asst. County Counsel~~

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in the 7th recital on page 14 of this Agreement.

Date: _____

Signature of Employee

Angiulo, Nicholas

From: Angiulo, Nicholas
Sent: Wednesday, April 26, 2017 2:31 PM
To: 'mlimsky@limskymitolo.com'; lrosen@hcnj.us
Cc: Kalimah Ahmad
Subject: RE: Sabrina Minervini v. Hudson County, Department of Corrections - CSV 5941-16 and 5942-16 - Settlement

Mr. Limsky and Mr. Rosen:

Initially, please accept my apologies for the typo in my initial e-mail. As noted below by Mr. Limsky, the "gap" that I was asking about was actually 45 days, not 15 days. Additionally, the clarification indicated below by Mr. Limsky is sufficient.

I will ensure that the settlement gets placed on an upcoming Civil Service Commission agenda for acknowledgment.

Thanks for your cooperation!

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: mlimsky@limskymitolo.com [mailto:mlimsky@limskymitolo.com]
Sent: Wednesday, April 26, 2017 2:25 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; lrosen@hcnj.us
Cc: Kalimah Ahmad <kahmad@hcnj.us>
Subject: RE: Sabrina Minervini v. Hudson County, Department of Corrections - CSV 5941-16 and 5942-16 - Settlement
Importance: High

Hi Mr. Anguilo. We have agreed that the discipline should reflect a 15 day suspension for the original 30 day; a 30 day suspension for the original 60 day; and a 45 day unpaid leave of absence. In your initial email you indicated it would be a 15 day unpaid leave. However, that would not account for all of the time. The total initial suspension was 90 days, not 60. Please feel free to contact me with any questions.

Very truly yours,

Merick H. Limsky, Esq.
LIMSKY MITOLO
Attorneys at Law
224 Johnson Avenue, 2nd Fl.
Hackensack, NJ 07601
p (201) 488-5300
f (201) 408-7947
www.limskymitolo.com

-------- Original Message --------
Subject: RE: Sabrina Minervini v. Hudson County, Department of Corrections - CSV 5941-16 and 5942-16 - Settlement
From: "Angiulo, Nicholas" <Nicholas.Angiulo@csc.nj.gov>
Date: Wed, April 26, 2017 9:38 am
To: "'mlimsky@limskymitolo.com'" <mlimsky@limskymitolo.com>, "lrosen@hcnj.us" <lrosen@hcnj.us>

Mr. Limsky and Mr. Rosen:

As Ms. Odoms has indicated that she no longer represents Hudson County, I have sent this e-mail to Mr. Rosen. Per the below e-mail, I am still awaiting the clarification regarding the above-captioned settlement. Please respond as soon as possible as we do not want to delay this matter going before the Commission for acknowledgement.

Thanks!

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Tuesday, April 18, 2017 2:48 PM
To: 'mlimsky@limskymitolo.com' <mlimsky@limskymitolo.com>; 'codoms@hcnj.us' <codoms@hcnj.us>
Cc: 'lrosen@hcnj.us' <lrosen@hcnj.us>
Subject: Sabrina Minervini v. Hudson County, Department of Corrections - CSV 5941-16 and 5942-16 - Settlement
Importance: High

Mr. Limsky and Ms. Odoms:

I am the Deputy Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Sabrina Minervini indicating that her 30 and 60 working day suspensions are being modified to a 45 working day suspension.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, the we need to know how the suspension is being separated for the separate Final Notices. For example, will the appellant be given a 15 working day suspension for the first FNDA and a 30 working day suspension for the second FNDA, or something else? Additionally, we need to account for the remaining 15 suspension

days. Will the appellant be receiving back pay for those days or is that time to be categorized as an unpaid leave of absence, or something else?

Please let me know as soon as possible the intention of the parties regarding the above. An e-mail response is sufficient so long as it is agreed upon by the parties. The sooner the information is provided the better.

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

5-3-17

STATE OF NEW JERSEY

In the Matter of Emerald G. Platzer
Monmouth County,
Department of Parks

CSC DKT. NO. 2016-3946
OAL DKT. NO. CSV 7456-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 7456-16

AGENCY DKT. NO. 2016-3946

IN THE MATTER OF
EMERALD G. PLATZER,
MONMOUTH COUNTY,
DEPARTMENT OF PARKS.

Barry Isanuk, Esq., for appellant

Steven W. Kleinman, Special County Counsel, Monmouth County, for respondent

Record Closed: April 17, 2017 Decided: April 18, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 18, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 18, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 4/20/17

Date Mailed to Parties: 4/20/17

cmo

AGREEMENT AND RELEASE

This Agreement and Release ("Agreement") is entered into this 10th day of April **2017**, and is by and between Monmouth County and the Monmouth County Board of Recreation Commissioners (collectively, "County"), Emerald Platzer ("Platzer" or "Employee"), and CWA Local 1075 ("Union").

RECITALS

WHEREAS, Platzer is employed as a Park Ranger by the County, and is a member of the Union; and,

WHEREAS, on July 17, 2015, the County issued Platzer a Preliminary Notice of Disciplinary Action (DPF-31A) (the "Disciplinary Action") relating to an incident that occurred on June 14, 2015; and,

WHEREAS, the Disciplinary Action charged Platzer with violating N.J.A.C. 4A:2-2.3(a)(1), (2) (6), (7) and (12); and County Policies 104, 502 and 701; and,

WHEREAS, based on the charges and specifications contained in the Disciplinary Action, the County determined that a ten (10) working day unpaid suspension was the appropriate penalty; and,

WHEREAS, following a departmental hearing conducted on March 17, 2016, the charges and proposed penalty of a ten (10) working day unpaid suspension were sustained, and she thereafter was suspended from May 4, 2016 through May 17, 2016; and,

WHEREAS, Platzer timely filed an appeal of the Disciplinary Action to the New Jersey Civil Service Commission ("Commission"), which was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number CSV 7456-2016S; and,

WHEREAS, prior to the scheduling of a hearing date at the OAL on the Disciplinary Action, the parties engaged in settlement discussions; and,

WHEREAS, the County, Platzer and Union now desire to resolve all outstanding issues with respect to the Disciplinary Action via this Agreement.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the County, Platzer and Union hereby agree as follows:

1. **RESOLUTION OF THE DISCIPLINARY ACTION.**

   a. Platzer agrees the charges contained in the Disciplinary Action have been sustained.

   b. Platzer hereby withdraws her appeal with the Commission and request for a hearing at the OAL, and the parties agree that the following result will occur with regard to the sustained charges: The proposed penalty of a ten (10) day suspension shall be reduced to a five (5) day suspension, which is considered "minor discipline" under Commission regulations. As Platzer has already served the entirety of the ten (10) day suspension, the final five (5) days she served during her suspension shall be reclassified in her personnel records as an approved, but unpaid, administrative leave. Accordingly, she shall not be entitled to any back pay or other compensation as a result of this Agreement.

   c. The parties agree that Platzer's personnel and Civil Service records shall reflect that the Disciplinary Action was reduced to a "minor discipline."

   d. Platzer and the Union irrevocably waive any rights they might have to appeal or challenge the outcome of the Disciplinary Action in any forum whatsoever.

e. Platzer waives any and all claims arising from or relating to the Disciplinary Action including, but not limited to, back pay, benefits, seniority, attorneys' fees and/or costs.

f. The parties acknowledge that no pension or seniority time may be credited for periods for which Platzer is not paid by the County.

g. The County will amend its records to confirm to the terms of this Agreement.

2. **RELEASE AND RELINQUISHMENT OF CLAIMS.**

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, Platzer, along with her successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the County of Monmouth and the Monmouth County Board of Recreation Commissioners, as well as all of their officers, agents, employees, agencies and instrumentalities (collectively, "**Releasees**"), regardless of whether such claims are presently known or unknown to Releasor, with respect to the events, information or disputes giving rise to this matter, the Disciplinary Action, or the Agreement.

This release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States Constitution, the federal Fair Labor Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, seniority credit, attorneys' fees, equitable relief, or any other relief.

This release also specifically includes, but is not limited to, the right to receive any monetary relief in connection with the prosecution of a charge or suit brought on the Releasor's behalf by a third party, including any federal, state or local governmental agency or entity.

Nothing in this release shall apply to any vested benefits or any claim to determine or enforce rights with respect to said benefits, nor with respect to any claim filed under the New Jersey Workers Compensation Act.

3. **OLDER WORKERS BENEFIT PROTECTION ACT REVOCATION PERIOD.**

This Agreement is intended to comply with the federal Older Workers Benefit Protection Act (OWBPA), and Platzer acknowledges she specifically is waiving rights and claims under the OWBPA. Therefore, this Agreement and Release shall not be effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the OWBPA.

4. **ACKNOWLEDGEMENT.**

Platzer acknowledges that this Agreement shall resolve all issues related to the Disciplinary Action and that she has had the right and opportunity to discuss all aspects of this Agreement with her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

6. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

7. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

8. **AMBIGUITIES.**

Each party and their counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

9. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

10. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between Platzer, the County, and the Union, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

11. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

12. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other employee of the County. The Union expressly agrees not to use this Agreement as evidence of "past practice" in any forum.

13. **CONFIDENTIALITY.**

The parties agree that this document constitutes a confidential personnel record under OPRA and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. Platzer and the Union agree that they will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case they agree to notify the County before doing so to provide for an opportunity to oppose such a request), relating to the terms or execution of this Agreement.

14. **APPROVALS.**

The parties acknowledge that this Agreement is subject to approval by the Commission and shall be provided to the Commission and/or the assigned Administrative Law Judge for approval. Any disapproval by the Commission shall not interfere with the rights of either party to pursue the matter further.

15. **Emerald Platzer** agrees to and acknowledges the following:

(a) I agree and acknowledge that I was represented by and consulted with an attorney of my choosing throughout the negotiation and execution of this Agreement and Release. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement and Release before signing it.

(b) I agree and acknowledge that I have the right to reflect upon this Agreement and Release for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) days after executing the Agreement and Release to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: *Steven W. Kleinman, Special Monmouth County Counsel, Hall of Records, 1 East Main Street, Freehold, NJ 07728.*

(c) I understand and acknowledge that if I sign this Agreement and Release, along with the waiver attached hereto, prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

16. **ACKNOWLEGEMENT.**

By signing this Agreement and Release, Emerald Platzer acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE COUNTY TO CONSULT WITH AN ATTORNEY OF MY

CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND REPRESENT THAT I HAVE IN FACT CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Emerald Platzer executed the foregoing Agreement this 6 day of April 2017.

Sworn and subscribed to before me this 6 day of April 2017

Notary Public of the State of New Jersey
Attorney at Law, State of NJ
Barry D. Isanuk, Esq.

EMERALD PLATZER

Date: 4/10/2017

FOR:
County of Monmouth

By: Steven Klerner, Special County Counsel

AND

Monmouth County Board of Recreation Commissioners

Date:_____

By:_____

CWA Local 1075

Date:_____

By:_____ AFL CWA 1075

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 15(c) of this Agreement.

EMERALD PLATZER

Date: 6, April 2017

5-3-17

STATE OF NEW JERSEY

In the Matter of David Reid
Ann Klein Forensic Center,
Department of Human Services

CSC DKT. NO. 2016-1804
OAL DKT. NO. CSV 19728-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 04 2017 BW

The appeal of David Reid, Senior Medical Security Officer, Ann Klein Forensic Center, Department of Human Services, removal effective November 9, 2015, on charges, was heard by Administrative Law Judge Dean Buono, who rendered his initial decision on April 4, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 3, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of David Reid.

Re: David Reid

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 19728-15
AGENCY DKT. NO. 2016-1804

IN THE MATTER OF DAVID REID,
ANN KLEIN FORENSIC CENTER,
DEPARTMENT OF HUMAN SERVICES.

David P. Schroth, Esq., appearing for appellant, David Reid

Elizabeth A. Davies, Deputy Attorney General, appearing for respondent, Ann Klein Forensic Center, Department of Human Services (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 10, 2017 Decided: April 4, 2017

BEFORE **DEAN BUONO,** ALJ:

STATEMENT OF THE CASE

Appellant, David Reid (Reid or appellant), a Senior Medical Security Officer (SMSO) at respondent, Ann Klein Forensic Center (Center), appeals disciplinary action seeking his removal for conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), physical or mental abuse of a patient, client or resident in violation of

Administrative Order 4:08 C-3, and inappropriate physical contact or mistreatment of patient client, resident or employee in violation of Administrative Order 4:08 C-5. The appellant denies the allegations and contends that he acted appropriately.

PROCEDURAL HISTORY

On July 9, 2015, the Center issued a Preliminary Notice of Disciplinary Action suspending appellant without pay. On November 9, 2015, the Center issued a Final Notice of Disciplinary Action sustaining the charges and removing appellant from his position effective November 9, 2015. Appellant filed a timely Notice of Appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on December 3, 2015, N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on June 7 and October 25, 2016. The record remained open until March 10, 2017, for the receipt of transcripts and briefs.

FACTUAL DISCUSSION

TESTIMONY

For respondent

H.H. was an affable, forty-five-year-old male that has been a patient at the Center for nearly four years. He admitted to being self-abusive and bore the visible facial scaring and injuries to prove it.

On May 27, 2015, he admitted to "trying to hurt myself" and was banging his head on the window sill while smashing his fist on the same sill. This caused severe lacerations over his right eye and head, leading to a substantial amount of bleeding. He

recalled that "Reid had a One-to-One"[1] and never had a problem with Reid. "I don't know why he did it." Reid attempted to restrain H.H. but he was uncontrollable.

H.H. recalled that he began fighting and spitting at the security officers that were called into his room to assist Reid. At this point, the security officers were attempting to place H.H. in the Medical Safety Net (Net).[2] As he was being restrained by three officers, Officer Page (Page) was on his right side, Reid was on the left side, and Officer Glenn (Glenn) was up by his head, H.H. stated, "I can't breathe." This was because the outside of Reid's forearm was on H.H.'s throat. H.H. was very clear in his description that Reid's "Forearm was pushing on my throat."

H.H. passionately stated that, "I was not trying to hurt them," but "A lot of staff was beating on me" over the years. He admitted that at the time he may have yelled that 'they were going to lose their jobs!" After H.H. was put in the Emergency Restraint Chair (ERC) he indicated his intention of pressing charges. The next morning his neck was sore on the left side as well as the front of his throat.

Frankie Page has been employed at the Center from 1996 to 2006 and from 2008 to the present, as a Supervisor Senior Medical Security Officer (SSMSO).

On May 27, 2015, at approximately 3:30 a.m., H.H. was acting out and had a "One-to-One." The officers were attempting a Net restraint on H.H. and Page was on the left side of H.H.'s head and was securing his left arm, but H.H. was still spitting and resisting putting his arms into the Net. Suddenly, Reid leapt across H.H.'s body and

[1] A "One-to-One" was explained by the officer that due to the aggressive/violent/unpredictable nature of a particular patient, a full-time security staff member is assigned to them for their own safety and the safety of the staff members and patients.

[2] The "Net" was described by the officer as a Medical Safety Net protective restraint device that is comprised of mesh netting with arm holes and straps. The patient's arms are placed through the arm holes and the Net is then strapped to the bed as a cocoon. The FDA defines "protective restraint" at 211 C.F.R. Section 880.6760 as: "a device, including but not limited to a wristlet, anklet, vest, mitt, straight jacket, body/limp holder, or other type of strap that is intended for medical purposes and that limits the patient's movements to the extent necessary for treatment, examination, or protection of the patient or others."

choked him with his right hand. He described the choke as Reid's thumb having been on one side of H.H.'s neck and his other fingers having been on the opposite side of H.H.'s neck.

At that time, Reid was a distraction, so Page called for a supervisor to get Reid out of the room. As soon as Reid left, H.H. calmed down and complied with all commands. After the incident, Reid confronted Page in the hallway and said, "You don't know what you're doing. We can do whatever we want." According to Page, Reid and Page do not get along.

Randolph Brown (Brown) has been employed at the Center for eight years as a SMSO. He recalled an incident on May 27, 2015, involving H.H. who suffers from a self-injurious condition. H.H. was kicking, spitting and fighting with officers after they tried to subdue him. The officers were attempting to put H.H. in a Net restraint and were not successful. At that time, someone called for the chair restraint and Reid was on top of H.H. Reid was straddling H.H., but Brown could not see his hands. Brown described "straddling" as Reid's leg having been on either side of H.H.'s body. As he was being straddled, H.H. exclaimed that he could not breathe. Both Page and Glenn were telling Reid to stop choking H.H., but Reid did not comply. It was at this point that Page grabbed Reid and physically pulled him off H.H. Page then asked for Reid to be removed from the room and then H.H. calmed down.

James Jones (Jones) has been employed as a SMSO at the Center for five years. He recalled the incident with H.H. on May 27, 2015, where he was tasked with assisting other officers who were placing H.H. in the Net. He recalled that Page told Reid to stop choking H.H., but couldn't see what happened.

Renee Maxwell (Maxwell) has been employed at the Center for thirteen years, the past five years as a SMSO. On May 27, 2016, at 3:40 a.m., she was called to Unit 2 for a call of a patient injuring himself. Upon arrival, H.H. was hurting himself and was covered in blood. The Net was needed and Reid was called in to help because H.H. was wiggling out of the restraint. H.H. was so combative, officers needed to restrain him. Reid was laying on top of H.H., chest-to-chest, in such a way that they were in the

orientation of an X. At that point, Page was yelling for Reid to get out of the room. As soon as Reid left the room, H.H. calmed down. Maxwell also recalled that Reid and Page had an altercation afterwards.

Julie Baranowski (Baranowski) is a Registered Nurse (RN) who has been a Charge Nurse (CN) at the Center for six-and-a-half years. She recalls H.H. as a forty-five-year-old male who is self-abusive and was usually on a One-to-One with staff. On May 27, 2015, she was the CN and recalled that H.H. was being put in restraints. Although she could not see what was happening, she could hear that H.H.'s voice went up several octaves and it sounded as if someone was restricting his throat, or that he was in distress. Her notes were authored contemporaneous to reflect the same. (R-6, Tab 11).

On cross-examination, she conceded that an individual's voice could have gone up several octaves for a number of reasons. For example: being excited, fighting, or being tired. She also recalled that H.H. was bleeding and bloody, but not spitting.

Sandy Ferguson (Ferguson) has been employed by the Center for thirty years as Director of Training, but is also a RN. In her capacity as a trainer she provides staff development and training to all staff members in the facility. Training is inclusive of de-escalation techniques which includes assessing patient needs and providing it to the, so they can calm down.

She described that all staff receive annual training. Reid's attendance is accounted for in the 2014 class. Also, The Policy on Control and Defense Manual is also provided to each employee and discussed in the class. (R-7, Tab 20) (R-8, Tab 26). The policy covers a crisis management continuum, including the use of verbal commands and then increasing into restraint techniques, including only two holds that are permitted to deal with an unruly patient. Holds are discussed and taught in Advanced Emergency Holds (AEH). (R-15, Tab 24). AEH are described as different techniques to restrain a patient. This involves arm locks and only one requires a leg lock. The physical skills involved in making contact with an aggressive patient involve verbal techniques and de-escalation techniques. Reid took the AEH class on

December 8, 2014. The AEH class provides there is never a reason for an officer to climb on a patient, to lay or be near the chest, (R-14, Tab 23), nor should an officer have his face near the patient's face. In fact, there is nothing that permits contact above the diaphragm so as to not restrict or obstruct the airway.

On cross-examination, Ferguson demonstrated the techniques involved in restraint. It was specified that the individual who is restraining the patient must simply hold onto the limbs and allow the patient to tire out. H.H. was banging his hand and head so hard for ten minutes on the window that he was still bleeding. You are supposed to hold on to them, until they burn out. Since people eventually get tired, only four people are needed. However, Ferguson was not aware if more than four people were on the scene with Reid restraining H.H. Nevertheless, there is never a reason for someone to lie across or stretch across a person to restrain them. Nor is it permitted to control the individual's shoulders.

Doris Ballentine (Ballentine) has been employed at the Center for the last seven-and-a-half years as a RN and as an Investigator. To qualify as an investigator, she completed an investigative training course, which includes interviewing and evidence gathering. She explained that only nineteen percent of all investigations are substantiated.

In this case, after her investigation, she completed an Investigative Report. (R-17-Tab3). Her conclusion was that H.H. was harming himself and the Net was ordered because he was out of control. A number of officers went in and could not put H.H. in the Net and they needed more officers. It is her opinion that Reid had inappropriate contact with H.H., despite the fact that Lopez indicated that he did not see any abuse by Reid, and Officer Charles Glenn's (Glenn) handwritten statement also indicated no abuse witnessed by him.

However, Glenn's handwritten statement was well after the incident and it is clearly based on the evidence that there was "inappropriate contact" because of Reid's own statements. Reid indicates that his "hand was on the upper chest of H.H. to keep him from getting up." Also, Reid's statement indicates that "I pushed him back to his

mattress, my hand slides [sic] forward toward the neck" and "of course at this point it's going to look as if I'm choking H.H." (R-5, Tab 12).

For appellant

Officer Charles Glenn has been employed Ann Klein Forensic Center as a Medical Security Officer (MSO) for six years. On May 27, 2015, between 2:00 a.m. and 4:00 a.m., he had a "One-to-One" with H.H. who is a very unpredictable patient who would harm staff and himself. He began to act out and spit at Glenn, tried to throw urine and harm himself by banging his head against the wall. Glenn asked for a code "grey" and another officer came in. The supervisor also came in and asked for more help because H.H. was bloodied and combative. They tried to get him into the Net, but were not successful. Next, they tried to put him in the restraint chair. Again, this was not successful.

At this point, Glenn was on H.H.'s right side, up by his head, and Reid was next to Glenn on the right side of H.H., near his waist. Reid took H.H.'s right arm under control and also reached across and helped Page control H.H.'s left arm. Reid never choked H.H. nor did he do anything inappropriate. "It could have appeared that Reid was across H. H.'s body, but he wasn't."

Glenn was questioned about the discrepancies in his statements. When confronted with his first statement (P-3), Glenn says he misunderstood what was asked of him and the statement is incorrect. As a result, he thought about it more clearly and wrote the second statement. (P-2). Also, the (P-4) incident report "Incident Description" is his, but he did not write the statement, Patient stated, "he was choked by MSO Reid."

On cross-examination, Glenn indicated that H.H., "tried to throw urine," but nothing was in his original written statement about urine or spitting. Interestingly, he did note those facts in his subsequent statement. (P-2). Also, his new statement was written five months after the incident and solely to help Reid. The original Glenn interview was completed on May 28, 2015, at 12:00 a.m. (R-17, Tab 3).

Glenn specifically stated that Reid did reach over H.H. to try to control his other arm while lying across H.H. Reid was next to him the entire time, but in his first statement he indicated otherwise, that he did not know Reid's position. Again, the reason was that he "misunderstood the questions." Also, as further clarification, Reid was "not laying across H.H.," he was standing up. Finally, Glenn stated that it was not permissible to touch a patient on the chest, "but it does happen." He then testified it is not permissible but it happens when confronting a combative patient.

Officer Robert Green (Green) indicated that he had been employed at the Center as a MSO since 2001. He understands his job is ensuring the safety of patients.

Green testified that after the incident, he recalled being present when the investigator approached H.H. for the interview. He was assigned to relieve a MSO for H.H., when he pulled the covers over his head. The investigator wanted to speak with H.H. about the "choking incident."

Green recalled that the investigator asked H.H., "When Mr. Reid choked you, was it like this or this?" Green said, "You shouldn't be leading a witness. You should ask open-ended questions," an investigator would not lead a witness.

On cross-examination, Green conceded that he was not witness to any other interview of H.H. He did not know if H.H. was the one who described the incident, and Reid as choking him. Also, despite being previously charged with abuse of a patient, he found Reid's reputation to be, "pretty sound."

David Reid is currently employed at Volunteers of America as an Employment Coordinator. He took a civil service test in 2009, and worked until 2011, when he became a part-time staff member. In 2012, he became a full-time MSO at the Center.

Pointedly, Reid was asked if he knew H.H. His response was, "we know the patients better than anyone. H.H. and I are buddies and I would never hurt him. I ordered a soft mattress for him. He intimidates staff; his one hand is his main weapon."

On May 27, 2015, he had been on the job for six years and was assigned to patient V.A., when he could hear H.H. yelling and screaming two doors away. He left V.A. to peer in the hallway to see Glenn, while H.H. was banging his head and arm on the window sill. Soon after he went back to V.A.'s side, he was called to H.H.'s room at approximately 2:00 a.m.

Reid went into H.H.'s room and could see a doctor and others, "shaking their heads." He entered the room and saw H.H. battered and bloody. H.H.'s feet were being secured by two other officers and Page was on H.H.'s left arm. So, "I excused myself and tippy-toed" around the officers and took a position near H.H.'s head, next to Glenn. Reid was on the right and Glenn was on the left of H.H. Then he took five seconds to assess the situation.

Reid could see that Page's glasses fell off and he was foaming at the mouth. Reid claims that because Page is a smoker, he looked like he was in distress. Page was flustered and had his difficulties with the situation. In Reid's mind, it was clear that Page was the trigger mechanism for H.H.

At this point, H.H.'s hands were crossed at the wrist and Reid leaned over H.H. and grabbed both arms and spread them apart. Reid's had slipped up to H.H.'s neck. H.H. was still using abdominal sit-ups to head-butt people and spit on people. Reid then reached across and grabbed H.H.'s left arm with both hands and slipped it in the restraint sleeve. Reid placed his right hand on H.H.'s chest and did not hurt him because, "H.H. is my boy. Me and H.H. are boys. Everything I'm doing is to be honest," and "I'm being honest." Reid testified that Glenn's testimony was not correct chronologically.

It was at this point that "Page punched me." He reached across, hit and punched Reid and told him to leave the patient's room. Reid told Page that he is a dictator. At 3:30 a.m., Page started arguing with Reid that, "I don't like you" and you "brushed up against me." Reid testified about a prior history with Page and described an incident where he was "proactive" and Page was smoking and "maybe drinking." Smoking on the premises was not allowed and a supervisor thought it was Reid. He also testified

that Page comes in drunk and curses at people. Reid has smelled alcohol on him on several occasions, but never reported it. He felt that he can say that in court without getting in trouble.

Finally, Reid testified that there was nothing in any manual that addresses restraining a patient in the prone position. "You can lay across a patient and place your hands on the chest" to restrain or subdue the patient.

On cross-examination, Reid reiterated that it was permissible for a MSO to place their hands on a patient's chest or lay on the person, as long as they were not harming a person. He stated that Ferguson gave the wrong testimony and did not testify about the restraint techniques correctly. These were "discrepancies in her testimony that should be brought out."

Reid claims that he never laid chest-on-chest with H.H. Instead, he demonstrated that he leaned over him, without any contact and with one leg up in the air, all while holding H.H.'s flailing arms, while H.H. was doing sit-ups to head-butt and spit on staff. However, the bed is only two feet off the ground. He acknowledged that H.H. exclaimed, "I can't breathe," and Reid immediately got up. Reid said he only controlled H.H.'s upper body. "I was never choking [H.H.] intentionally. It would seem that I did it."

Reid also claimed that Page was a "drunk" but was promoted after this incident, despite being a "drunk." He also claimed that he never testified about "tip-toeing" upon entering H.H.'s room, or that Page's mouth was "ashy" and not "foaming." This happened because Page was "passing out and dehydrated." Reid disputes that the restraint chair came in at 3:19:17 a.m. because the video was never provided to counsel. In fact, Reid claims that he did not enter H.H.'s room at 3:18:49 a.m. He says the whole incident happened at 2:00 a.m., "an hour earlier." Reid claimed that he has a "razor-sharp memory."

Rebuttal Witness

Page acknowledged that he restarted smoking but has no troubles with physical ability to perform the job. "I'm good." He disagreed that he ever came to work intoxicated and that the statement by Reid about Page's glasses falling off is also untrue. In fact, he was not wearing glasses because they are only used for reading.

Page agreed that H.H.'s arm was loose and he was having difficulty restraining him, but then Reid came in and landed on top of him. This happened when H.H. was in a forty-five degree crunch position and Reid landed on H.H.'s torso and went "splat."

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After hearing the testimony and reviewing the evidence, I make the following findings of fact:

On May 27, 2015, the appellant was engaged in the restraint of patient, H.H. H.H. was known to be a difficult patient. He was aggressive and unpredictable, and had engaged in behaviors that presented a danger to himself and others. He was self-abusive. The appellant was charged with restraining him and keeping him safe. However, consistent with Brown, Page and Reid's testimony, Reid was on top of H.H.'s body and his hand slipped near H.H.'s neck.

The testimony of respondent's witnesses was especially credible and persuasive. Despite the varying degrees of observation on the position of Reid when it came to H.H., their testimony as a whole was more convincing in that Reid had inappropriate contact and had abused H.H.

Conversely, Reid's testimony was both credible in terms of his factual recitation of the case, but not credible with the manner in which it was given. Reid's own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. His testimony that H.H.'s hands were crossed at the wrist and Reid leaned over H.H., grabbing both arms and spreading them apart, was believable in concert with the testimony from the respondent's witnesses. Also believable with the testimony from the respondent's witnesses was Reid's testimony that his hand slipped up to H.H.'s neck but "I was never choking [H.H.] intentionally." Furthermore, when he stated that, "it would seem that I did it," was particularly poignant.

It was obvious that Reid attempted to "sell" his version of the facts to the undersigned. Particularly, not only was his recitation and demonstration of the contact with H.H. not credible, but also not realistic to believe that Reid could have performed that maneuver in that setting under those circumstances. Reid's claim that he never laid chest-on-chest with H.H. was not believed because it defies logic. The mechanics of the maneuver described by Reid are simply not possible. Also, when Reid testified that upon entering H.H.'s room, "I excused myself and tippy-toed" around officers, was not realistic under the circumstances. Furthermore, the fact that Reid constantly had to reassure the undersigned that he and H.H. were "boys" and that everything he said was "truthful" and "honest" because he has a "razor-sharp memory" detracted from any modicum of credibility. Coupled with the fact that, he discounted the testimony of Page

because he was a "drunk," Ferguson because her testimony had "discrepancies" and his own witness, Glenn, who's testimony was "chronologically" incorrect, undermined the believability of his testimony.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobarrista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The Center has charged the appellant with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), physical or mental abuse of a patient,

client or resident in violation of Administrative Order 4:08 C-3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee in violation of Administrative Order 4:08 C-5.

Respondent sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1988); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publically accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156, A.2d 821, 825 (1959). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App.Div.) (1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension of removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. At 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a public employee laying on top of and choking a mentally or emotionally disadvantaged patient. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of such is hereby **SUSTAINED**.

As to the charges of violation of section C-3 of the DAP, "Physical or mental abuse of a patient," the DAP at Supplement 3 defines physical abuse as:

> ... a physical act directed at a client, patient or resident of a type that could tend to cause pain, injury, anguish, and/or suffering. Such acts include but are not limited to the client, patient, or resident being kicked, pinched, bitten, punched,

> slapped, hit, pushed, dragged, and/or struck with a thrown or held object.

The actions of appellant do fit directly within the definition of physical abuse as set forth in the DAP. Appellant directed an act of retaliation at H.H. by laying on him that would tend to cause pan, injury, anguish, and/or suffering. Therefore, I **CONCLUDE** that the appointing authority has met its burden of proof that appellant did physically or mentally abuse patient H.H. pursuant to DAP section C-3.1 and that this charge is **SUSTAINED**.

With regard to the charge of a violation of section C-5.1 of the DAP, "Inappropriate physical contact or mistreatment of a patient," the appointing authority has proven that appellant did act inappropriately by laying on to of H.H. and I **CONCLUDE** that the appointing authority has met its burden of proof on this issue and that this charge is also **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See, Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is well settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See, Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has a fairly unremarkable disciplinary record. It is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192, N.J. 19, 32 (2007) (DYFS worker who waved a let cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App.Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law).

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who could not balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Kluwsaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, and the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action terminating appellant were justified.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), physical or mental abuse of a patient, client or resident in violation of Administrative Order 4:08 C-3, and inappropriate physical contact or mistreatment of a patient, client, resident or employee in violation of Administrative Order 4:08 C-5 be **SUSTAINED**. I further **ORDER** respondent's action terminating the appellant be **AFFIRMED**.

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

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

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

April 4, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 4/4/17

Date Mailed to Parties: 4/4/17

/vj

APPENDIX

LIST OF WITNESSES

For appellant:

Charles Glenn, MSO
Robert Green, MSO
David Reid, appellant
Rebuttal Witness, Frankie Page, SSMSO

For respondent:

H.H., patient
Frankie Page, SSMSO
Randolph Brown, SMSO
James Jones, SMSO
Renee Maxwell, SMSO
Julie Baranowski, RN
Sandy Ferguson, RN and Director of Training
Doris Ballentine, RN and Investigator

LIST OF EXHIBITS

For appellant:

P-1	Lopez Interview Statement, dated May 28, 2015
P-2	Hand-written statement from Glenn, dated October 20, 2015
P-3	Glenn Interview Statement, dated May 28, 2015
P-4	Incident Report, dated May 27, 2015
P-5	Reid Interview Statement, dated June 3, 2015

For respondent:

R-1, Tab 9	Page Statement, dated May 28, 2015
R-2, Tab 10	Special Report, dated May 27, 2015
R-3, Tab 8	Brown Statement, dated May 28, 2015
R-4, Tab 5	Jones Statement, dated May 27, 2015
R-5, Tab 4	Report of Renee Maxwell, dated May 27, 2015
R-6, Tab 11	Baranowski's Notes, dated May 28, 2015
R-7, Tab 20	Attendance
R-8, Tab 26	Policy on Defense and Control
R-9, Tab 27	Manual Policy and Procedure
R-10, Tab 28	Emergency Procedures
R-11, Tab 29	Instructor Manual
R-12, Tab 21	Therapeutic Options Roster
R-13, Tab 22	Therapeutic Options Quiz
R-14, Tab 23	Advanced Emergency Holds
R-15, Tab 24	Advanced Emergency Holds
R-16, Tab 25	Emergency Restraint Chair (ERC)
R-17, Tab 3	Investigative Report
R-18, Tab 31	Disciplinary Action Program
R-19, Tab 2	Final Notice of Disciplinary Action
R-20, Tab 19	Prior Disciplines

5-3-17

STATE OF NEW JERSEY

In the Matter of Isaac Reyes
Camden County,
Department of Corrections

CSC DKT. NO. 2016-3162
OAL DKT. NO. CSV 07433-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 04 2017 BW

The appeal of Isaac Reyes, County Correction Officer, Camden County, Department of Corrections, 120 calendar day suspension, on charges, was heard by Administrative Law Judge Catherine A. Tuohy, who rendered her initial decision on March 28, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 3, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

Re: Isaac Reyes

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 07433-16
AGENCY DKT. NO. 2016-3162

IN THE MATTER OF ISAAC REYES, CAMDEN COUNTY, DEPARTMENT OF CORRECTIONS.

Micole C. Sparacio, Esq., for appellant (The Vigilante Law Firm, P.C., attorneys)

Antonieta Rinaldi, Esq., for respondent (Camden County, Office of County Counsel)

Record Closed: February 21, 2017 Decided: March 28, 2017

BEFORE **CATHERINE A. TUOHY**, ALJ:

STATEMENT OF THE CASE

Appellant, Isaac Reyes, a Corrections Officer at Camden County Correction Facility (respondent) appeals a 120-day suspension he received as major discipline as a result of his participation in posing for a photograph with other corrections officers inside a jail cell on November 9, 2014 and the subsequent Internal Affairs investigation surrounding same. Appellant was charged with violations of N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7) Neglect of duty; N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause; Camden County Corrections Facility

Rules of conduct:1.1 Violations in general; 1.2 Conduct unbecoming; 1.3 Neglect of duty; 2.10 Inattentiveness to duty; 3.2 Security; General Order# 73, #74; and Internal Affairs order #001; et al. The appellant denies the allegations and maintains he did nothing wrong.

PROCEDURAL HISTORY

On March 13, 2015 respondent issued a Preliminary Notice of Disciplinary Action (R-1, page 1) setting forth the charges and specifications made against the appellant. After a departmental hearing on January 27, 2016, the respondent issued a Final Notice of Disciplinary Action (R-1, page 2) on February 16, 2016 sustaining the charges in the Preliminary Notice and suspending appellant from employment for 120 days. Appellant appealed on March 4, 2016 and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on May 16, 2016, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13. The hearing was held on February 8, 2017. The record remained open to allow the parties to submit post-hearing submissions and the record closed on February 21, 2017.

FACTUAL DISCUSSIONS AND FINDINGS

John Jones has been employed by the respondent for seventeen years: thirteen years as a corrections officer; four years as a sergeant; and one month as a lieutenant. At the time of this incident, he was a sergeant in the Internal Affairs Department (IA). He has been in IA for ten years. His primary duties involve conducting criminal and administrative investigations and preparing reports. He prepared a five page IA report in connection with this case (R-2). Lt. Jones stated that on December 30, 2015, his supervisor gave him a photograph (R-3) of five correctional officers posing for the picture in a jail cell and requested an investigation to be conducted. Lt. Jones identified the five officers shown in the photograph as follows: the top left in the photograph is Officer John Gillen; Officer Jason King is below him gesturing with the middle finger; next to him kneeling, giving the #1 sign with his index finger, is Officer Isaac Reyes; Officer Matthew Bulzak has both hands on his belt and is to the right in the photograph;

next to him on the right is Officer Damion Pearson, who also is making the #1 sign with his finger. Lt Jones conducted an IA interview of Officer Reyes on January 26, 2015 which was audiotaped and later transcribed (R-4). During the IA interview, Officer Reyes admitted he was familiar with the policies and procedures of the correctional facility. He knew that personal cell phones are not permitted as they are considered contraband. He also identified all of the officers in the photograph (R-3). Lt. Jones testified that during his IA interview, Officer Reyes was not forthcoming and that he lied and made excuses. He denied posing for the photograph and he denied knowing it was Officer Michael Jacobs personal cell phone. He believed it was the official county camera that Officer Jacobs was using. Officer Reyes was in the process of conducting the shakedown in the toilet area of the cell and he looked up and Officer Jacobs took the photo with the county camera. Officer Reyes could not describe the county camera. Lt. Jones described the county camera as being a red Nikon camera with a pop-up flash. The cell phone used by Officer Jacobs to take the photo was a black I-Phone 6, yet Officer Reyes insisted it was a county camera. He never admitted to seeing a cell phone. Lt. Jones advised Reyes that the consequences of lying to IA could include disciplinary charges as well as possible termination. Officer Reyes was adamant that he was giving a truthful statement. He never admitted to posing for the photo even though he was questioned why he was looking directly at the lens and making the #1 sign with his finger. Lt Jones also conducted IA interviews of Sgt. Pearson (R-5); Officer Bulzac (R-6); and Officer John Gillen (R-7). None of these officers denied posing for the photograph or said it was taken with the county camera. None of the other officers lied to IA. Officer Jason King was not interviewed by IA because he went out on an extended medical leave after the photograph (R-3) surfaced. As a result of his investigation, Lt. Jones recommended charges and issued a Supervisory Staff Complaint against Officer Reyes (R-8). He stated that the warden issues the charges and determines the penalty. Officer Reyes said he had previously seen Officer Jacobs with a cell phone so he believed he was allowed to have it. Lt. Jones stated that Officer Jacobs was previously reprimanded for having his cell phone in the jail before this incident. Lt. Jones stated that all of the officers who appeared in the photo (R-3) were brought up on charges.

John Gillen has been a Camden County Correctional Officer for twelve years. On November 9, 2014, he was involved in a "shakedown" while assigned to 3 North C Block. There were ten officers assigned to the shakedown including Officers Bulzac, Jacob, King, Reyes, and the supervisor, Sgt. Pearson. Officer Gillen identified all of the officers appearing in the photograph R-3, including himself shown on the top left corner of the photograph. Officer Michael Jacobs took the photo with his personal cellphone. They all posed for the photograph when Officer Jacobs said "Let's pose for a picture fellas". (R-7, page 6 line 236). Officer Gillen was familiar with the policies and procedures of the jail and knew that cellphones were not allowed in the correctional facility as they are contraband and could be a security breach if introduced to the inmates. He admitted observing Officer Michael Jacobs in possession of a personal cellphone that was smuggled into the prison, but did not notify his supervisor, Sgt. Pearson. He admitted this to IA. Officer Gillen also admitted to IA that Michael Jacobs took the photograph and that in his opinion it was clearly a cellphone and not a county camera. The photograph was not taken by surprise. He admitted that he made a bad judgment call allowing the photo to be taken of himself in uniform and with making the hand gestures. It was an embarrassment to himself and not indicative of his character as a law enforcement officer. He took full responsibility for his actions. Officer Gillen stated that he told IA the truth. On cross-examination, Officer Gillen admitted that he knew Officer Jacobs was using his personal cell phone on that date but did not report him to the supervisor because he did not want to get involved personally in what Officer Jacob was doing. Also, he did not want to report Officer Jacobs because they were friendly outside the facility.

Karen Taylor has been employed by the Camden County Department of Corrections for twenty years, the last three months as warden. When this incident occurred, she was the administrative captain. Her responsibilities included touring the facility; reviewing the cameras; and ensuring that the staff was following all policies and procedures. She would make decisions regarding discipline. She served as both an administrative captain as well as a regular captain assigned to a platoon. An administrative captain reviewed policy and recommended discipline.

This matter first came to her attention in early March 2015, following her receipt of the Supervisory Staff Report that was generated following the IA investigation concerning the circumstances surrounding the taking of the photograph R-3. Captain Taylor reviewed the photograph (R-3) of several staff members posing inside a cell inside the correctional facility that was taken by another staff member. She reviewed all of the documents including the IA report (R-2); the transcripts of the IA interviews of the officers involved (R-4, R-5, R-6, R-7); the Supervisory Staff report (R-8); Officer Reyes rebuttal (R-9); and the chronology of discipline of Officer Reyes (R-15). Based on her review of all the reports and prior discipline, she issued the Preliminary Notice of Disciplinary Action 31A (R-1) dated 3/13/15. She recommended a 120-day suspension, but the warden makes the final decision.

Captain Taylor found Officer Reyes guilty of violating the orders, policies and procedures of the Camden County Corrections Department. All of the other officers admitted to posing for the picture and admitted that Officer Jacobs took the photo with his personal cell phone. They all admitted it except Reyes. Officer Reyes impeded the IA investigation claiming that he did not do anything wrong. Captain Taylor stated she questioned whether Officer Reyes would have advised his supervisor if Officer Jacobs had been bringing drugs in to the facility. She thinks not which goes to her belief that he has no accountability for his actions. Captain Taylor feels that he has to be made to understand which is why she recommended 120 days. Captain Taylor admitted that a 120-day suspension was a significant penalty, but he could have been terminated. Captain Taylor signed the Preliminary Notice of Disciplinary Action (31-A) dated March 13, 2015 (R-1).

Captain Taylor was asked on cross-examination whether after seeing the photograph (R-3) was there anything else she would have needed in order to charge the officers involved. She stated that an investigation was necessary to make sure R-3 was the only photograph.

Officer Isaac Reyes testified on his own behalf. Officer Reyes was working November 9, 2014 and was assigned to a shakedown. He was shown R-3 and identified himself in the photograph that was taken on that date. He was interviewed by

IA on January 26, 2015 and saw the photograph for the first time. He has in the past been issued a department approved cell phone and an approved camera when he worked as a videographer. He explained that at the time many officers had authorized cell phones. On November 9, 2014, he did not know Officer Jacobs had a personal cell phone in his possession. He assumed Officer Jacobs had a county camera in his possession. Officer Reyes also stated that he didn't realize Officer Jacobs was taking a picture that day. At the time, they were shaking down the cell and Officer Reyes was in the toilet area of the cell, when Officer Jacobs walked in with the device. Officer Reyes could not describe the device but assumed it was a camera that day. He stated that it looked like a camera. He now knows it was Jacobs' cell phone which makes him upset. He always assumed his fellow officers were acting lawfully. Officer Reyes did not think Officer Jacobs was in possession of anything unauthorized. He did not remember why he was holding up his finger making the #1 sign. Officer Reyes stated that a picture can say a thousand words. He was not aware that Officer Jacobs was taking a picture. Officer Reyes was asked whether he believed the other Officers were lying as to what they saw that day. He testified no, that was their interpretation. He was very much on the defense during his IA interview, however he did not lie to IA. Officer Reyes feels that everyone was telling the truth based on what they thought that day.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App Div. 1958).

I deem Officer Reyes' testimony to be unbelievable. The other officers involved admitted to the photograph being taken by Officer Jacobs with his personal cellphone. Officer Reyes insisted he did not know Officer Jacobs was in possession of his personal cell phone and thought it was the county camera although he could not describe the device. Officer Reyes stated he did not pose for the photograph although he is looking right at the lens and gesturing with his finger and clearly posing in R-3. Based on the above, I do not believe Officer Reyes to be a credible witness.

In reviewing the record therefore, and after having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

1. Officer Reyes did pose for the photograph (R-3) in the jail cell on November 9, 2014 along with four other officers that was taken by Officer Jacobs with his personal cell phone.

2. Officer Reyes knew that Officer Jacobs used his personal cell phone in the jail to take the photograph.

3. Officer Reyes knew that personal cell phones were contraband and were not permitted in the jail.

4. Officer Reyes did not report Officer Jacobs to his supervisor.

5. Officer Reyes did not provide truthful answers during the course of the IA investigation.

LEGAL DISCUSSION

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline,

depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

Appellant raises the issue that the internal charges should be dismissed since the respondent failed to comply with the requirements of the forty-five-day rule as set forth in N.J.S.A. 30:8-18.2. This rule does not apply to general causes for major discipline listed under N.J.A.C. 4A:2-2.3(a). McElwee v. Bor. Of Fieldsboro, 400 N.J. Super. 388 (App. Div. 2008). Furthermore, since there was no appeal to the Commissioner for interim relief at the time the charges were brought pursuant to N.J.A.C. 4A:2-2.5(e), procedural irregularities are deemed waived.

Therefore, I **CONCLUDE** that any objections to the timeliness of the internal charges are waived.

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

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained - of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In reZeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation

of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't. of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Appellants status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1980). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304. N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes" [Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Officer Reyes allowed the contraband cell phone into the jail. He failed to report the contraband to his supervisor. He posed for the photograph in the jail cell with other officers all of whom were making various hand gestures which were unprofessional and brought discredit to the Department. In posing for the photograph he was not attending to his duties and breached security protocol. During the course of the IA investigation Officer Reyes was not forthcoming, impeded the investigation and lied to IA.

I **CONCLUDE** that appellant's conduct rose to the level of conduct unbecoming a public employee, and that the respondent has met its burden of proof on this issue.

Appellant was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term 'negligent' connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. Of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Officer Reyes allowed the contraband cell phone into the jail. He failed to report the contraband to his supervisor as he was required to do. He failed to report Officer Jacobs for bringing in the contraband to the jail. He allowed the photograph to be taken of him and the other officers with the contraband cell phone. By posing for the photograph he was inattentive and neglecting his duties. By posing for the photograph he brought discredit to the Department. Officer Reyes was under a duty to respond truthfully to IA and he did not. He failed to cooperate with the IA investigation and impeded the IA investigation by maintaining that the cell phone was a county camera. He failed to accept responsibility for his actions and his conduct.

I **CONCLUDE** that respondent has met its burden of proof in establishing that appellants conduct constituted neglect of duty.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct in posing for the photograph in the jail cell, failing to report the contraband cellphone and being untruthful throughout his IA interview, violates the implicit standard of good

behavior one would expect from a corrections officer. Therefore, I **CONCLUDE** that the respondent has met its burden of proof in establishing a violation of other sufficient cause.

The appellant was also charged with violations of C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1:2 Conduct Unbecoming; 1.3 Neglect of Duty; 2.10 Inattentiveness to Duty; 3.2 Security; General Order #73, #74; and Internal Affairs Order #001. Officer Reyes violated the C.C.C.F. Rules of Conduct (R-11, section 1.2) "Conduct Unbecoming" in that his conduct in posing for the photograph brings discredit upon the department. Officer Reyes also violated section 1.3 of the Rules of Conduct (R-11) regarding "Neglect of Duty in that he failed to notify his supervisor of the contraband that was brought into the facility and he had a duty to do so. He lied during the investigation. Furthermore, while he is posing for the picture, he is not paying attention to his duties and inattentiveness to duty is dangerous in a corrections facility (R-11 section 2.10) Allowing contraband into the facility and failure to report the contraband is a breach of security (R 11, section 3.2). Officer Reyes also violated General Order #73 (R-13) which requires all department employees to conduct themselves in a manner that will not bring discredit or criticism to the department. Common sense and good judgment are to be the guiding principles for the expected employee standard of conduct. Officer Reyes lied to IA and continued to lie to IA in his rebuttal by maintaining that the cell phone was a county camera. He did not accept responsibility for his actions. He also violated General Order #74 (R-14) which requires all sworn personnel to conduct themselves in a professional and ethical manner at all times. Officer Reyes conduct in this matter detracted from the professionalism required of all department members. Officer Reyes also failed to report the contraband as required by R-14, section 5. He also violated the Department of Corrections IA policy Order #001 (R-10, page 7, Section 9(h)) which states: "Employees being questioned are obligated to answer all questions truthfully or he/she will be subject to disciplinary action, up to and may include termination." All of the other officers told the truth that it was a cell phone and that they posed for the picture. Officer Reyes did not. He lied to IA.

I **CONCLUDE** that Respondent has met its burden of proof in establishing violations of these department rules of conduct and orders.

PENALTY

The Civil Service Commission's review of a penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. General principles of progressive discipline involving penalties of increasing severity are used where appropriate. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Brock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The question to be resolved is whether the discipline imposed in this case is appropriate.

For his actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 2.10 Inattentiveness to Duty; 3.2 Security; General Order #73, #74; and Internal Affairs Order #001. Appellant received a 120-day suspension from February 17, 2016 to June 15, 2016 (R-1). Respondent provided appellants chronology of discipline (R-15) which indicates he had been disciplined on three previous occasions. On September 15, 2014 and September 25, 2014 appellant received a reprimand for abuse of sick leave (AWOL). On June 18, 2013, he received a five-day suspension for neglect of duty. He

also received a one day suspension on June 18, 2013 for neglect of duty. On September 12, 2012 appellant received a thirty-day suspension for neglect of duty, failure to perform duty, insubordination, conduct unbecoming and various other rules of conduct arising out of an incident that occurred on May 11, 2012. On that date, appellant was in the control booth engaged in conversation when he should have been patrolling the moat area. During the time appellant was failing to perform his duties, an inmate was severely assaulted requiring hospitalization. Appellants failure to take accountability for his actions, his impeding the IA investigation and being untruthful during his IA interview, support the imposition of the 120-day suspension. After having considered all of the proofs offered in this matter and the impact upon the C.C.C.F. regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significant to warrant a penalty of a 120-day suspension. Therefore, I **CONCLUDE** that the imposition of a 120-day suspension was an appropriate penalty.

ORDER

I **CONCLUDE** that the respondent has sustained its burden of proof as to the charges of violating N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; C.C.C.F Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 2.10 Inattentiveness to Duty; 3.2 Security; General Order #73, #74; and Internal Affairs Order #001.

Accordingly, I **ORDER** that the action of respondent in suspending the appellant for 120 days is **AFFIRMED.**

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.

March 28, 2017
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: March 28, 2017 (emailed)

Date Mailed to Parties: 4/3/17

/mel

APPENDIX
WITNESSES

For Appellant:

Officer Isaac Reyes

For Respondent

Lt. Investigator John Jones

Officer John Gillen

Warden Karen Taylor

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action (31A) dated March 13, 2015
Final Notice of Disciplinary Action (31B) dated February 16, 2016

R-2 Internal Affairs Report by Investigator Sgt. John Jones

R-3 Photograph of Five Officers in jail cell

R-4 Internal Affairs Interview of Correctional Officer Isaac Reyes

R-5 Internal Affairs Interview of Correctional Officer Damion Pearson

R-6 Internal Affairs Interview of Correctional Officer Matthew Bulzak

R-7 Internal Affairs Interview of Correctional Officer John Gillen

R-8 Supervisor's Complaint Report by Investigator Sgt. John Jones

R-9 Rebuttal authored by Correctional Officer Isaac Reyes

R-10 Camden County Department of Corrections Internal Affairs Order #001

R-11 Camden County Department of Corrections Rules of Conduct

R-12 Camden County Department of Corrections Post Order #032

R-13 Camden County Department of Corrections General Order #073

R-14 Camden County Department of Corrections General Order #074

R-15 Correctional Officer Isaac Reyes Chronology of Discipline

5-3-17

STATE OF NEW JERSEY

In the Matter of Arti Sahni Ewing Township, Department of Administration, Finance and Public Works	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2015-1296 OAL DKT. NO. CSV 15050-14	:	

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15050-14

AGENCY DKT. NO. 2015-1296

IN THE MATTER OF ARTI SAHNI,
EWING TOWNSHIP DEPARTMENT
OF ADMINISTRATION, FINANCE AND
PUBLIC WORKS,

and

ARTI SAHNI,

Charging Party,

v.

TOWNSHIP OF EWING,

Respondent.

OAL DKT. NO. PRC 11649-16
PERC DKT. NO.CO-2015-024
(Consolidated)

Jason L. Jones, Esq., for appellant Arti Sahni (Weissman & Mintz, attorneys)

Rocky Peterson, Esq., for Ewing Township Department of Administration, Finance and Public Works (Hill Wallack, LLC, attorneys)

Record Closed: April 6, 2017

Decided: April 18, 2017

BEFORE **JOSEPH A. ASCIONE**, ALJ:

PROCEDURAL HISTORY

The matters were transmitted to the Office of Administrative Law (OAL) on for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On December 3, 2015, the matters were consolidated for hearing, with the Civil Service Commission having predominant interest.

STATEMENT OF THE CASE

The cases concern the appeal of appellant, Arti Sahni from the action of the respondent, Ewing Township. On April 6, 2017, the parties filed a fully executed Settlement Agreement and the record closed on that date. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with **THE CIVIL SERVICE COMMISSION AND THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by **THE CIVIL SERVICE COMMISSION AND THE PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission and the Public Employment Relations 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.

April 18, 2017
DATE

Joseph A. Ascione
JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 4/19/17

Date Mailed to Parties: 4/19/17

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement

Ascione

Hill Wallack LLP
Attorneys at Law

21 Roszel Road
P.O. Box 5226
Princeton, NJ 08543-5226
609.924.0808 *main* | 609.452.1888 *fax*
www.hillwallack.com

FILED

2017 APR -6 A 11:28

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Writer's Direct Dial: (609) 734-6311

April 5, 2017

Via Lawyers' Service
Clerk.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-0049

Re: Arti Sahni v. Ewing Twp.
OAL Docket No.: CSV-15050-2014-S
Agency Docket No.: 2015-1296
-and-
CWA Local 1032 v. Township of Ewing
PERC Docket No.: CO-2015-024

Dear Sir/Madam:

Enclosed for filing are an original and one copy of the following:

- Settlement Agreement and Release; and
- Ewing Township Resolution #17R-60

Kindly file the enclosed originals and return date-stamped "filed" copies to me in the enclosed return envelope.

Thank you for your services in this regard.

HILL WALLACK, LLP

Rocky L. Peterson, Esq.

RLP/cln

cc: Jason Jones
Hon. Joseph Ascione, A.L.J

J-1

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release (the "Agreement") is by and between Arti Sahni ("Sahni") and Ewing Township ("Ewing"), collectively referred to as the "Parties".

NOW, THEREFORE, in consideration of the promises and mutual covenants set forth in this Agreement, together with other good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the Parties hereby agree as follows:

1. Definitions. As used in this Agreement, any reference to Ewing shall include its predecessors and successors and all of its present, past, and future directors, elected officials, officers, employees, representatives, attorneys, insurers, reinsurers, agents and assigns, as well as all of its affiliates, parent or controlling corporations, partners, divisions and subsidiaries. Any reference to Sahni shall include, her family, heirs, administrators, representatives, agents, successors and assigns.

2. Conclusion of Employment. Sahni's employment with Ewing has concluded effective August 5, 2014. Sahni and Ewing desire to amicable resolve any and all claims arising out of Sahni's employment and separation therefrom.

3. Release. In consideration of the obligations created by this Agreement, together with other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, Sahni freely and unconditionally relinquishes, waives and releases Ewing from all possible claims, complaints, charges, liabilities, promises, obligations, demands, agreements, damages, debts, dues, sums of money, covenants, and lawsuits of any nature whatsoever, whether presently known or unknown, which may have arisen from the beginning of time through the date of signature on this Agreement, exclusive of a claim for breach of this Agreement. "All possible claims" includes those arising from, involving or relating to Sahni's claims set forth in EEOC, New Jersey Department of Labor, New Jersey Division of Civil Rights, PERC, OAL, and including but not limited to, any and all claims for damages of whatever kind or nature whatsoever, injunctive relief, attorneys' fees, expenses and costs. This release of claims includes but is not limited to, any and all claims for employment discrimination on the basis of age, race, color, religion, sex, national origin, veteran status, disability and/or handicap, marital status, sexual orientation, or any other characteristic protected by law; any and all claims for unlawful retaliation; and any and all claims in violation of any federal, state or local statues, ordinance, executive order, or common law doctrine including, but not limited to, claims for discrimination under Title VII of the Civil Rights Act of 1964, as amended; the Americans with Disabilities Act, as amended; the Americans with Disabilities Amendments Act of 2008; the Employee Retirement and Income Security Act of 1974, and any other applicable federal or state statue relating to employee benefits or pensions; 29 U.S.C. Sec. 1000; the Consolidated Omnibus Budget Reconciliation Act; the Occupational Safety and Health Act; the National Labor Relations Act; the Fair

Labor Standards Act; the Rehabilitation Act of 1972; the Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage Payment Law; and amendments to any and all of these laws; all New Jersey wage and hour, overtime, disability and family leave laws; the New Jersey Constitution; the U.S. Constitution; and any other federal, state, foreign, or local laws or regulations prohibiting employment discrimination of any kind; the common law, civil codes; any action in tort or wrongful discharge or breach of any other contract, express or implies, or breach of covenant of good faith and fair dealing, or express or implied public policy of the United States, the State of New Jersey, or any other state; any and all claims in tort or contract; any and all claims for compensatory, emotional distress or punitive damages; and any and all claims for attorneys' fees and/or costs.

4. Monetary Consideration. Within thirty (30) days of receipt of the executed Agreement by Sahni, Sahni will receive payment in the gross amount of Nine Thousand Three Hundred Twenty Five Dollars ($9,325.00) (referred to herein as the "Settlement Amount"). In full and final settlement of all claims between the Parties. The Settlement Amount will be paid by one (1) check in the amount of Nine Thousand Three Hundred Twenty Five Dollars ($9,325.00), made payable to Arti Sahni. The check identified above shall be sent by certified mail to the offices of Sahni's counsel, Jason Jones, Esquire. The Settlement Amount will be paid in exchange for Sahni's general release of claims and other promises in this Agreement, as recited in Paragraph 3 above.

5. Indemnification. Sahni understands that for the purpose of Federal and State Income Tax, Sahni shall be solely responsible for the allocation of the Settlement Amount referred to herein. Sahni acknowledges that Ewing has not made and makes no representations to Sahni as to the tax treatment of the Settlement Amount. Ewing has no monetary liability or obligation regarding payment whatsoever (other than delivering valid check in the sum referenced in Paragraph 4 of this agreement to Sahni and her counsel). Sahni agrees to bear all tax consequences, if any, attendant upon the payment to her of the Settlement Amount. Sahni agrees to defend, indemnify and hold Ewing harmless for any adverse tax consequences arising out of the payment of the Settlement Amount, including required tax withholdings, penalties, additions to tax and/or interest that Ewing is obligated to pay because of the tax treatment of the Settlement Amount.

6. Waiver of Re-employment. Sahni understands that she is waiving all rights to employment, re-employment and/or reinstatement with Ewing, and that should she apply for re-employment, Ewing may lawfully and by this Agreement decline such application with impunity.

7. All Compensation Due. Sahni specifically represents and warrants that she was paid all compensation due and owing and arising out of her employment with Ewing, including but not limited to wages, overtime, sick, bonuses, and any other form of compensation.

8. Agreement To Refrain From Filing Claims. Sahni represents that she has not filed any lawsuit or initiated any proceeding against Ewing, except the Claims identified above, Sahni also agrees not to bring any lawsuit or initiate any proceeding for any claim waived in any

Paragraph of this Agreement, and agrees, further, not to encourage anyone else to do so on her behalf, to the maximum extent possible under applicable law.

9. No Admission of Liability. This agreement is a compromise of disputed claims. Neither the execution of this Agreement nor any provision or term hereof constitutes an admission of liability or fault on the part of Ewing. Sahni acknowledges that Ewing is entering into this Agreement for the sole purpose of avoiding further protracted and expensive litigation. Nothing in this Agreement is an admission of liability by Ewing and nothing in this Agreement may be interpreted as an admission of liability.

10. Public Interest. Settlement of this matter is in the public interest and avoids the financial, legal and administrative burden which will result from continued litigation.

11. CONFIDENTIALITY. SAHNI AGREES TO KEEP THE TERMS OF THIS AGREEMENT, INCLUDING THE SETTLEMENT AMOUNT, AND THE NEGOTIATIONS LEADING TO THIS AGREEMENT, STRICTLY CONFIDENTIAL. SAHNI REPRESENTS THAT SHE WILL NOT DISCLOSE, SUCH INFORMATION TO ANYONE, EITHER DIRECTLY OR INDIRECTLY, WITH THE FOLLOWING EXCEPTIONS: SHE MAY DISCLOSE THE AGREEMENT TO HER SPOUSE, ATTORNEYS, ACCOUNTANTS, AND/OR TAX ADVISORS IN ORDER TO OBTAIN PROFESSIONAL ADVICE WITHIN THE SCOPE OF THEIR REPRESENTATION. THIS PARAGRAPH DOES NOT PROHIBIT SAHNI FROM STATING THAT THE MATTER HAS BEEN AMICABLE RESOLVED IN RESPONSE TO INQUIRIES REGARDING THE CLAIMS.

12. Non-Disparagement. Sahni agrees that she will not make any negative statements (oral, written, or otherwise) about Ewing or otherwise disparage Ewing.

13. Neutral Reference. In response to written employment verification and/or reference inquiries on behalf of Sahni to Ewing, Ewing will provide a "neutral" reference by confirming Sahni's employment with Ewing and providing her job title, dates of employment, and rate of pay. All inquiries must be directed in writing to Hilary Hyser, Personnel Director. Sahni's separation from employment shall be listed as a "Resignation in Good Standing" per N.J.A.C. 4A:2-6.3.

14. Medicare.

    a. While it is impossible to accurately predict the need for medical treatment, this settlement is based upon a good faith determination of the Parties to resolve a disputed claim. The Parties have not shifted responsibility of medical treatment to Medicare in contravention of 42 U.S.C. Sec. 1395y(b). The Parties resolved this matter in compliance with both state and federal law. The Parties made every effort to adequately protect Medicare's interest and incorporate such into the terms and conditions of this Agreement.

b. Sahni, and her counsel warrant that Sahni is not a Medicare beneficiary as of the effective date of this Agreement. Because Sahni is not a Medicare recipient as of the effective date of this Agreement, no conditional payments have been made by Medicare.
c. Sahni will indemnify, defend and hold Ewing harmless from any and all claims, liens, Medicare conditional payments and rights to payment, known or unknown, If any governmental entity, or anyone acting on behalf of any governmental entity, relating to Sahni's alleged injuries, claims or lawsuit, Sahni will defend and indemnify Ewing and its Insurer, and Ewing and its Insurer harmless from any and all such damages, claims, liens, Medicare conditional payments and rights to payment, including any attorney's fees sought by such entities.
d. While these claims are included in the waiver of claims set forth in Paragraph 3 of this Agreement, Sahni further expressly acknowledges and agrees that she is waiving any and all further actions against Ewing, including but not limited to any private cause of action for damages pursuant to 42 U.S.C. § 1395y(b)(3)(A) et seq.

15. Breach. Sahni is not aware of any other claim that could be asserted against Ewing. Sahni understands that if she brings any future legal action, proceeding of any kind against, or makes any claim against Ewing for any claim arising out of, on account of, based upon, or in any way related to all or any part of the subject matter of the Claims, or the prosecution or defense thereof (other than an action or claim based upon a breach of the Agreement) or if she otherwise breaches this Agreement, Sahni shall immediately return to Ewing 85% of any consideration she received under this Agreement. Ewing shall be entitled to recover any damages proven to result from such breach and shall be entitled to be reimbursed by Sahni for all reasonable legal fees, costs and expenses, including any lost profits, incurred by Ewing in defending itself in enforcing its rights relative to such matters.

16. Severability. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby, and said illegal or invalid part, term or provision shall be deemed not to be part of this Agreement. This Agreement expresses the complete and only understanding between the Parties with respect to its subject matter, and no promise, inducement or agreement not herein expressed has been made. No change or modification to this Agreement shall be binding on any Party unless it is in writing and executed by all Parties.

17. Acknowledgement of Waiver of Claims Under the ADEA.

a. Sahni acknowledges that she is waiving and releasing any rights she may have under the Age Discrimination in Employment Act of 1967 ("ADEA") and that this waiver and release is knowing and voluntary and complies with the Older Workers Benefit Protection Act ("OWBOA"). Sahni acknowledges that the consideration given for this waiver and release agreement is in addition to anything of value to which she was already entitled.
b. Sahni further acknowledges that she has been advised by this writing that (a) she should consult with an attorney prior to executing this Agreement; (b) she has at least twenty-one (21) days within which to consider this Agreement; (c) she has seven (7)

days following her execution of this Agreement to revoke this Paragraph 17 (the "Revocation Period"); (d) this Agreement shall not be effective until the Revocation Period has expired (the "Effective Date"); and by executing the Agreement in advance of the expiration of the 21 day period stated herein, Sahni thereby voluntarily waives the 21 day consideration period discussed in subsection (B) of this Paragraph.

18. Construction. This Agreement shall be governed by, and construed in accordance with, the laws of the State of New Jersey. Any disputes relating to this Agreement shall be resolved exclusively by a state or federal court in the State of New Jersey, and the Parties hereto consent to the jurisdiction of the venue of said courts. This Agreement shall be construed according to its plain language, and not strictly for or against any Party hereto. Captions herein are inserted for convenience, do not constitute a part of this Agreement, and shall not be admissible for the purpose of proving the intent of the Parties.

19. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

Arti Sahni

By: Arti Sahni, on her own behalf

Dated: March 23, 2017

Ewing Township

By: James McManimon
Title: Business Administrator

Dated: 4-5-17

THE TOWNSHIP OF EWING
Municipal Complex
2 Jake Garzio Drive
Ewing, NJ 08628

Phone: (609) 883-2900
Admin. Fax: (609) 538-0729
Clerk Fax: (609) 771-0480
Web Address: www.ewingnj.org

A RESOLUTION AUTHORIZING THE TOWNSHIP TO SETTLE A DISPUTE IN THE MATTER STYLED ARTI SAHNI V. TOWNSHIP OF EWING, DEPT. OF ADMINISTRATION, FINANCE & PUBLIC WORKS, DOCKET NO. CSV-15050-2014-S

Resolution #17R-60 WHEREAS, the Township has been implicated in a matter styled *Arti Sahni v. Township of Ewing, Dept. of Administration, Finance & Public Works*, Docket No. CSV-15050-2014-S (the "matter"); and

WHEREAS, the Township wishes to enter into a settlement agreement for complete and final resolution of the matter; and

WHEREAS, among other things, the terms of the settlement agreement require that the Township pay the monetary amount of $9,325.00 to claimant; and

WHEREAS, the settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation; and

WHEREAS, the Township Chief Financial Officer supplied a certification of availability of funds indicating that sufficient funds exist for payment under the settlement agreement.

NOW, THEREFORE, BE IT RESOLVED, by the Ewing Township Council that the Mayor and administration are authorized to enter into any and all documents necessary to finalize the settlement agreement for the matter styled as *Arti Sahni v. Township of Ewing, Dept. of Administration, Finance & Public Works*, Docket No. CSV-15050-2014-S, for the amount of $9,325.00.

IT IS SO RESOLVED.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2017 APR -6 P 3:07
FILED

Certification:

I, Kim J. Macellaro, Municipal Clerk of the Township of Ewing, hereby certify that the above is a true copy of a Resolution adopted by the Governing Body of the Township of Ewing at a Rescheduled Meeting of the Municipal Council of the Township of Ewing, County of Mercer, State of New Jersey held on the 16th day of March, 2017.

Kim Macellaro

Kim J. Macellaro, RMC
Municipal Clerk

5-3-17

STATE OF NEW JERSEY

In the Matter of Dominique Saint -Preux
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2372
OAL DKT. NO. CSV 01680-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01680-17

AGENCY DKT. NO. 2017-2372

IN THE MATTER OF
DOMINIQUE SAINT-PREUX,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: March 28, 2017 Decided: April 4, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Dominique Saint-Preux, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on February 3, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 4, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 4/5/17

Date Mailed to Parties: 4/5/17

/nd

OAL DKT. NO. CSV 1680-2017

AGENCY DKT. NO. 20 – 2017-2372

SETTLEMENT AGREEMENT

IN THE MATTER OF

Dominique Saint-Preux

AND

Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 1/11/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.O.4.08 B.2.1	Removal	1/13/2017
2.	B.3.1		
3.	E.1.1		
4.	NJAC 4A:2-2.3(a)6		
5.	(a)12		

B. The Appellant Dominique Saint-Preux withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.	Same As Above	Sustained	4 mos. Suspension
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 1/11/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: ~~Leave~~ Leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

N/A _____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ms. Saint-Preux 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands that any future acts of sleeping on duty, neglect of duty, improper use of cell phone, or medication policy breaches, will result in removal action and appellant's immediate suspension.

J. Upon Appellant's return to work she will be scheduled to complete training classes as required by Respondent.

K. Respondent expects Appellant to be responsible and upstanding in her duties and to take responsibility for her actions.

OAL DKT. NO. CSV 1680-2017

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

3-28-17 DATE	Dominique St Prex Appellant
3-28-17 DATE	Robert C Lattanzi On Behalf of Appellant
3-28-17 DATE	 RESPONDENT DHS
 DATE	 ~~On Behalf of~~

OAL DKT. NO. CSV 1680-2017

CERTIFICATION

I, Dominique St. Preux, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3-28-17
DATE

Dominique St Preux
NAME

5-3-17

STATE OF NEW JERSEY

In the Matter of Matthew Scheier
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-784
OAL DKT. NO. CSV 14517-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 14517-16

AGENCY DKT. NO. 2017-784

IN THE MATTER MATTHEW SCHEIER,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENT CENTER.

Raymond Montgomery, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)6, on behalf of appellant Matthew Scheier

Anita Pinkas, Director, appearing pursuant to N.J.A.C. 1:1-5.4(a)2 on behalf of respondent Department of Human Services, Hunterdon Development Center

Record Closed: March 23, 2017 Decided: April 6, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on September 26, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Matthew Scheier from the action of the respondent, Department of Human Services, Hunterdon Development Center. On March 23, 2017, the parties filed a fully executed Settlement Agreement. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 6, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 4/7/17

Date Mailed to Parties: 4/7/17

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement

J-1

OAL DKT. NO. CSV 14517-2016
AGENCY DKT. NO. 2017-784

SETTLEMENT AGREEMENT

IN THE MATTER OF:

Matthew Scheier

AND

Hunterdon Developmental Center
Department of Human Services

RECEIVED
2017 MAR 23 P 2:22
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

The parties in this appeal have voluntarily resolved all disputed matters and entered into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **September 8, 2016** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1.C.8.1, Falsification	**10 Days Suspension**	**Not Yet Served**
2.C.14.1, Willful damage to State Property	**In Total**	

B. The Appellant, **MATTHEW SCHEIER** withdraws his appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. C.8.1, Falsification	**Sustained**	**6 Days Suspension**
2. C.14.1, Willful Damage	**Sustained**	**in Total**

OAL. DKT. NO. CSV 14517-2016

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of **0** days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: **Appellant shall be scheduled to serve suspension of six days.**

For Removals, Complete the Following: **N/A**

1. To date, appellant has served a total of _____days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the appellant is as follows:_____
4. (Strike if not applicable) The appellant agrees to a:

____resignation in good standing

____general resignation

Which shall be effective _____(date). Any dates from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____

_____

_____

_____

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. **DEPARTMENT OF HUMAN SERVICES** (Respondent) shall amend Appellant's personnel records to confirm to the terms of the settlement. All internal records of the **Department of Human Services** will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of **MATTHEW SCHEIER'S** disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute in matters involving other employees.

G. Appellant waives all claims, suits, or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the **DEPARTMENT OF HUMAN SERVICES,** their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to events, information or disputes giving rise to this action u to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the American with Disabilities Act, the Family Leave Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the occupational Safety and Health Act, the Public Employees

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statures, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This wavier includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remained of this Settlement Agreement shall be fully enforceable.

I. **Appellant acknowledges that he must perform his duties according to the policies and procedures required of his title, Senior Food Service Handler, particularly involving meal prep, snack time and kitchen clean-up. Any other incident involving accountability pertaining to the kitchen utencils, other kitchen items and food items will be cause for his immediate suspension and removal being sought.**

OAL. DKT. NO. CSV 14517-2016

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

Monday, March 20th, 2017
DATE

Appellant

3-20-17
DATE

On Behalf of Appellant

3-22-17
DATE

RESPONDENT DHS

3/21/17
DATE

On Behalf of Hunterdon Dev. Ctr.

OAL. DKT. NO. CSV 14517-2016

CERTIFICATION

I, Matthew Schreier, Being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION,** my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Monday, March 20th, 2017

DATE APPELLANT

5-3-17

STATE OF NEW JERSEY

In the Matter of John Williams
Trenton Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2013-963
OAL DKT. NO. CSV 14860-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 04 2017 BW

The appeal of John Williams, Human Services Technician, Trenton Psychiatric Hospital, Department of Human Services, removal effective April 18, 2012, on charges, was heard by Administrative Law Judge Edward J. Delanoy, Jr., who rendered his initial decision on March 21, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a review of the video recording of the incident, the Civil Service Commission, at its meeting on May 3, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of John Williams.

Re: John Williams

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 14860-12
AGENCY DKT. NO. 2013-963

IN THE MATTER OF JOHN WILLIAMS,
TRENTON PSYCHIATRIC HOSPITAL

William A. Nash, Esq., for appellant John Williams (Nash Law Firm, attorneys)

Peter H. Jenkins, Deputy Attorney General, for respondent Trenton Psychiatric Hospital (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: February 13, 2017 Decided: March 21, 2017

BEFORE **EDWARD J. DELANOY, JR.**, ALAJ:

STATEMENT OF THE CASE

Appellant John Williams was removed from his position as a human services technician (HST) at the Trenton Psychiatric Hospital (TPH) after charges pertaining to a physical altercation with another employee of TPH on February 20, 2012, were sustained. The specifications underlying the charges set forth:

> Through a review of the video, on 2/20/12, you violated Executive Order 48, and TPH's zero tolerance of violence in the workplace by physically assaulting another employee.

> The video revealed that you used a clipboard as a weapon when you threw a clipboard with the intent to injury [sic] another employee. In fact, you caused injury to Charge Nurse, MK which required medical attention. Your behavior was threatening, intimidating and caused intentional injury to MK. Behaviors that comprise [sic] safety of employees and patients will not be tolerated. This is not the conduct one would expect from a TPH employee that is responsible for the well being of patients. Your conduct reflects negatively on TPH and is in violation of the policies prohibiting violence in the workplace.
>
> [R-1.]

PROCEDURAL HISTORY

On April 18, 2012, appellant was charged in a Preliminary Notice of Disciplinary Action. (R-1.) A departmental hearing was held and all charges were sustained. A Final Notice of Disciplinary Action was filed on October 1, 2012, removing appellant from his position effective April 18, 2012. (R-2.) Appellant appealed on October 10, 2012, and on October 23, 2012, the matter was filed at the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to Administrative Law Judge John F. Russo, Jr. on December 20, 2012. On March 26, 2013, the appellant passed away while the case was pending before Judge Russo and by request of appellant's counsel, the matter was held open while the parties applied for an administrator of the estate. On March 26, 2013, John Paul Dickerson was appointed as co-administrator of the Estate of John Williams. By letter dated September 30, 2014, the State requested this matter be placed on the inactive list for a period of sixty days to provide sufficient time to determine whether appellant's estate would enter an appearance in this case. No written order of inactivity was issued by Judge Russo; however, a motion to reinstate the appeal was submitted by appellant's counsel on January 8, 2015. The State opposed the motion and requested the motion be denied and dismissed as no documentation was produced nearly one year later as to whether appellant's estate was pursuing the appeal. Judge Russo granted appellant's order on August 13, 2015. Prior to the conclusion of this matter, Judge Russo was appointed to Superior Court and the case was reassigned to me on January 5, 2016. The Estate of John Williams

determined to continue this matter to a hearing. After several conference calls with the parties, a hearing date was scheduled and held on January 10, 2017. Summation briefs were fully submitted on February 13, 2017, and on that date the record closed.

FACTUAL DISCUSSION

Mary Kuriakose has been employed as a charge nurse by TPH for sixteen years. Kuriakose worked with HST Williams for ten years at TPH. Kuriakose knew Williams to have anger management issues, and he would slam doors and kick items in TPH.

On February 20, 2012, Williams arrived late for his shift. He was angry for some unknown reason. Kuriakose assigned Williams a temporary 1:1 observation of a difficult elderly female patient who had confusion issues, as well as a propensity to undress and touch herself inappropriately. Williams was unhappy with this assignment, and as he began observing the patient, he began screaming loudly. Williams was requesting to switch off the 1:1 of this patient, and for assignment to another patient. When Kuriakose responded negatively, Williams answered with profanity. Kuriakose requested Williams to quiet down, and he responded by throwing a hard clipboard at Kuriakose. The clipboard struck Kuriakose in her upper left arm, and Kuriakose later produced a statement and informed her supervisor of the incident. As a result of being struck by the clipboard, Kuriakose received a two-inch-long by half-inch-wide black mark on her upper left arm. Her left arm was not injured before the incident. She was treated and released from a local emergency room. Kuriakose did not call the police or file criminal charges against Williams. It was not against TPH policy for a male HST to undertake a 1:1 observation of a female patient.

Kuriakose viewed a video recording taken on February 20, 2012, showing an angle from inside TPH where the incident occurred. (R-10.) The video does not have audio. The video shows Williams at 1:42 a.m. At 1:45 a.m., Williams is seated and Kuriakose is standing. At 1:47 a.m., Williams stands and then sits, so that he can observe the patient. At 1:48, Williams is cursing at Kuriakose, and he throws a

clipboard at Kuriakose. The video is unclear as to whether it struck Kuriakose. Williams then stands up and retrieves the clipboard.

John Paul Dickerson is the co-administrator of his father's (John Williams) estate. Dickerson has worked at TPH for fifteen years. On February 20, 2012, Williams requested Dickerson to meet him. Williams discussed the incident with Dickerson. Williams told Dickerson that he requested to be switched to another patient, and that he exchanged words with Kuriakose. Kuriakose advised Williams that she would not make the switch, and that if he did not like it, he could retire. Williams stated that he never struck Kuriakose with the clipboard, and that he was very upset about the incident.

Audrey Houston worked with Williams at TPH for fifteen years. Williams was not a violent man, but he was outspoken. The day after the incident, Williams spoke to Houston. He advised her that he requested to be switched to another patient because his patient was stripping off her clothes and touching herself. Kuriakose advised Williams that she would not make the switch, and Williams was upset. Williams stated that he did throw the clipboard at Kuriakose, but that he never struck Kuriakose with the clipboard.

FINDINGS OF FACT

Given that the Estate of John Williams has challenged the credibility of Kuriakose, it is my obligation and responsibility to weigh the credibility of the witness in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives or bias of a witness are relevant, and 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). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, supra, 5 N.J. 514.

The respondent's evidence was the testimony of Kuriakose and the recorded video of the incident. The recording was from a camera located above the room where the incident occurred. This camera angle does clearly show a view of what occurred, and what actions were undertaken by Williams. (R-10.) Kuriakose subsequently filed a report confirming the incident. (R-6.) Respondent's position is that the video revealed that Williams threw a clipboard at Kuriakose, and that he hit Kuriakose with the clipboard. Williams had a responsibility to refrain from this type of action. The altercation was sufficiently egregious as to require the removal of Williams.

The Estate of John Williams did not produce any evidence refuting the respondent's evidence. Their position is that the clipboard did not hit Kuriakose, and that the video confirms this. They submit that the video reveals that Kuriakose does not react to the clipboard hitting her, and her left arm must have been injured prior to this incident. Although Kuriakose testified that she immediately reported the incident to her supervisor, the statement of Kuriakose's supervisor, Inese Conklin, reveals that Kuriakose did not report the matter to her supervisor until 3:00 a.m. (R-9.) Finally, the Estate of Williams argues that Williams was improperly assigned to a watch a female patient who was disrobing in front of him.

After my review of the video, I note that it is recorded with relatively high-definition clarity, and it does provide a sufficient view of the incident. Although audio is not provided, the camera shows Williams addressing Kuriakose for several minutes before throwing a hard clipboard at Kuriakose. The video is unclear as to whether it struck Kuriakose, and Williams then stands up and retrieves the clipboard. Based simply on that video, it is clear that John Williams throws a hard clipboard at Kuriakose. Unfortunately, because of his untimely death, John Williams could not share his version of what occurred on that day. Nevertheless, the Estate of John Williams urges that the clipboard did not hit Kuriakose, and the Estate argues that Kuriakose lacks credibility.

The Estate offers as proof the fact that Kuriakose does not react in the video to the clipboard allegedly hitting her. However, the unrefuted credible testimony of Kuriakose was that the clipboard did hit her, and that it caused bruising on her left arm. There is also no evidence in the record that the left arm of Kuriakose was injured prior to this incident. Although Kuriakose testified that she immediately reported the incident to her supervisor, the statement of Kuriakose's supervisor, Inese Conklin, reveals that Kuriakose did not report the matter to her supervisor until 3:00 a.m. I attribute this inconsistency in the testimony of Kuriakose to the passage of time and the dimming of her memory because of such time passage. Finally, the fact that Williams was assigned to a watch a female patient who was disrobing in front of him was not against TPH policy, according to the unrefuted testimony of Kuriakose. As such, this is also not an issue herein. For all of the aforementioned reasons, I give credibility to the testimony of Kuriakose.

The record in this matter includes video evidence and the credible testimony of an individual who witnessed or had knowledge of the incident they described. After carefully considering the testimonial and video evidence presented, and having had the opportunity to review the video on numerous occasions and to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

On February 20, 2012, Williams arrived late for his shift and angry for some unknown reason. Kuriakose assigned Williams a temporary 1:1 observation of a difficult elderly female patient who had confusion issues, as well as a propensity to undress and touch herself inappropriately. Williams was unhappy with this assignment, and as he began observing the patient, he began screaming loudly. Williams was requesting to switch off the 1:1 of this patient, and for assignment to another patient. When Kuriakose responded negatively, Williams answered with profanity. Kuriakose requested Williams to quiet down, and he responded by throwing a hard clipboard at Kuriakose. The clipboard struck Kuriakose in her upper left arm, and Kuriakose later produced a statement and informed her supervisor of the incident. As a result of being struck by the clipboard, Kuriakose suffered a two-inch-long by half-inch-wide black mark

on her upper left arm. Her left arm was not injured before the incident. It was not against TPH policy for a male HST to undertake a 1:1 observation of a female patient.

LEGAL ANALYSIS

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). Such a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). 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 preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

Based on the specifications in the charges, John Williams was charged with unbecoming conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(11). In addition, John Williams was charged with violations of Department of Human Services Disciplinary Action Program (DAP) C3-1, physical or mental abuse of a patient, client, resident, or employee; C5-1, inappropriate physical contact or mistreatment of a patient, client, resident or employee; and E1-1, violation of a rule, regulation, policy, procedure, or administrative decision. John Williams was removed from his duty as a result of this incident.

John Williams has been charged with violating N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Conduct unbecoming a public employee has been described as an elastic phrase that includes any conduct that adversely affects the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554–57 (1998); In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation and may be based upon the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

The video showed John Williams throwing a hard clipboard at his supervisor. Whether or not the clipboard struck Kuriakose, and I have found that it did, the actions of John Williams represent conduct that could adversely affect the morale of governmental employees or the efficiency of a public entity or conduct that has a tendency to destroy public respect for governmental employees and confidence in public entities. Such actions do not reflect the implicit standard of good behavior governing public employees consistent with public policy. Therefore, as to this charge, respondent has met its burden of proof that John Williams did commit an act of unbecoming conduct. I do so **CONCLUDE**.

John Williams has been charged with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. As to the charge of other sufficient cause, respondent has met its burden of proof that John Williams threw a hard clipboard at his supervisor. Therefore, respondent has proven that John Williams committed an act that violated standards of good behavior for an HST, and I do so **CONCLUDE**.

John Williams has been charged with violating DAP section C3-1, physical or mental abuse of a patient, client, resident, or employee. As to this charge, respondent has met its burden of proof that John Williams threw a hard clipboard at his supervisor, who is an employee of TPH. Therefore, respondent has proven that appellant committed an act of physical abuse of an employee, and I do so **CONCLUDE**.

John Williams has been charged with violating DAP section C5-1, inappropriate physical contact or mistreatment of a patient, client, resident or employee. As to this charge, respondent has met its burden of proof that John Williams threw a hard clipboard at his supervisor, and that the clipboard physically contacted her. The supervisor is an employee of TPH. Therefore, respondent has proven that appellant committed an act of inappropriate physical contact or mistreatment of an employee, and I do so **CONCLUDE**.

John Williams has been charged with violating DAP section E1-1, violation of a rule, regulation, policy, procedure, or administrative decision. Respondent alleges that appellant has violated TPH Policy and Procedure 3.500 ("Procedure"). The Procedure sets forth that:

> The safety and security of all employees at Trenton Psychiatric Hospital is of the utmost importance. It is the policy of the Hospital that threats and threatening behavior, harassment, intimidation, physical acts of violence, and intentional property damage committed on hospital property will not be tolerated.

> Any intent to use or use of, any object as a weapon is also a violation of this policy.
>
> [R-4]

Respondent has proven that appellant intended to use the clipboard as a weapon, in violation of the Procedure. Appellant also harassed and threatened a fellow employee of TPH. Therefore, respondent has proven that appellant committed a violation of the Procedure, and I do so **CONCLUDE**.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). The question to be resolved is whether the discipline imposed in this case is appropriate.

John Williams has been found guilty of unbecoming conduct, in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12). In addition, appellant has been found guilty of violations of DAP C3-1, physical or mental abuse of a patient, client, resident, or employee; C5-1, inappropriate physical contact or mistreatment of a patient, client, resident or employee; and E1-1, violation of a rule, regulation, policy, procedure, or administrative decision. John Williams has been removed for his actions on February 20, 2012.

The parties have stipulated that appellant has no prior disciplinary action on his record. While I am aware that the penalty of removal is substantial, I am satisfied that appellant's actions herein were egregious.

Appellant did physically abuse an employee of TPH. If an action of abuse is found, then the appropriate discipline is found in the DAP of the New Jersey Department of Human Services. (C-1.) This document calls for removal of an employee when abuse is found. (C-1 at 10.) There is no discretion allowed in the document. Concepts of progressive discipline or discussions of a range of disciplines are not to be considered. Such action from an employee in the position of appellant is unacceptable. It is impossible to see how the appointing authority could have continued to allow appellant to remain in his position. The removal of appellant was not inappropriate, and it was necessary to maintain the diligence and integrity of the appointing authority staff. I **CONCLUDE** that the finding of abuse requires removal, and that the action by the appointing authority was acceptable.

Appellant also committed inappropriate physical contact or mistreatment of a employee. The DAP calls for a penalty for a first offense ranging from official reprimand to removal. (C-1 at 11.) There is discretion allowed in the document for this violation. Concepts of progressive discipline or discussions of a range of disciplines may be considered for this violation. However, such action from an employee in the position of appellant is unacceptable. It is again impossible to see how the appointing authority could have continued to allow appellant to remain in his position. The removal of appellant was not inappropriate, and it was necessary to maintain the diligence and integrity of the appointing authority staff. I **CONCLUDE** that the finding of inappropriate contact requires removal, and that the action by the appointing authority was acceptable.

Finally, appellant violated the Procedure. The DAP calls for a penalty for a first offense ranging from counseling to removal. (C-1 at 16.) There is discretion allowed in the document for this violation. Concepts of progressive discipline or discussions of a range of disciplines may be considered for this violation. However, such action from an employee in the position of appellant is unacceptable. The appointing authority could not be expected to have continued to allow appellant to remain in his position. The removal of appellant was not inappropriate, and it was necessary to maintain the diligence and integrity of the appointing authority staff. I **CONCLUDE** that the finding of

the Procedure requires removal, and that the action by the appointing authority was acceptable.

Given the actions of appellant on February 20, 2012, imposition of major discipline is necessary to maintain the diligence and integrity of the appointing-authority staff. Appellant's behavior was serious and unprofessional. As a public employee, the appellant's actions must be above reproach.

Having considered all the proofs offered in this matter, and the impact upon the institution of the behavior by appellant herein, and having given due deference to the concept of progressive discipline, I **CONCLUDE** that appellant's misbehavior on February 20, 2012, was so significant as to warrant his removal. which, in part, is meant to impress upon TPH employees, as well as others, the seriousness of his infractions. Therefore, based on the totality of the record, I **CONCLUDE** that the imposition of removal was appropriate.

ORDER

I **ORDER** that the appeal of John Williams is **DENIED**, and that the disciplinary action of the TPH removing appellant is **AFFIRMED**.

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.

March 21, 2017
DATE

EDWARD J. DELANOY, JR., ALAJ

Date Received at Agency: 3/21/17

Date Mailed to Parties: 3/21/17

mph

APPENDIX

LIST OF WITNESSES

For appellant:

John Paul Dickerson
Audrey Houston

For respondent:

Mary Kuriakose

LIST OF EXHIBITS

Court exhibits:

C-1 Disciplinary Action Program of the New Jersey Department of Human Services

For appellant:

None

For respondent:

R-1 Preliminary Notice of Disciplinary Action, dated April 18, 2012

R-2 Final Notice of Disciplinary Action, dated October 1, 2012

R-3 New Jersey Executive Order 49

R-4 TPH Policy #3.500 Violence in the Workplace

R-5 For identification only

R-6 Mary Kuriakose written statement, dated February 20, 2012

R-7 For identification only

R-8 For identification only

R-9 Inese Conklin written statement, dated February 20, 2012

R-10 Video surveillance DVD

5-3-17

STATE OF NEW JERSEY

In the Matter of Troy Williams
Ann Klein Forensic Center,
Department of Human Services

CSC DKT. NO. 2016-2154
OAL DKT. NO. CSV 1906-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2017 BW

The Civil Service Commission, at its meeting of May 3, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 3, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 1906-16
AGENCY DKT. NO. 2016-2154

IN THE MATTER OF TROY WILLIAMS,
ANN KLEIN FORENSIC CENTER,
DEPARTMENT OF HUMAN SERVICES.

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Adam K. Phelps, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 28, 2017 Decided: April 3, 2017

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

April 3, 2017
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 4/7/17

Date Mailed to Parties: 4/7/17

/cb

51

OAL DOCKET NO. CSV 01906-2016
SETTLEMENT AGREEMENT

IN THE MATTER OF
TROY WILLIAMS
AND
STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES, ANN KLEIN FORENSIC CENTER

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated December 9, 2015, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6 conduct unbecoming a public employee	Removal	effective October 16, 2015.
2. DHS Disciplinary Action Program Admn. Order 4:08-C3- physical or mental abuse of a patient; and Admn. Order 4:08-C5- inappropriate physical contact or mistreatment of a patient.		

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.
4. The Respondent Department of Human Services/Ann Klein Forensic Center agrees to accept a Resignation in Good Standing` from Appellant Troy Williams effective October 16, 2015. Appellant Troy Williams agrees not to seek or accept employment

with the Department of Human Services or any of its subsidiaries, including Ann Klein Forensic Center, at any time in the future.

C. The Appellant Troy Williams withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the charges in paragraph A are withdrawn.

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Troy Williams' personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department of Human Services from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Human Services with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Troy Williams' disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against

Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

3/28/2017
DATE

Troy Williams

3/28/17
DATE

William A. North Esq
ON BEHALF OF Troy Williams

3/28/17
DATE

Charles Moore
ON BEHALF OF Respondent
Department of Human Services

03/28/17
DATE

Adam K. Phelps, DAG

CERTIFICATION

I, Troy Williams, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that as a result of this Settlement Agreement, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

3/28/2017 Troy Williams

DATE Troy Williams

5-17-17

STATE OF NEW JERSEY

In the Matter of Ashley Hinds
City of Plainfield,
Department of Public Affairs and Public Safety

CSC DKT. NO. 2016-2354
OAL DKT. NO. CSV 01849-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 17, 2017 BW

The Civil Service Commission, at its meeting of May 17, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 01849-16
AGENCY DKT. NO. 2016-2354

IN THE MATTER OF ASHLEY HINDS, CITY OF PLAINFIELD, DEPARTMENT OF PUBLIC AFFAIRS AND PUBLIC SAFETY.

Kyle G. Schwartz, Esq., for appellant (Schwartz & Betzner, P.C., attorneys)

David L. Minchello, Corporation Counsel, for respondent

Record Closed: April 13, 2017 Decided: April 24, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 29, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Release and Settlement Agreement were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 24, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 4-26-17

APR 26 2017

Date Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

dr

RELEASE AND SETTLEMENT AGREEMENT

THIS RELEASE AND SETTLEMENT AGREEMENT is made and entered into this 13 day of April 2017, by and between the City of Plainfield and Ashley Hinds.

WHEREAS, the City of Plainfield and Ashley Hinds desire to enter into this **RELEASE AND SETTLEMENT AGREEMENT** (hereinafter referred to as the "Agreement") in order to settle disputed claims and avoid conflict, expense and continued litigation, and

WHEREAS, it is understood and agreed by the City of Plainfield and Ashley Hinds that this Agreement is a settlement of disputed claims and the parties understand and acknowledge that this Agreement does not constitute an admission of liability or wrongdoing on the part of any of the parties hereof, and this Agreement is purely an act of practical compromise;

NOW, THEREFORE, in consideration of the mutual promises of the parties to this Agreement, the City of Plainfield (hereinafter "the City") and Ashley Hinds (hereinafter "Hinds") agree as follows:

1. It is understood and agreed by the City and Hinds that the appeal in the State of New Jersey Office of Administrative Law under Docket # PTC 16107-15 CSV 01849-16 is hereby withdrawn.

2. In consideration for this Agreement and in settlement of all claims, the City has agreed to enroll in Hinds in the John Stamler Union County Police Academy.

3. The City hereby reserves the right to seek removal of Hinds if she fails to complete the program at the John Stamler Union County Police Academy.

4. Hinds agrees to waive any claim to compensatory and/or punitive damages, back pay, interest or attorneys' fees associated with her removal from the Passaic Police Academy in consideration for another opportunity to complete the Police Academy.

5. It is further agreed that this settlement shall be, at all times in the future, private and privileged by and among the City and Hinds and their counsel to the fullest extent permitted by law. This paragraph is an integral and material part of the consideration for entering into and executing this Agreement.

6. The City and Hinds affirm that the terms stated herein constitute the entire consideration for this Agreement and that no other promises or agreements of any kind have been made to the City and Hinds by any person or entity to cause them to sign this Agreement. This

Agreement contains and constitutes the entire understanding and agreement between the parties respecting the subject matter hereof, and supersedes all previous negotiations, agreements, commitments and writings in connection therewith. No change or addition is to be made to this Agreement, except in a written memorandum executed by the parties hereto.

7. The City and Hinds acknowledge that they each have the power, pursuant to the laws of the State of New Jersey and any applicable by-laws, certificates of incorporation, or partnership or shareholder agreements, to enter into this Agreement, and the parties acknowledge that they have mutually entered into this Agreement in reliance thereon, as well as in reliance upon all of the other terms and conditions contained herein.

8. The City and Hinds affirm that they have carefully read the foregoing Agreement, know its contents, and freely and voluntarily, without duress, coercion, or undue influence, agree to all of its terms and conditions, after full consultation with their attorneys.

IN WITNESS WHEREOF, the parties have signed this Agreement effective as of the date first written above.

By: _____ Date: 4/4/17
KYLE SCHWARTZ, ESQ.
Attorney for Ashley Hinds

By: _____ Date: 4/11/17
DAVID L. MINCHELLO, ESQ.
Attorney for the City of Plainfield

5-17-17

STATE OF NEW JERSEY

In the Matter of Donzella Mears
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2781
OAL DKT. NO. CSV 03955-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 17, 2017 BW

The Civil Service Commission, at its meeting of May 17, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03955-17

AGENCY DKT. NO. 2017-2781

IN THE MATTER OF DONZELLA MEARS,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: April 20, 2017 Decided: April 24, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Donzella Mears, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 22, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 24, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 4/25/17

Date Mailed to Parties: 4/25/17

/nd

OAL DKT. NO. CSV 3955-2017

AGENCY DKT. NO. 20 – 2017-2781

SETTLEMENT AGREEMENT

IN THE MATTER OF

Donzella Mears

AND

Vineland Developmental Services
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/1/2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.D.4:08:		
2. A.2.8, A.4.6,		
3. A.9.8, E.1.2.	Removal	3/1/2017
4. NJAC 4A:2-2.3(a)4,6,12		
5.		

B. The Appellant Donzella Mears withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.		
2.	Parties agree to modify removal to resignation in good standing.	
3.	No reemployment with DHS	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 3/1/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

✓ resignation in good standing

____ general resignation

which shall be effective 3/1/2017 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant agrees not to seek or accept reemployment with the Department of Human Services in the future.

OAL DKT. NO. CSV 3955-2017

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/20/17
DATE

Danzella Neal
Appellant

4-20-17
DATE

On Behalf of Appellant

4-20-17
DATE

RESPONDENT

4/20/17
DATE

Bernadette M. Musiwa
On Behalf of Vineland Developmental Center

OAL DKT. NO. CSV 3955-2017

CERTIFICATION

I, Donzella Means being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4-20-17
DATE

Donzella Means
NAME

5-17-17

STATE OF NEW JERSEY

In the Matter of Ann Pearl
Hudson County, Sheriff's Department

CSC DKT. NO. 2017-294
OAL DKT. NO. CSV 11832-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 17 2017 BW

The appeal of Ann Pearl, Keyboarding Clerk 2, Hudson County, Sheriff's Department, removal effective July 5, 2016, on charges, was heard by Administrative Law Judge Thomas Betancourt, who rendered his initial decision on April 13, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 17, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision except with respect to the standard of review utilized by the Administrative Law Judge regarding the penalty.

However, in determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history.

See Henry v. Rahway State Prison, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

The appellant's disciplinary history includes three verbal warning for insubordination in 2010, a verbal warning for excessive lateness in 2010, two written warnings for insubordination in 2011, a 30 day suspension in 2011 for insubordination, conduct unbecoming a public employee, and other sufficient cause, a 60 working day suspension in 2012 for insubordination and conduct unbecoming a public employee, and a five day suspension in May 2016. As such, in its *de novo* review of the penalty, the Commission finds removal is the appropriate penalty for the sustained charges against the appellant in this matter.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Ann Pearl.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11832-16
CSC DKT. NO. 2017-294

ANN PEARL,
Appellant,
v.
HUDSON COUNTY SHERIFF'S DEPARTMENT,
Respondent.

William Hannon, Esq., for Appellant (Oxfeld Cohen, attorneys)

Robert Pompliano, Esq., Assistant County Counsel, for Respondent

Record Closed: March 10, 2017 Decided: April 13, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Ann Pearl, appeals a Final Notice of Disciplinary Action imposing a penalty of removal effective July 5, 2016, for Incompetency, Inefficiency or Failure to perform duties; Insubordination; Conduct unbecoming a public employee; and Other sufficient cause.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on August 5, 2016.

A prehearing conference was held on August 19, 2016, and a prehearing order, dated August 22, 2016, was entered by the undersigned.

A hearing was held on March 10, 2017, whereupon the record was closed.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of a removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

David Anthony testified as follows:

He is employed by the Hudson County Sheriff's Department as the manager of the foreclosure unit. He is Appellant's supervisor. On May 17, 2016, Appellant was brought to his office at approximately 11:30 a.m. He had heard yelling and screaming but did not know who was doing so. Appellant, Ms. Pearl, and another worker, Ms. Rivera, were brought into his office and were still screaming. They were highly agitated and screaming at each other. He did not know what the dispute was over. He separated the two. He removed Ms. Rivera from his office and spoke with Appellant first. He did not understand what the dispute was over.

He reported the incident to his supervisor, Undersheriff Francine Shelton, and prepared a report.

Other employees complained. Customers were present when the incident took place.

He was not present at a meeting called by Undersheriff Shelton on May 20, 2016.

He knew Appellant was to receive a five-day suspension for the incident and entered it in his log book.

He does not recall if he spoke with Appellant on either June 1 or June 2, 2016. He does not recall if he gave Appellant the five-day suspension notice. That is usually done by personnel. If he was asked to do it he would.

Claudia Macaro testified as follows:

She is employed by the Hudson County Sheriff's Department as assistant supervisor of accounting. On May 17, 2016, at approximately between 10:45 a.m. and 11:00 a.m. she heard a disturbance. She heard two people yelling and went to see. She saw Appellant and Ms. Rivera. She did not determine why they were yelling. She asked both to go to the back office where Mr. Anthony was located.

Both Appellant and Ms. Rivera were still yelling in the back office. She took Ms. Rivera to the front office and Appellant stayed with Mr. Anthony. She does not know what the argument was over, and never found out.

She prepared a joint report of the incident with Mr. Anthony. The report was given to Undersheriff Shelton who is in charge of the civilian employees.

On June 1 and June 2, 2016, Ms. Macaro thinks Appellant was still working, but does not specifically recall. She was aware that Appellant was to receive a five-day suspension. She did not give a copy of the five-day suspension notice to Appellant.

She did not know what the exact days of the suspension were.

Patricia Bustin testified as follows:

She is the chief clerk and the supervisor of both Appellant and Ms. Rivera. She was present on May 17, 2016, but did not witness the argument. She was upstairs in the sales office.

On May 20, 2016, she escorted Appellant to the office of Undersheriff Shelton around 3:00 p.m.

She prepared a report for Undersheriff Shelton regarding the May 20, 2016, meeting.

Undersheriff Shelton had called Ms. Bustin and requested that Appellant and Ms. Rivera be brought to her office. She did not know why at the time. Present at the meeting were Undersheriff Shelton, Ms. Bustin, Sharon Mallory, a union representative, and William Gonzalez. Prior to Appellant entering the office the proposed suspension and the suspension notice for Appellant to sign were discussed. The dates of the suspension were on the notice. Appellant was then brought in. Undersheriff Shelton attempted to explain to Appellant, who became aggravated and frustrated. Appellant stated she was not properly represented. Appellant was told Ms. Mallory was a union representative. Appellant stated she did not request her and left the meeting. Appellant returned in about ten to fifteen minutes. Prior to Appellant's return, Ms. Rivera was given notice of her five-day suspension and left.

Appellant returned with papers and started reading from them. She was angry and frustrated. She was beet red. Ms. Bustin does not recall what Appellant stated while reading. Undersheriff Shelton attempted to explain the days of suspension. Appellant left and was not given the notice of suspension. She was not given permission to leave.

She does not know who requested Ms. Mallory to be present. She was not aware of why there was a meeting before it occurred. She does not recall if Appellant requested a different union representative. When Appellant left for the second time it was after 4:00 p.m.

William Gonzalez testified as follows:

He is the sales department supervisor. Appellant was one of his employees. He did not hear the argument on May 17, 2016.

On May 20, 2016, he escorted Appellant and Ms. Rivera to Undersheriff Shelton's office. The meeting was to discuss the suspension of Appellant and Ms. Rivera. Also present was Sharon Mallory.

Undersheriff Shelton was trying to explain the days of suspension and the reason why to Appellant. Appellant interrupted and stated that her employee rights were being violated and left the meeting. Undersheriff Shelton had told Appellant that Ms. Mallory was a union representative. Appellant responded that she did not request her. Appellant was not given permission to leave. Appellant came back with papers and handed them to the Undersheriff. Undersheriff Shelton tried to speak again and was interrupted again. Appellant then left again, without permission.

The Undersheriff attempted to serve the notice to Appellant during the meeting. Appellant refused to accept it. He is not sure if the Undersheriff gave the notice to Appellant after the meeting. Mr. Gonzalez did give the notice to Appellant sometime thereafter, but is unsure as to what day.

The days of the suspension were on the notice. Appellant never took the notice. The days of suspension were June 1, 2, 8, 14, and 15, 2016.

On June 1, 2016, Appellant went to work. Mr. Gonzalez told Appellant that the day was a suspension day and that she should not be in the office. He then called Richard Sires to advise that Appellant was in the office. Ms. Bustin was present when he spoke to Appellant. This was during the morning hours. Appellant refused to leave even though she was told to do so.

Elizabeth Nevarez arrived and had a private conversation with Appellant. Ms. Nevarez is a union representative. Appellant returned to work after the conversation.

On June 2, 2016, Appellant again went to work. Two officers arrived and asked Appellant to leave at least three times. One officer was Sergeant Ruiz. The other was a female officer, but he does not know her last name. Sergeant Ruiz advised Appellant that if she did not leave she would be arrested. He did so in a calm and very professional manner. Appellant left after first trying to call a union representative. He believes Appellant left around 4:00 p.m.

Wilson Ruiz testified as follows:

He is a sergeant with the Hudson County Sheriff's Department. He spoke with Appellant on June 2, 2016. Officer Zulima Cabrera was with him. He was advised by Richard Sires that Appellant would be served with a termination notice. The paperwork was served and Appellant was asked to leave.

Mr. Sires had told Appellant to leave after he served her. Sergeant Ruiz gave Appellant time to gather her belongings. Appellant wanted to speak with a union representative. He told Appellant that if she did not leave he would arrest her as a defiant trespasser. Appellant then left without incident. He escorted her.

Sergeant Ruiz believed that Appellant spoke with a union representative outside the building. He heard her state "I don't know what to do." Her demeanor was calm.

Francine Shelton testified as follows:

She is an undersheriff with the Hudson County Sheriff's Department. She is responsible for the civilian personnel. She is familiar with Appellant.

Undersheriff Shelton was informed of the incident that occurred on May 17, 2016. She was informed by David Anthony. She had asked that reports be prepared. She issued minor discipline to both Appellant and Ms. Rivera. Each received a five-day suspension. The Notice of Minor Disciplinary Action prepared for Appellant states the days of the suspension: June 1, 2, 7, 14, and 15, 2016. The days are spread out so as to not cause a hardship upon salaries. Ms. Rivera received the same discipline as Appellant.

She saw Appellant on May 20, 2016 during a meeting. The Undersheriff had summoned Appellant to the meeting, which took place in the afternoon. Also present were Mr. Gonzalez, Ms. Bustin, Sharon Mallory, a union representative. She spoke with both Appellant and Ms. Rivera individually in her office with the others present. The purpose of the meeting was to inform them of the disciplinary action being taken for the May 17, 2016 incident. Neither Appellant nor Ms. Rivera was interrogated.

Undersheriff Shelton introduced participants in the meeting to Appellant, and then read the Notice of Minor Disciplinary Action to Appellant. She was not able to read the entire document but did read the dates of the suspension. Appellant became irate and did not want to speak with her. Appellant said she was entitled to union representation. Appellant continued to interrupt the Undersheriff, stating that she thought it unfair, and that she did not agree. She then stormed out of the office as the Undersheriff was getting towards the end of reading the charges. Appellant returned and handed Undersheriff Shelton a document pertaining to Weingarten. Undersheriff Shelton inquired of Appellant what it was. Appellant said she would not speak with her any further. Undersheriff Shelton informed Appellant that Ms. Mallory was a union representative. She attempted to serve the Notice of Minor Disciplinary Action upon Appellant who turned her back on the Undersheriff and refused to take it.

She was informed that Appellant arrived at work on June 1 and 2, 2016.

She did not prepare or sign the form 31A, the Preliminary Notice of Disciplinary Action.

Richard Sires had requested that Ms. Mallory be present at the meeting of May 20, 2017.

She placed a handwritten note on the Notice of Minor Disciplinary Action which states "Ms. Pearl walked out of meeting as I was reading the charges to her."

Sharon Mallory testified as follows:

She is an employee of the County of Hudson. She is also a union delegate. She had not met with Appellant prior to May 20, 2016. She was summoned to Undersheriff Shelton's office to be the union representative for Appellant. She recalls the Undersheriff reading the notice about the five-day suspension. Does not recall what the discipline was about. She recalls the Undersheriff giving the actual days of the suspension. Appellant did not want to hear what the Undersheriff was saying. After the days of suspension were read Appellant left and returned with Weingarten rights. Appellant was a little upset. The Undersheriff tried to hand Appellant the notice. She refused to accept it. Appellant stated that Ms. Mallory was not the delegate of her choice. Ms. Mallory stayed for the entirety of the meeting. She did not speak with Appellant prior to the meeting. Ms. Mallory saw the Notice of Minor Disciplinary Action the day of the meeting. She sent a copy to Floyd Worley, a union representative. Appellant did not request a different union representative at the meeting. Neither Appellant nor Ms. Rivera was interrogated at the meeting.

Richard Sires testified as follows:

He is the Principal Personnel Technician. Both Appellant and Ms. Rivera were disciplined on May 20, 2016, for their involvement in an incident on May 17, 2016. Each received a five-day suspension. The suspension days are spread out to avoid hardship for the employees. He became aware of the suspension on or after May 20, 2016. He notified the union through Floyd Worley. He did this via email to Mr. Worley dated May 24, 2016. In the email he noted that Appellant refused service of the notice and that escalation of discipline was being discussed. He also mailed this via certified mail.

Mr. Sires knew that June 1 and 2 were suspension days. He was working both days. He became aware that Appellant was at work on June 1, 2016. He had received a call prior to 9:00 a.m. He explained to the caller that Appellant needed to leave or discipline may escalate. He called the undersheriff and the legal department to advise them.

He also spoke with Elizabeth Navarez on June 1, 2016, to advise that Appellant was at work. Ms. Navarez came to the office and spoke with Appellant. Mr. Sires was not with Ms. Navarez when she spoke with Appellant. Appellant still refused to leave. Ms. Navarez returned to Mr. Sires after speaking with Appellant. He asked Ms. Navarez to prepare a report. He noted that Appellant signed in to work on June 1, 2016, at 8:05 a.m., and signed out at 4:05 p.m.

On June 2, 2016, Appellant returned to work. Mr. Sires then prepared a form 31A, Preliminary Notice of Disciplinary Action. He advised the undersheriff and sent the form to the law department. It was then signed by Undersheriff Andrew Conte.

He served the form 31A on Appellant about 3:00 p.m. on June 2, 2016, with Sergeant Ruiz and another officer. He told Appellant she was immediately suspended and had to leave. Appellant refused to sign the document. He then asked Sergeant Ruiz to have Appellant leave. A copy of the form 31A was mailed to the union.

Mr. Sires then reviewed Appellant's disciplinary history, which consisted of the following: 1/2/10, Insubordination with a penalty of verbal warning; 3/26/10, Insubordination with a penalty of verbal warning; 8/13/10, Insubordination with a penalty of verbal warning; 11/5/10, Excessive Lateness with a penalty of verbal warning; 2/14/11, Insubordination with a penalty of written warning; 9/29/11, Insubordination, Conduct unbecoming a public employee, Neglect of duty, Other sufficient cause with a penalty of 30-day suspension; 10/10/12, Insubordination, Conduct unbecoming a public employee with a penalty of 60-working-day suspension; the 5-day suspension arising out of the incident of May 17, 2016; and, the present matter.

The email that he sent to Mr. Worley was not sent to Appellant. He believes he mailed a copy to Appellant and that Mr. Gonzalez gave it to her.

Ms. Navarez does not work in the sales office and is not Appellant's supervisor.

He does not recall Appellant showing up for work during her previous thirty-day and sixty-day suspension.

On June 2, 2016, he spoke with Appellant while she was sitting at her desk. She was not disruptive. He handed her the notice of discipline. She refused to sign it. She is not required to sign it. Sergeant Ruiz was a witness. Mr. Sires believes that Appellant understood, but she did say "I don't understand" and "I'm not clear."

Appellant's Case

Ann Pearl, Appellant, testified as follows:

She began her employment with the Hudson County Sheriff's Department in July 2000. She was a Senior Clerk Typist and worked Monday through Friday from 8:00 a.m. to 4:00 p.m.

On May 17, 2016, Ms. Rivera was "quite vocal." Ms. Pearl was on the telephone. When she finished the call Ms. Rivera said "people don't even turn on their computer." Ms. Pearl made it a point to counter Ms. Rivera. Ms. Pearl got up to report this to the back office. Ms. Rivera was "instigative." Ms. Pearl felt her comments were derogatory to the employees. Ms. Pearl was the senior employee at this time. Ms. Pearl stated that she would not refer to her interaction with Ms. Rivera as a disagreement. She wanted to counter Ms. Rivera and report it to her supervisor. She stated "at a certain time we all moved in there" referring to Mr. Anthony's office. She stated Mr. Anthony understood how upset she was and asked her to write something up.

On May 20, 2016, she was told by Mr. Gonzalez that Undersheriff Shelton wanted to see her. She called the Undersheriff to inquire what it was about. She was told she would be informed when they met. Present at the Undersheriff's office were Mr. Gonzalez, Ms. Bustin, Undersheriff Shelton and someone introduced as a union representative. Ms. Pearl confirms that this was Sharon Mallory. She did not request Ms. Mallory.

Undersheriff Shelton invited her in the office and offered her a seat. Ms. Pearl did not feel like sitting. The Undersheriff started reading from a piece of paper. Ms. Pearl heard "shouting match" and felt discipline might be in store. Upon hearing this she excused herself and got the Weingarten Rights.[1] When she first left she believes she said "excuse me." She returned and handed the Weingarten Rights to the Undersheriff.

Undersheriff Shelton asked what it was. Ms. Pearl did not feel she needed to say anything. She felt her submission of the Weingarten Rights was her statement. She sensed that a violation of her rights. She had no opportunity to speak with the Undersheriff prior to the meeting. At that point she did not know what communication needed to take place, other than merely asserting her rights.

[1] Weingarten Rules refer to NLRB v. Weingarten, 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975), which upheld a National Labor Relations Board (NLRB) decision that employees have a right to union representation at investigatory interviews.

She then looked at the clock and it was the end of the work day. She told the Undersheriff that it was 4:00 p.m. and her work day is over. She left the meeting without the notice of discipline. The Undersheriff gave her back the Weingarten Rights.

She does not recall the Undersheriff trying to serve her with the disciplinary notice. She does not recall the Undersheriff stating the suspension days.

When she returned to work that Monday[2] she called Floyd Worley and left a message that she needed his involvement. There was no other discussion this week.

Ms. Pearl recalls Ms. Macaro calling Ms. Pearl into her office to ask if Ms. Pearl knew she was suspended. Ms. Pearl did not. Mr. Gonzalez was also present. She does not recall if Mr. Gonzalez said anything. What was uppermost in her mind was what Ms. Macaro said. Ms. Macaro did not tell her she had to go home. No one that day gave her notice of the suspension. This was probably on June 1, 2016.

There was a woman in the office that identified herself as someone from the union. She spoke of the suspension and the possible escalation of it. She gave Ms. Pearl her card. She told Ms. Pearl that ignoring the suspension could escalate. The union representative was looking at paperwork. Mr. Pearl "took it to mind."

Mr. Sires spoke with her on what Ms. Pearl believes to be June 2, 2016, and told her she was immediately suspended. At that point Ms. Pearl reached out for a union representative. Before she spoke with Mr. Sires Mr. Worley called her inquiring about what was going on. She is unsure if Mr. Worley called on June 1 or June 2, 2016.

Mr. Sires was clearly saying there was a suspension. She reached out for a union representative again. Another worker offered to call Sharon Mallory. Ms. Pearl was waiting for a call back. She was under the impression that Sergeant Ruiz was waiting with her for a union representative to call back. When she was told by Sergeant Ruiz she had to leave she left. She then met with Ms. Mallory and discussed what

[2] Presumably May 23, 2016, as May 20, 2016, was a Friday.

happened. The next day she filled out a grievance that was given to her by Ms. Mallory.

During her two previous suspensions she did not return to work. She doesn't believe she would have gone to work had she received notice.

She disputes the description of her interaction with Ms. Rivera as an argument. She decided to report the incident to Mr. Anthony. She disputes that she and Ms. Rivera were ever separated. She cannot recall if customers were present during the incident with Ms. Rivera. There was no one present at the sales door. Ms. Pearl was questioned by Mr. Anthony regarding the incident with Ms. Rivera.

At the June 20, 2016, meeting with Undersheriff Shelton she does not remember Ms. Rivera being there. She stated she walked to the meeting alone.

The Weingarten Rights form she keeps at her desk. She had not read it prior to May 20, 2016. She felt it applied to her matter.

She was not interrogated by the Undersheriff.

She decided to leave the May 20, 2016, meeting at 4:00 p.m., stating "four o'clock is four o'clock."

She does not believe Ms. Macaro told her she was suspended. She disputes that Mr. Gonzalez gave her the notice of discipline.

Ms. Pearl refutes that Ms. Navarez told her she was suspended. She was told there was a suspension.

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 In re Polk, 90 N.J. 550 (1982). 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).

David Anthony was a credible witness. He was calm and straightforward in his testimony. He did not embellish. He simply stated what he saw and heard.

Claudia Macaro was also credible. She testified in a direct and professional manner. She related what she saw and heard in a straightforward manner.

Patricia Bustin too was a credible witness. She was able to relate what she saw and heard in a clear manner.

William Gonzalez was credible also. He too was straightforward and direct in his manner.

Sergeant Wilson Ruiz testified in a professional manner. He was direct and to the point. He was quite credible.

Undersheriff Francine Shelton was credible. She related what she saw and heard at the meeting of May 20, 2016, in a straightforward and direct manner.

Sharon Mallory was also credible. She stated what she saw and heard without hesitation.

Richard Sires was likewise credible. He testified in a calm and straightforward manner.

I had great difficulty with the testimony of Petitioner, Ann Pearl. She seemed at times not able to answer simple questions. Often she took a great deal of time to formulate an answer. Her recollection of events differed markedly from other witnesses. Pointedly, her recollection of the events surrounding her argument with Ms. Ruiz strain belief. She recollects that she went to Mr. Anthony's office on her own. Others recollect that she was brought to the office because of the argument. Her statement that she left Undersheriff Shelton's office at four o'clock as this was the end of her shift – "four o'clock is four o'clock" – was astonishing. Her insistence that she was never told of the five-day suspension is simply not believable. How she related her conversation with Ms. Navarez was bizarre. When asked if Ms. Navarez told her of the five-day suspension her response was she was told "there was a suspension" but refuted that Ms. Navarez told her of the five-day suspension. It was difficult to credit much of what she said as credible. Simply put, I did not believe her version of what transpired on May 17, 2016, May 20, 2016, June 1, 2016, and June 2, 2016.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant, Ann Pearl, was employed by the Hudson County Sheriff's Department as a Senior Clerk Typist.

2. On May 17, 2016, Appellant became involved in an argument with a co-worker, Ms. Rivera.

3. The argument became loud. Both Appellant and Ms. Rivera were summoned to the office of David Anthony, the manager of the foreclosure unit.

4. Both Appellant and Ms. Rivera were still arguing loudly when brought to Mr. Anthony's office. The matter was reported to Undersheriff Francine Shelton.

5. Undersheriff Shelton is responsible for the civilian employees of the Hudson County Sheriff's Department.

6. Both Appellant and Ms. Rivera were disciplined for their involvement in the argument of May 17, 2016. Each received a five-day suspension.

7. On May 20, 2016, both Appellant and Ms. Rivera were brought to Undersheriff Shelton's office for the purpose of being served with the five-day suspension notice.

8. While Undersheriff Shelton was reading the Notice of Minor Disciplinary Action to Appellant she walked out of the office.

9. Petitioner returned with a Weingarten Rights form and handed it to Undersheriff Shelton.

10. Appellant refused to accept the Notice of Minor Disciplinary Action from Undersheriff Shelton.

11. Appellant left the office at approximately 4:00 p.m. without accepting a copy of the Notice of Minor Disciplinary Action.

12. The days Appellant was suspended were June 1, 2, 7, 14, and 15, 2016.

13. Appellant was served with a copy of the Notice of Minor Disciplinary Action by William Gonzalez.

14. Appellant went to work on June 1, 2016, the first day of the five-day suspension.

15. Appellant was informed by William Gonzalez, the office supervisor, that June 1, 2016 was a suspension day and that Appellant should not be in the office. Mr. Gonzalez then called Richard Sires, the Principal Personnel Technician, to advise him.

16. Appellant was also advised on June 1, 2016, by Elizabeth Navarez, a union delegate, that she was suspended. Petitioner refused to leave.

17. Appellant remained at work June 1, 2016.

18. Appellant again went to work on June 2, 2016.

19. Appellant was served with a notice of termination on June 2, 2016, by Richard Sires.

RESIDUUM RULE

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)(3); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52:14B-10(a) and N.J.A.C. 1:1-15.1(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable (N.J.R.E. 802) unless it falls within an exception enumerated in N.J.R.E. 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate

> competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
>
> [Id. at 51.]

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

In accordance with the residuum rule, I accepted into evidence a statement prepared by Elizabeth Navarez. Competent evidence exists in the form of the testimony of Mr. Gonzalez and Ms. Pearl to corroborate what is found in the statement.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, supra, 90 N.J. 550. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, supra, 26 N.J. at 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Appellant is charged in the Final Notice of Disciplinary Action (FNDA)[3] with incompetency in violation of N.J.A.C. 4A:2-2.3(a)(1); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and, other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person.

As to the charge of incompetency, no evidence was presented. Therefore, as to this charge Respondent has not met its burden of proof.

As to the charges of insubordination, conduct unbecoming a public employee and other sufficient cause, Respondent has met its burden of proof by a preponderance of the credible evidence. In reaching this conclusion it is important to note that Appellant's conduct on May 17, 2016, during the verbal confrontation with Ms. Rivera

[3] The Final Notice of Disciplinary Action was not introduced into evidence. It was provided in the package submitted to the OAL when the matter was transferred by the Civil Service Commission.

was not considered. That conduct was dealt with in the Notice of Minor Disciplinary Action providing for a five-day suspension dated May 20, 2016. Appellant's conduct on May 20, 2016, during the meeting with Undersheriff Shelton, and her conduct on June 1, 2016, and June 2, 2016, meet the standard of insubordination, conduct unbecoming a public employee, and other sufficient cause. It is unacceptable for an employee to refuse to listen to her superior during a meeting regarding a disciplinary matter. It is unacceptable for an employee to remove herself from such a meeting without permission. It is unacceptable for an employee to leave work prior to the conclusion of such a meeting. It is unacceptable for an employee to refuse to accept a disciplinary notice, and then claim it was never served upon her. It is unacceptable for an employee to arrive at work during days she was suspended. This is particularly egregious as she was advised of the suspension by Undersheriff Shelton and William Gonzalez, who served her the notice personally. It is unacceptable for an employee to refuse to leave work after being told she was suspended and had to leave by both Mr. Gonzalez and the union delegate Elizabeth Navarez. It is unacceptable for an employee to have to be escorted from work under threat of arrest for her refusal to leave.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. W. New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

> [In re Hernmann, 192 N.J. 19, 33-34 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State-Operated Sch. Dist. v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463, 465.

In Bock, supra, 38 N.J. at 522, which was decided more than fifty years ago, 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." Herrmann, supra, 192 N.J. at 29 (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523-24.

As the Supreme Court explained in Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct. . . .

> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [Hermann, supra, 192 N.J. at 30-33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Commission modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." Id. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, supra, 38 N.J. at 523-24, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979).

The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter, Appellant has a substantial disciplinary history. She has three verbal warnings for insubordination in 2010. She has a verbal warning for excessive lateness in 2010. She has two written warnings for insubordination in 2011. She was suspended for thirty days on September 29, 2011, for insubordination, conduct unbecoming a public employee, and other sufficient cause. She was suspended for sixty working days on October 10, 2012, for insubordination and conduct unbecoming a public employee. She was suspended five days on May 20, 2016, for her behavior on May 17, 2016.

Based upon the above authorities, I **CONCLUDE** that progressive discipline should apply. The question remains whether removal is warranted, or that a lesser penalty be imposed.

Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). Appellant's entire record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock, supra, 38 N.J. 500.

A court should overturn a final agency decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, 191 N.J. 474, 482 (2007) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). As the Court observed in Carter, a reviewing panel:

> must defer to an agency's expertise and superior knowledge of a particular field. Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result."

[Id. at 483 (citations omitted).]

I **CONCLUDE** that the respondent has proved by a preponderance of the credible evidence that that appellant was guilty of the charge of insubordination, conduct unbecoming a public employee and other sufficient cause set forth in the Final Notice of Disciplinary Action.

I further **CONCLUDE** that the penalty of removal is neither arbitrary, unreasonable nor offensively excessive, and therefore should be upheld.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**;

It is further **ORDERED** that the Final Notice of Disciplinary Action providing for a penalty of removal, effective July 5, 2016, is **AFFIRMED**.

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, P.O. Box 312, Trenton, New Jersey**

08625-0312, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APRIL 13, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: April 13, 2017

Date Mailed to Parties: April 13, 2017

db

APPENDIX

List of Witnesses

For Appellant:

Ann Pearl, Appellant

For Respondent:

David Anthony

Claudia Macaro

Patricia Bustin

William Gonzalez

Wilson Ruiz

Francine Shelton

Sharon Mallory

Richard Sires

List of Exhibits

For Appellant:

P-1 District 1199J Grievance Form

For Respondent:

R-1 Email from David Anthony to Francine Shelton dated May 18, 2016

R-2 Letter from David Anthony to Francine Shelton dated May 17, 2016

R-3 Office Incident report dated May 18, 2016, by Claudia Macaro and David Anthony

R-4 Notice of Minor Disciplinary Action dated May 20, 2016

R-8 Memo by William Gonzalez

R-9 Email from Francine Shelton to Richard Sires dated May 25, 2016

R-10 Weingarten Rights form

R-13 Email from Louis Rosen to Urmila Patel dated May 24, 2016

R-14 Hudson County Sheriff's Office Business Daily Attendance Record dated June 1, 2016

R-15 Elizabeth Navarez memo dated June 1, 2016

R-16 Preliminary Notice of Disciplinary Action dated June 2, 2016, with Notice of Immediate Suspension

5-17-17

STATE OF NEW JERSEY

In the Matter of Suzette Ravix
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2780
OAL DKT. NO. CSV 03544-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 17, 2017 BW

The Civil Service Commission, at its meeting of May 17, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. 03544-17

AGENCY DKT. NO. 2017-2780

IN THE MATTER OF SUZETTE RAVIX,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: April 20, 2017 Decided: April 24, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Suzette Ravix, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 13, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 24, 2017 — **LISA JAMES-BEAVERS**, ALJ

DATE

Date Received at Agency: 4/25/17

Date Mailed to Parties: 4/25/17

/nd

OAL DKT. NO. CSV 3544-2017

AGENCY DKT. NO. 20 – 2017-2780

SETTLEMENT AGREEMENT

IN THE MATTER OF

Suzette Ravix

AND

Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/1/2017 + Amended 3/23/2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.D.4:08 B.2.1. Neglect	20 days susp.	3/18/2017 19, 20,
2. Stepping on duty B.3.1		23, 24, 25, 26, 3/27/2017
3. Violation of Rule E1.1.		(8 days served October)
4. NJAC 4A:2-2.3(a)1, 6, 7, +12		
5.		

B. The Appellant Suzette Ravix withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.		
2. All Sustained as above	Sustained	15 days (7 days to be served)
3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 8 days based upon the above charges. Appellant will be scheduled to serve 7 days more.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Suzette Ravix 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands that any future infraction of neglect of client or patient or sleeping on duty will result in the appointing authority seeking her removal.

OAL DKT. NO. CSV 3544-2017

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

04-20-17
DATE

Appellant

4-20-17
DATE

~~Respondent~~ Appellant's Representative

4-20-17
DATE

ON BEHALF OF RESPONDENT

DATE

ON BEHALF OF

OAL DKT. NO. CSV 3544-2017

CERTIFICATION

I, Suzette Ravix, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

04-20-17
DATE

NAME

5-17-17

STATE OF NEW JERSEY

In the Matter of Bijoy Rodriguez,
City of Paterson,
Police Department

CSC DKT. NO. 2017-1814
OAL DKT. NO. CSR 19133-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 17, 2017 BW

The Civil Service Commission, at its meeting of May 17, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 19133-16

IN THE MATTER OF BIJOY RODRIGUEZ,
CITY OF PATERSON (POLICE DEPARTMENT).

Charles J. Sciarra, Esq., (Sciarra & Catrambone, attorneys) appearing for appellant, Bijoy Rodriguez

Steven S. Glickman, Esq.,(Lite DePalma Greenburg, attorneys) appearing for respondent City of Paterson (Police Department)

Record Closed: April 19, 2017 Decided: April 19, 2017

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

This matter concerns the appeal of appellant Bijoy Rodriguez from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on December 13, 2016, pursuant to N.J.S.A. 40A:14-202(d).

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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. 40A:14-204.

April 19, 2017

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 20 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

20-03- 14:15 IN

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT, made and executed this ___ day of February, 2017, by and between the City of Paterson (hereafter referred to as the "City") and Bijoy Rodriguez (hereafter "Rodriguez"), represents the full and final understanding between the City and Rodriguez concerning disciplinary charges brought against Rodriguez by the City dated September 12, 2016.

1. Based upon the unique circumstances of this case and the miscommunication between counsel, the City agrees to modify the disciplinary penalty imposed in the Final Notice of Disciplinary Action dated December 6, 2016 from termination to a six (6) month suspension without pay beginning with the first day of his termination and served continuously until completed.

2. Rodriguez accepts the disciplinary penalty of a six (6) month suspension without pay beginning with the first day of his termination and served continuously until completed.

3. Rodriguez agrees to withdraw his disciplinary appeal, Docket No. , with prejudice.

4. Rodriguez agrees and understands that if another allegation of misconduct is made for any of the same reasons as expressed in the Specifications of the above-referenced Preliminary Notice of Disciplinary Action, or for any other misconduct where major discipline is recommended, Rodriguez shall be entitled to an administrative disciplinary hearing regarding same. However, the sole issue at the administrative disciplinary hearing shall be whether the alleged misconduct occurred. If the said alleged misconduct is substantiated, Rodriguez consents to a penalty of termination. If Rodriguez does not request a hearing within the requisite five (5) calendar day period as set forth in N.J.A.C. 4A:2-2.5(c), after

20-03-17 14:15 IN

receiving notice of the adverse administrative action, Rodriguez agrees to the imposition of termination immediately thereafter.

5. This Memorandum of Agreement is not precedent setting on either party in that the Union and the employee cannot interpret and construe this Memorandum of Agreement or the terms of this settlement as a waiver of the City of Paterson's policy and procedures, or interpret and construe this settlement as a waiver of the parties' contract and applicable labor laws. The parties and the Union agree that the terms of this Agreement are specific to the facts and circumstances of this particular action and binding only as to this matter.

6. MODIFICATION

This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

7. ENTIRE AGREEMENT

This Agreement supersedes all prior agreements and understandings between the parties; it contains the full understanding of the parties with respect to this subject matter; and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

8. CONTROLLING LAW

This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

9. NON-ADMISSION

Rodriguez acknowledges that this Agreement does not constitute and shall not be construed as an admission, violation of any law, rule or regulation, breach of any contract or commitment of any wrongdoing whatsoever on the part of the City.

20-03-17 14:15 IN

10. **SEVERABILITY**

Should any of the provisions of this Agreement be declared or determined by a court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first above written.

Michele D. Sedunsky
WITNESS

3/07/17
BIJOY RODRIGUEZ

CITY OF PATERSON

ATTEST

By: Jane Spejale 3/20/17

Reviewed as to form:

Steven S. Glickman

5-17-17

STATE OF NEW JERSEY

In the Matter of Rashaan Sampson
Irvington Township,
Department of Public Safety

CSC DKT. NO. 2017-311
OAL DKT. NO. CSV 11828-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: MAY 17, 2017 BW

The Civil Service Commission, at its meeting of May 17, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11828-16
AGENCY DKT. NO. 2017-311

IN THE MATTER RASHAAN SAMPSON, IRVINGTON TOWNSHIP, DEPARTMENT OF PUBLIC SAFETY.

Anthony J. Iacullo, Esq., for appellant, (Iacullo Martino, LLC, attorneys)

Ramon Rivera, Esq., for respondent

Record Closed: April 19, 2017 Decided: April 19, 2017

BEFORE **EVELYN J. MAROSE**, ALJ:

On August 5, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for April 19, 2017 and during that time the parties agreed to settle the matter. A Settlement Agreement indicating the terms of settlement was signed by the parties and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** my initial decision settlement 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.

April 19, 2017
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 20 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

LOCAL

OAL DKT. NO. CSV- 11828-16

AGENCY DKT. NO. 20__

SETTLEMENT AGREEMENT

IN THE MATTER OF

Rashaan Sampson

AND

Township of Irvington

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated July 13, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. IPMD 3.1.9	30 day suspension	
2. IPMD 3.19	"	
3. IPMD 3.1.28	"	
4. IPMD 3.1.10	"	
5.		

B. The Appellant Rashaan Sampson withdraws his/her appeal and request for a hearing, and the Respondent appointing authority Township of Irvington agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. IPMD 3.1.9	21 day suspension	
2. IPMD 3.19	"	
3. IPMD 3.1.28	"	
4. IPMD 3.1.10	"	
5.		

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 30 days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 9 days.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Township of Irvington (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority Township of Irvington will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Rashaan Sampson 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, Township of Irvington, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV _____

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

4/19/17
DATE

#371
Appellant

4/19/17
DATE

Respondent - Attorney

4/19/17
DATE

ON BEHALF OF Rashaan Sampson

DATE

ON BEHALF OF

OAL DKT. NO. CSV _____

CERTIFICATION

I, Rashaan Sampson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

4/19/17 _____ #371 _____

DATE NAME

5-17-17

STATE OF NEW JERSEY

In the Matter of Nadeyah Sarmad
Department of Children and Families

CSC DKT. NO. 2014-629
OAL DKT. NO. CSV 12825-14

(ON REMAND OAL DKT. NO. CSV 13733-13)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 17 2017 **BW**

The appeal of Nadeyah Sarmad, Family Service Specialist II, Department of Children and Families, release at the end of the working test period, was heard by Administrative Law Judge (ALJ) Leland S. McGee, who rendered his initial decision on May 2, 2017. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on May 17, 2017, accepted and adopted all of the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision with the exception of the following. The Commission does not adopt the ALJ's references in the initial decision and order regarding charges of insubordination. The inclusion of those references appears to have been included in error.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Nadeyah Sarmad.

Re: Nadeyah Sarmad

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 12825-14
CSC DKT. NO. 2014-629
(ON REMAND)
OAL DKT. NO. CSV 13733-13
CSC DKT. NO. 2014-629

NADEYAH SARMAD,

Petitioner,

v.

DEPARTMENT OF CHILDREN AND FAMILIES, PASSAIC NORTH,

Respondent.

Laurie Taylor, Staff Representative, CWA Local 1037, for Petitioner pursuant to N.J.A.C. 1:1-5.4(a)(6)

Diane Noboa, Employee Relations Officer, New Jersey Department of Children and Families (Laurie M. Hodian, Director, Office of Employee Relations) for Respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: June 27, 2016 Decided: May 2, 2017

BEFORE **LELAND S. MCGEE**, ALJ:

PROCEDURAL HISTORY

Petitioner is a former Family Service Specialist II with the Department of Children and Families. She was released at the end of her working test period effective September 9, 2013, following an unsatisfactory rating for the second half of the probationary period. Petitioner appealed this action to the Civil Service Commission (CSC) which transmitted the matter to the Office of Administrative Law (OAL). A hearing was scheduled in the matter for July 14, 2014. Neither Petitioner nor her union representative appeared at the hearing, nor did they attempt to contact the OAL. Based upon their absence, the OAL issued a "Failure to Appear" notice. On July 16, 2014, this matter was returned to the Commission for a Final Decision, with a notice giving the parties thirteen days to present any reason for the failure to appear.

On July 28, 2014, Petitioner submitted a request for reinstatement of her appeal and Respondent filed an objection to same. On October 1, 2014, the Commission concluded that it would be unjust to deny Petitioner a hearing on the merits of her appeal and remanded the matter to the OAL for hearing. On October 3, 2014, the Remand was transmitted to the OAL.

Hearings in this matter were held on August 6, 2015, October 26, 2015, and January 7, 2016. Post-hearing submissions were filed on or about June 2016 and the record closed.

FACTUAL DISCUSSION

The following background facts are undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case.

On February 27, 2012, Petitioner was hired as a Family Service Specialist (FSS) Trainee with DCF, Division of Child Protection and Permanency. When hired, she entered into an extensive Pre-Service Training Program in which Petitioner received classroom training on how to complete the essential job functions of a Family Service Specialist. The Pre-Service Training included instructions in family engagement, safety

and risk assessment, case documentation, and learning how to detect the signs of child abuse and neglect. Petitioner was also instructed on Departmental policies, practices, and procedures. In addition to classroom instruction, Petitioner received hands-on field experience by serving as a "buddy" or "shadowing" experienced FSS's on the job.

On March 9, 2013, Petitioner entered her Working Test Period for the title of Family Service Specialist II and was subjected to a WTP of four months. The WTP was extended during which time she received four progress reports. On three of the reports Petitioner received an "unsatisfactory" rating.

Credibility Determinations

In assessing a witness's credibility, an Administrative Law Judge (ALJ) must consider his/her testimony in "light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder may reject a witness's testimony "when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (rejecting testimony "inconsistent with other testimony or with common experience" or "overborne by other testimony."); D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). An ALJ may consider the "interest, motive, bias, or prejudice of a witness" but "where such choice is reasonably made, it is conclusive on appeal." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952); Renan Realty Corp. v. State, Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

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.) Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." Perrone, supra, 5 N.J. at 522.

Here, Petitioner does not dispute that she received unsatisfactory PAR reviews. In fact, in her letter of appeal, Petitioner outlined the specific corrective action that she developed for each of her "deficiencies." Her assertion is that Respondent failed to properly train her, failed to adequately supervise and support her, and placed her in a position of having to perform duties that a more seasoned staff person would be required to perform. Petitioner acknowledged that Supervisor Krauser did offer "some" assistance by going into the field with her did some of her monthly visits for her and, as was common practice, had other workers complete some of her monthly visits. There were five (5) cases that he helped her to close. Petitioner acknowledged that Krauser gave her good advice about how to handle cases and how to manage time to reduce time required for some cases. One of her colleagues, Biatrice Reyes, was also very helpful and knowledgeable.

Respondent does not dispute that it was understaffed and was operating under a Modified Settlement Agreement (MSA). Respondent was required to adjust staff to meet the directives of the MSA. Respondent acknowledged that it had supervisors with six (6) workers, in violation of the MSA standard of not more than five (5) workers per supervisor. In fact, when Petitioner came into the permanency unit, Krauser was the supervisor for the litigation unit as well and therefore, supervised a total of eleven (11) workers. Conflicting and irreconcilable testimony requires credibility determinations, based on the totality of the evidence, prior to making findings as to the disputed facts. In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002). The basic facts of this case are not in dispute.

I **FIND** the testimony of both parties' witnesses was credible.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

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).

Civil Service matters are governed by N.J.A.C. 4A:2-4.3(b), which places upon the employee the burden of proving that a termination following a working test period was a decision reached by the appointing authority in bad faith.

The purpose of the working test period is to give an appointing authority the opportunity to determine whether an employee satisfactorily performs the duties of a particular job. A working test period is part of the examination process. The Civil Service Commission shall provide for:

a. A working test period following regular appointment of four months, which may be extended to six months at the discretion of the commission, except that the working test period for political subdivision employees shall be three months and the working test period for entry level law enforcement, correction officer, and firefighter titles shall be 12 months;

b. Progress reports to be made by the appointing authority and provided to the employee at such times during the working test period as provided by rules of the commission and a final progress report at the end of the entire working test period shall be provided to the employee and the commission;

c. Termination of an employee at the end of the working test period and termination of an employee for cause during the working test period; and

d. The retention of permanent status in the lower title by a promoted employee during the working test period in the higher title and the right to return to such permanent title if the employee does not satisfactorily complete the working test period, but employees removed for cause during a working test period shall not be so returned.

[N.J.A.C. 11A:4-15.]

The working test period shall begin on the date of regular appointment and in State service, shall extend for a period of four months of active service, which the Commissioner may extend on request of an appointing authority for an additional two months. Such request should be submitted to the Department of Personnel at least five working days before the end of the four-month period. The appointing authority shall notify the employee of the extension in writing on or before the last day of the four-month period.

N.J.A.C. 4A:4-5.2(b)(2)

After evaluating the testimony and supporting evidence, I **CONCLUDE** that no bad faith existed here. There was "no evidence of furtive design, ill will or other illicit motivation" in any of Petitioner's progress reports. It is evident that the agency was insufficiently staffed, which may also have led to management and organizational challenges. There is no evidence that the burden of those problems was directed at Petitioner. I have every reason to believe that all of the staff bore the burden of the management and organizational problems that Respondent experienced at the time and there is no evidence that Petitioner's experience was the result of any misdeeds or bad faith. The standard of review for this court is not whether the agency was mismanaged or whether it operated in compliance with the MSA. The issue in this case was whether Respondent acted in bad faith when it terminated Petitioner in bad faith. Perhaps if Petitioner had applied for the position and gone through the training for the position at a time when the agency was at full staff, she would have had a different result. That I cannot predict. However, the evidence presented here indicates a strained operation and an unfortunate circumstance for Petitioner but does not indicate bad faith.

I further **CONCLUDE** that there is no evidence to support a charge of insubordination by Petitioner.

ORDER

It is **ORDERED** that the decision of the appointing authority to terminate Petitioner following the end of her working test period is hereby **AFFIRMED**.

I further **ORDER** that the determination that Petitioner is guilty of insubordination against Petitioner is hereby **REVERSED.**

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, P.O. 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.

May 2, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: May 2, 2017

Date Mailed to Parties: MAY 3 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

LIST OF WITNESSES

For Petitioner:

Nadeyah Sarmad

For Respondent:

Victor Niedbalski

Karl Krauser

Maria Rios

LIST OF EXHIBITS

For Petitioner:

P-1 Progress Report, 4/5/13

P-2 Progress Report, 6/7/13

P-3 Progress Report, 7/9/13

P-4 Interoffice Memo, 3/13

P-5 Interoffice Memo, 4/13

P-6 Corrective Action 1, 6/30/13

P-7 Corrective Action 2, 6/30/13

P-8 Corrective Action 3, 6/30/13

For Respondent:

R-1 Performance Assessment Review

R-2 Working Test Period Reports for 6/7/13, 7/9/13, and 8/9/13

R-3 Policy on Case Reporting on Family Assessments and Reassessments

R-4 Policy on risk Assessments and Case Plans

R-5 Sarmad Training Transcript

R-6 Krauser Email on Protected Time – 6/11/13

R-7 Memo Conference – 5/20/13

R-8 Krauser Email on MVR – 5/31/13

R-9 Krauser Email on NJ SPIRIT – 6/5/13

R-10 Krauser Email on NJ SPIRIT – 7/10/13

R-11 Krauser Email on Safe Measures 7/26/13

R-12 Memo Conference – 7/31/13

R-13 Memo Conference – 8/26/13

R-14 Sarmad Case Plans in NJ SPIRIT

R-15 J.B. Case in NJ SPIRIT

R-16 Correction Action Memos

R-17 Leadership meeting minutes of 3/9/12

R-18 Leadership meeting minutes of 4/11/13

R-19 Leadership meeting minutes 6/12/13

R-20 Progress report for Ms. Sarmad

R-21 Conference memos for March and April, 2013

R-22 Modified Settlement Agreement

R-23 Ms. Sarmad's caseload stats from February 2012 to August 2013

5-17-17

STATE OF NEW JERSEY

In the Matter of Danyell Smith-Ekhaguere
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2821
OAL DKT. NO. CSV 04259-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 17, 2017 BW

The Civil Service Commission, at its meeting of May 17, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04259-17

AGENCY DKT. NO. 2017-2821

IN THE MATTER OF
DANYELL SMITH-EKHAGUERE,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: April 20, 2017 Decided: April 24, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Danyell Smith-Ekhaguere, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 28, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

April 24, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 4/25/17

Date Mailed to Parties: 4/25/17

/nd

OAL DKT. NO. CSV 4259-2017
AGENCY DKT. NO. 20 – 2017-2821

SETTLEMENT AGREEMENT

IN THE MATTER OF

Danyell Smith-Ekhaqvere

AND

Hunterdon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/27/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.D. 4.08 A.4.4. Chronic/excessive absenteeism	Removal	3/2/2017
2.	NJAC 4A:2-2.3(a)4, 6, 12		
3.			
4.			
5.			

B. The Appellant Danyell Smith-Ekhaqvere withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.D. 4.08 A.4.4.		
2.	NJAC 4A:2-2.3(a)	Sustained	60 days suspension
3.	4, 6, 12		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 3/2/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges she is not given an infinite number of days off each year and understands the importance of reporting to work as scheduled. She further understands that any further incident of chronic or excessive absenteeism (A.4.) shall result in the appointing authority seeking her removal and Appellant should not expect to receive a disciplinary settlement that results in her return to work.

OAL DKT. NO. CSV 4259-2017

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

April 20th, 2017
DATE

Appellant

4-20-17
DATE

On Behalf of Appellant

4-20-17
DATE

RESPONDENT

DATE

On Behalf of

OAL DKT. NO. CSV 4159-2017

CERTIFICATION

I, Danyell T. Smith-Khaguere being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

April 20th, 2017
DATE

Danyell S. Smith-Khaguere
NAME

6/6/2017

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of Shirley Shay

CSC Docket No. 2016-3834
OAL Docket No. CSV 6715-16

REMAND TO THE OFFICE OF ADMINISTRATIVE LAW

ISSUED: JUN 06 2017 (NFA)

The appeal of Shirley Shay, Omnibus Driver with Sussex County, Department of Human Services, of her removal, effective April 8, 2016, was before Administrative Law Judge Leland S. McGee (ALJ), who rendered his initial decision on May 11, 2017, reversing the removal. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 6, 2017, did not adopt the recommendation to reverse the removal. Rather, the Commission remanded the matter to the Office of Administrative Law (OAL).

DISCUSSION

The pertinent procedural history of this matter is detailed in the ALJ's initial decision. At the OAL, based on a dispute as to whether the appellant had waived her departmental hearing, as indicated on the Final Notice of Disciplinary Action (FNDA) issued on April 5, 2016, the ALJ issued an order on November 18, 2016 remanding the matter to the appointing authority for a departmental-level hearing[1] and subsequently issued the subject initial decision finding that the appointing

[1] The appointing authority subsequently held the appellant's departmental hearing, upheld the charges and removal, and issued a new Final Notice of Disciplinary Action (FNDA) on May 4, 2017. That notice was also timely appealed by the appellant and shall be attached to this decision upon remand to be considered the FNDA upon which the OAL hearing should be based.

authority improperly removed the appellant "as a result of such 'waiver' ". Upon its *de novo* review of this matter, the Commission does not agree.

While a departmental-level hearing is an important procedural protection afforded to Civil Service employees, it is only an initial step in the procedural protections afforded to such employees. In this regard, employees are given the discretion to waive a departmental-level hearing without any abrogation of their rights to thereafter appeal a FNDA issued based on the waiver of a departmental hearing. In this matter, it appears that the ALJ disregarded the portion of the FNDA issued where it indicated that the appointing authority upheld the charges and removal of the appellant and rather, focused on the fact that the appointing authority indicated that the departmental hearing was "deemed" to be waived. While it was improper for the appointing authority to have "deemed" the appellant's departmental hearing waived, in doing so, and issuing the FNDA upholding the underlying charges, it appropriately afforded the appellant the ability to appeal that action to the Commission, an opportunity she took advantage of. Once the timely appeal of the appellant's removal from employment was transmitted by the Commission to the OAL, the **only** issues that should have been explored were the actual alleged substantive charges and specifications lodged against the appellant and whether the penalty imposed based on those alleged infractions was proper.

It is a well-settled principle that procedural deficiencies at the departmental level which are not significantly prejudicial to an appellant are deemed cured through the *de novo* hearing received at the OAL. *See Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971). In this case, since the Commission granted the appellant a hearing on the merits of the allegations against her, there is no indication of significant prejudice. Accordingly, the Commission remands this matter back to the OAL for a hearing.

ORDER

The Commission orders that this matter be remanded to the OAL for further proceedings as set forth above.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF JUNE, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 06715-16
AGENCY DKT. NO. 2016-3834

IN THE MATTER OF SHIRLEY SHAY,
SUSSEX COUNTY DEPARTMENT
OF HUMAN SERVICES,

Gary A. Kraemer, Esq., for petitioner (Daggett & Kraemer, attorneys)

James T. Prusinowski, Esq., for respondent (Trimboli & Prusinowski, attorneys)

Record closed: December 19, 2016 May 11, 2017

BEFORE **LEELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE

The Sussex County Department of Health and Human Services (Respondent or County) brings a major disciplinary action against Shirley Shay (Shay or Petitioner). Petitioner appeals the determination that respondent was unable to proceed with a disciplinary hearing because Petitioner's attorney refused to recuse himself from representing Petitioner due to a conflict of interest. Further, Petitioner appeals the determination that she waived her right to a departmental hearing by way of such refusal. Finally, Petitioner appeals the determination to terminate her as a result of the "waiver" of her right to a departmental hearing.

PROCEDURAL HISTORY

On December 1, 2015, respondent served petitioner with a Preliminary Notice of Disciplinary Action (PNDA) that noted an immediate removal. Petitioner requested an internal disciplinary hearing, which was not held. On April 17, 2016, a Final Notice of Disciplinary Action (FNDA) was approved and served upon Petitioner by way of certified mail. The FNDA sustained the charges and the removal was upheld. Petitioner filed a timely request for an appeal of the FNDA.

On May 3, 2016, the New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On June 6, 2016, a prehearing conference was held. A subsequent prehearing conference was held on June 28, 2016, at which time a procedural schedule was established. On July 22, 2016, the parties filed a Joint Statement of Undisputed Facts. On July 28, 2016, Respondent filed a Notice of Motion to Disqualify Petitioner's counsel and supporting Brief. On August 11, 2016, Petitioner filed an Answer to the Motion. On August 25, 2016, Respondent filed a Reply to the Answer. In September 2016, additional submissions were filed and Oral Argument was heard on October 26, 2016.

On November 18, 2016, the undersigned issued an Order Reversing the decision of Respondent to terminate Petitioner and remanded the matter to the Respondent for a hearing. On November 28, 2016, Respondent filed a Request for Interlocutory Review to the Director of the Office of Administrative Law. On December 1, 2016, Petitioner filed an Answer to the Request. On December 13, 2016, Respondent filed a Reply to the Answer. On December 19, 2016, the Director of the Office of Administrative Law issued an Order Denying Request for Interlocutory Review and the record closed.

FINDINGS OF FACT

On July 22, 2016, the parties filed a Joint Statement of Undisputed Facts. Therefore, I **FIND** the following to be the **FACTS** of this case:

1. On or about December 1, 2015, Sussex County (the appointing authority) served a Preliminary Notice of Disciplinary Action seeking the removal of the Petitioner, Shirley Shay, from her position as a bus driver with the County Transportation Program. (A true and accurate copy of the Preliminary Notice of Disciplinary Action was attached in the Stipulation as "Exhibit A.")
2. The Petitioner disputed the allegations in the Preliminary Notice, and submitted a timely request for a hearing. (A true and accurate copy of correspondence from Gary Kraemer, Esq. dated December 1, 2015, was attached in the Stipulation as "Exhibit B.") The hearing request also requested that the County furnish relevant documentary evidence in discovery. (Ibid.)
3. On January 20, 2016, a hearing was scheduled for February 9, 2016. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated January 20, 2016, was attached in the Stipulation as "Exhibit C.") No discovery material had been furnished at that point.
4. On January 28, 2016, James Prusinowski, Esq. sent a letter to Petitioner's counsel (Mr. Kraemer) suggesting that the firm of Daggett & Kraemer be disqualified because it was also representing Carol Novrit, the Sussex County Director of the Division of Social Services, in a separate lawsuit filed against the County of Sussex. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated January 28, 2016, was attached in the Stipulation as "Exhibit D.")
5. Ms. Novrit currently has a complaint pending in Superior Court against the County making various allegations concerning her employment with the County, including a claim that the County failed to promote her to the position of County Business Administrator. Ms. Novrit is represented by George Daggett of the law firm of Daggett & Kraemer. Mr. Kraemer is not an attorney for the Novrit litigation against the County and has not met with Ms. Novrit regarding the specifics of the litigation.
6. As the Division Director, Ms. Novrit oversees the operations for Transit and the bus drivers.

7. In this capacity, Ms. Novrit was involved in review of the factual claims that led up to the disciplinary action being preferred against Ms. Shay and in requesting that disciplinary action be taken against Ms. Shay. Specifically, during the internal investigation of charges against Ms. Shay, John Jackson, Program Coordinator for Sussex County Skylands Ride, performed the initial fact gathering. He presented the information to Ms. Novrit, for administrative decision, as indicated in the memorandum drafted by Ms. Novrit regarding the investigation and request/recommendation for disciplinary action to be taken. (A true and accurate copy of a memorandum from Ms. Novrit dated November 20, 2015, was attached in the Stipulation as "Exhibit E.") As indicated in the memo, Ms. Novrit reviewed documents and information related to Ms. Shay's alleged actions. Based upon this review, Ms. Novrit requested that disciplinary action be taken against Ms. Shay.

8. Ms. Novrit personally met with Ms. Shay on December 1, 2015, in her office in Newton, New Jersey. Ms. Shay, Ms. Novrit, and Mr. Jackson were present for the meeting. In the course of the meeting Ms. Shay received her termination notice and the Preliminary Notice of Disciplinary Action. The parties disagree regarding the content of the discussion on December 1, 2016. The County contends that Ms. Novrit questioned Ms. Shay about her job performance and/or failure to perform her duties properly, which are the subject of this disciplinary action. The County also contends that Ms. Shay initially responded by claiming that she had completed all trips as indicated in the driver's manifest, but then, when Ms. Shay was confronted with conflicting GPS, she stated that the passenger in question requested to be dropped off at different locations. Finally, the County contends that Ms. Shay offered to call that passenger and "straighten things out." Ms. Shay contends that no interview or interrogation took place prior to Ms. Novrit handing her the Preliminary Notice and telling her that she was being terminated. The County plans to rely upon the information it contends was presented to Ms. Shay and by Ms. Novrit during the alleged interview as part of its case in chief to support the disciplinary charges it has preferred. The County has identified Mr. Jackson and Ms. Novrit as necessary witnesses for Ms. Shay's hearing.

9. Ms. Novrit authored the memorandum to Sarah Balzano, Administrator of the Department of Social Services, dated November 20, 2015, that triggered Ms. Shay's termination. (Exhibit E.)

10. Ms. Novrit, is the Director for the Division of Social Services, the highest position within the Division. The County has identified her as part of its control group and anticipates that Ms. Novrit will attend the OAL hearing as the County representative, as she has done for other employees charged with disciplinary action in her Division.

11. In a telephone conversation between Mr. Kraemer and Mr. Prusinowski, Mr. Kraemer said that he saw Ms. Novrit at the County reorganization meeting on January 1, 2016. In addition to exchanging pleasantries it was mentioned that the disciplinary charges had been preferred against Ms. Shay and Mr. Kraemer was representing Ms. Shay in the case. At that time, Mr. Kraemer stated that he did not believe a conflict existed based upon Ms. Novrit being represented by his firm and his representation of Ms. Shay in the disciplinary action.

12. Mr. Kraemer responded to Mr. Prusinowski's letter of January 28, 2016, with a letter dated February 4, 2016, indicating that allegations of a conflict of interest are insufficient, and that in order to assess the assertion of conflict properly, counsel would need to review the discovery materials that had been previously requested (but still not provided). He would also need a proffer of expected testimony from Ms. Novrit to gauge whether the asserted conflict was real or fanciful. (A true and accurate copy of correspondence from Gary Kraemer, Esq. dated February 4, 2016, was attached in the Stipulation as "Exhibit F".)

13. The hearing date of February 9, 2016, was adjourned pending resolution of the alleged conflict issue. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated February 5, 2016, was attached in the Stipulation as "Exhibit G.")

14. On February 25, 2016, the County provided a response to Mr. Kraemer, setting forth the factual basis for its claim that a conflict of interest precludes Mr. Kraemer's participation in this matter. (A true and accurate copy of correspondence from James Prusinowski, Esq. dated February 25, 2016, was attached in the Stipulation as "Exhibit H.") Specifically, the County explained that a fatal conflict of interest is present where an attorney has to cross-examine a

client of his firm. In support of its claim that Ms. Novrit is a necessary witness in this matter, the County produced Ms. Novrit's memorandum regarding the charges and investigation leading up to the disciplinary charges. (Exhibit E.) In light of the conflict of interest, the County deemed it was not permissible to provide the discovery requested by Mr. Kraemer.

15. On March 10, 2016, Mr. Kraemer wrote to Mr. Prusinowski, urging that from both factual and legal standpoints the conflict asserted by the appointing authority was baseless. (A true and accurate copy of correspondence from Mr. Kraemer, Esq. dated March 10, 2016 was attached in the Stipulation as "Exhibit I.")

16. There was no reply from Mr. Prusinowski or further communication between counsel.

17. Due to the parties' disagreement regarding whether an impermissible conflict of interest exists, the County took the position that it was unable to proceed with the disciplinary hearing. On April 7, 2016, the County served the Final Notice of Disciplinary Action upon Shay, which stated that she "waived her right to a departmental hearing by way of her counsel refusing to recuse himself based upon an actual non-waivable conflict of interest." (A true and accurate copy of the Final Notice of Disciplinary Action dated April 5, 2016, was attached in the Stipulation as "Exhibit J.")

18. The Appointing Authority provided no prior notice to Petitioner that a decision to continue with Mr. Kraemer as her attorney would be deemed a waiver of her right to the hearing she had requested on the disciplinary charges.

19. This appeal followed.

20. Mr. Kraemer has informed the Court that he will no longer be part of the firm Daggett & Kraemer as of September 1, 2016. Mr. Kraemer has also stated that his office would remain in the same building, which is owned by Mr. Daggett, and Mr. Kraemer plans to lease office space from Mr. Daggett.

21. Counsel for the parties stipulate that for the purpose of the instant motion that the exhibits attached hereto are true and accurate copies of the originals.

22. On or about September 1, 2016, Kraemer submitted a copy of the State of New Jersey Business Registration Certificate indicating the business registration for his new law firm of Kraemer & Corazza; a copy of the New Jersey Division of Revenue Request for Registration Information indicating a change in business

ownership from Daggett & Kraemer to Kraemer and Corazza; a copy of the letterhead for Kraemer & Corazza; a copy of the State of New Jersey Business Registration Certificate indicating the business registration of the Law Offices of George T. Daggett; and a copy of the letterhead of the firm of Law Offices of George T. Daggett.

23. On or about September 2, 2016, Respondent objected to submissions not contained in the original Joint Stipulation of Undisputed Facts. On or about September 6, 2016, Kraemer submitted a response to the objection. On or about September 30, 2016, Kraemer submitted a copy of a Substitution of Attorney filed in the Superior Court wherein the Law Offices of George T. Daggett was substituted for withdrawing attorney, Daggett and Kraemer. No Substitution of Attorney was filed in the present case.

DISCUSSION

The civil service laws "are designed to promote efficient public service, not benefit errant employees. The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State-Operated School Dist. Of City of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. An appointing authority may only discipline an employee for incompetency, inefficiency or failure to perform duties; inability to perform duties; neglect of duty; or other sufficient cause. N.J.A.C. 4A:2-2.3(a)

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in

order for a public employee to be fined, suspended or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Before an employee may be disciplined, he/she must be served with a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and a statement of facts to support the charges prior to imposing major discipline. Specificity of the factual allegations is not merely a technical requirement, but rather a fundamental attribute of due process. Fabian v. Town of N. Bergen, CSV 3198-97, Initial Decision (August 24, 2998), adopted, MSB (October 14, 1998), http:njlaw.rutgers.edu/collections/oal/. Specifically, N.J.A.C. 4A:2-2.5 provides:

> (a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and ***afforded the opportunity for a hearing prior to imposition of major discipline***, except:
>
> 1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. An employee who has been appointed on or after September 1, 2011, who does not have a principal residence in New Jersey and who has not received a residency exemption in accordance with P.L. 2011, c. 70, within one year of appointment, is defined by that statute as illegally holding and unqualified for employment, and therefore subject to immediate suspension as unfit for duty. However, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.
>
> 2. An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. See N.J.A.C. 4A:2-2.7.

If sufficient cause is established, then a determination must be made on what is a reasonable penalty. In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500 (1962). In Bock, the Court found the six-month suspension of a town fireman, on charges of being tardy three times in the previous four weeks, was a proper penalty. Furthermore, Bock explains an appropriate remedy should be related to the employee's past record including service ratings, promotions, commendations, and "formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated by having been called to employee's attention or admitted by him." Id. at 186. This Court has also found "the purpose of the imposition of penalty in a Civil Service proceeding is threefold. It is designed to deter, rehabilitate and punish the wrongdoer." Forand v. S. Woods State Prison, CSV 6334-99, Initial Decision (May 24, 2000), adopted, Comm'r (August 4, 200), <http://njlaw.rutgers.edu/collections/oal/final/csv06334-99.pdf>.

An appeal concerning violations of N.J.A.C. 4A:2-2.5, maybe presented to the Civil Commission through a petition for interim relief. N.J.A.C. 4A:2-2.5(e). Upon the filing of an appeal, a party to the appeal may petition the Civil Service Commission for a stay or other relief pending final decision of the matter. N.J.A.C. 4A:2-1.2. Further, an application for emergency relief shall be made directly to the agency head and *may not* be made to the Office of Administrative Law. N.J.A.C. 1:1-12.6 (emphasis added).

In the present case, the County served Petitioner with a PNDA seeking her removal from her position as a bus driver with the County Transportation Program on December 1, 2015. Petitioner submitted a timely request for a hearing and a hearing was scheduled for February 9, 2016. Both parties, collectively, decided to adjourn the February 9, 2016, hearing date in order to resolve the alleged conflict issue. The letter requesting the adjournment stated "I hope to have these procedural issues resolved shortly and the parties will contact you at that point to schedule a new date for the hearing." (Respondent's brief, Exhibit G.) However, due to the parties' disagreement regarding whether an impermissible conflict of interest existed, Respondent took the position that it was unable to proceed with the disciplinary hearing. On April 7, 2016, the

County served Petitioner the FNDA, which stated that Petitioner had waived her right to a departmental hearing by way of her counsel refusing to recuse himself based upon a non-waivable conflict of interest.

As stated above, pursuant to N.J.A.C. 4A:2-2.5, an employee must be afforded the opportunity to have a hearing prior to imposition of major discipline. The only exception is if the employee is unfit for duty or would be a hazard to any person if permitted to remain on the job or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. Here, this was not the case. The parties, agreed to adjourn the hearing in order the resolve the conflict issue. However, the County unilaterally decided that Petitioner waived her right to a hearing by way of her counsel refusing to recuse himself. This is not an exception to the right to have a hearing as proscribed by N.J.A.C. 4A:2-2.5.

The factual basis for issuing the Final Notice of Disciplinary Action (FNDA) was,

> The subject employee waived her right to a departmental hearing by way of her counsel refusing to recuse himself based upon an actual non-waivable conflict of interest due to concurrent representation of the County's witness.
>
> The County objected to counsel's representation of the subject employee because of the conflict of interest by correspondence dated January 28, 2016, and February 25, 2016. By letter date[d] March 10, 2016, the subject employee's counsel refused to withdraw from representation. Therefore, the departmental hearing is deemed waived.

The facts that formed the basis for terminating Petitioner had nothing to do with Petitioner's conduct. It was not related to the specifically enumerated bases for imposing major discipline pursuant to N.J.A.C. 4A:2-2.3(a). The factual basis articulated in the FNDA does not comport with any of the exceptions to an employee's right to an opportunity for a departmental hearing. Further the penalty of "termination" is not a reasonable penalty to impose upon an employee for the facts set forth in the FNDA. I am not persuaded that the purpose of the imposition of a penalty in a Civil Service proceeding has been met in this case: "to deter, rehabilitate and punish the wrongdoer." Forand, supra, CSV 6334-99, Initial Decision (May 24, 2000), adopted, Comm'r (August 4, 2000),

<http://njlaw.rutgers.edu/collections/oal/final/csv06334-99.pdf>. The "wrongdoer" in the present case is not Petitioner. There is absolutely no connection between the purpose for issuing the FNDA and the penalty imposed upon Petitioner. Additionally, the County did not provide any notice to Petitioner that her decision to continue with Mr. Kraemer as her attorney would be deemed a waiver of her right to the hearing that she requested on the disciplinary charges.

I note that Director Sanders denied Respondent's request for Interlocutory Review in part because, in the second paragraph of the Request, Respondent acknowledged that it does not challenge that, under the Rules of Professional Conduct, Petitioner's attorney is not prohibited from representing her.

Petitioner had a right to a hearing before the FNDA was issued and such right was not afforded to her.

CONCLUSIONS

For the foregoing reasons, I **CONCLUDE** that Respondent improperly determined that Petitioner waived her right to a departmental hearing by way of her attorney's failure to recuse himself.

I further **CONCLUDE** that Respondent improperly terminated Petitioner from her employment as a result of such "waiver."

I further I **CONCLUDE** that Respondent improperly denied Petitioner the right to a departmental hearing prior to issuing the Final Notice of Disciplinary Action.

I further **CONCLUDE** that the appropriate procedure was for Petitioner was to seek interim relief from the Civil Service Commission regarding the conflict of interest issues.

ORDER

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the determination to terminate Petitioner in this matter be and hereby is **REVERSED**.

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, P.O. 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.

May 11, 2017
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: May 11, 2017

MAY 12 2017

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

6-7-17

STATE OF NEW JERSEY

In the Matter of Michael Burton
Newark Public School District

CSC DKT. NO. 2015-2509
OAL DKT. NO. CSV 03345-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03345-15
Agency DKT No 2015-2509

IN THE MATTER OF MICHAEL BURTON,
NEWARK PUBLIC SCHOOL DISTRICT.

Kevin P. McGovern, Esq., for appellant (Mets, Schiro, McGovern, attorneys)

Adam S. Herman, Esq., for respondent (Adams, Guiterrez & Lattiboudere, LLC, attorneys)

Record Closed: May 11, 2017 Decided: May 15, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 29, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Release and Settlement Agreement were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 15, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 5-17-17

Date Mailed to Parties: MAY 17 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

Michael Burton v. Newark Public School District
OAL Docket No.: CSV 03345-2015N
Agency Reference No.: CSC Dkt. No.: 2015-2509

This Settlement Agreement and Release ("Agreement") is made this _____ day of February 2017, by and between Appellant Michael Burton ("Burton" or "Appellant") and Respondent State-Operated School District of the City of Newark, commonly known as Newark Public Schools ("NPS" or "Respondent") (collectively, the "Parties").

WHEREAS, on or about April 10, 2014, Respondent issued Preliminary Notice of Disciplinary Action to Appellant, Supervisor of Custodians, asserting Charges of Conduct Unbecoming, Neglect of Duty, and Other Sufficient Cause; and

WHEREAS, the Departmental Hearings of the above Charges took place on June 18 and 19, July 1 and 10, and August 13, 2014, during which the Parties presented evidence before Hearing Officer James Cooney, Esq.; and

WHEREAS, Hearing Officer Cooney issued a Recommended Order dated February 12, 2015 dismissing Respondent's Charge of Conduct Unbecoming, sustaining the Charges of Neglect of Duty and Other Sufficient Cause, and imposing a 60-day unpaid suspension; and

WHEREAS, Appellant initiated the instant appeal with the Civil Service Commission ("CSC"); and

WHEREAS, without waiving their respective positions and without any admissions as to liability, the Parties wish to fully resolve the pending appeal and Administrative Law Hearing, and all related claims and defenses by and between them pursuant to the terms and conditions set forth below; and

NOW THEREFORE, the Parties hereby agree to the following terms as full and final settlement of the above matter:

1. This Agreement sets forth all of the terms and conditions of the Parties' agreement.

2. Respondent will return to Appellant the sixty (60) days' pay which was withheld pursuant to the suspension recommended by Hearing Officer Cooney. As the payment represents back pay, all usual and mandatory deductions and withholdings will be made by Respondent.

3. The payment under Paragraph 2 shall represent Respondent's entire financial obligation to Appellant in connection with this action.

4. The Parties agree that Appellant is not a prevailing party and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

5. The payment under Paragraph 2 shall be made to Appellant within thirty (30) days after approval of this Agreement by the Honorable Leslie Z. Celentano, A.L.J. The Parties understand this Agreement is subject to approval of Judge Celentano and the CSC. In the event that Judge Celentano approves this Agreement and NPS makes payment to Appellant under Paragraph 2, but the CSC ultimately does not approve this Agreement, then Appellant agrees to: (i) pay back Respondent in a lump sum the entire amount received under Paragraph 2 within thirty (30) days of the CSC's rejection of the Agreement, or (ii) permit Respondent to automatically deduct the entire amount he received from Respondent under Paragraph 2 directly from his paycheck(s) in the pay period(s) immediately following the CSC's decision until said amount is paid back in full.

6. Appellant agrees to voluntarily dismiss the instant Appeal with prejudice.

7. The Parties agree that the underlying disciplinary charges and April 10, 2014 final notice of disciplinary action cannot be referred to, or utilized, by Respondent in any future disciplinary action brought against Appellant.

8. In exchange for the consideration set forth in Paragraphs 2 and 7, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that he has or may have against Respondent, the Superintendent, Board of Education and Board members, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Appellant's employment, up until the time that this agreement is fully executed and approved by the necessary administrative agencies. It specifically includes, without limitation, all claims which Appellant may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability

benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Appellant does not waive or release any claim that cannot be waived or released as a matter of law.

9. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

10. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

11. This Agreement is subject to the approval of the Office of Administrative Law and the Civil Service Commission.

12. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.

13. This Agreement shall not serve as a precedent for any other employee or matter.

14. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

15. The Parties acknowledge that they have entered into this Agreement voluntarily, with the assistance of counsel, and hereby sign it without duress or coercion.

16. This Agreement shall be governed by the laws of the State of New Jersey.

17. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures

or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

18. By signing this Agreement, Mr. Burton acknowledges that he has been fully and fairly represented in this matter by his union, OPEIU Local 32, and that he is satisfied with that representation.

The Parties hereby acknowledge their agreement to the terms and conditions set forth above by signing below.

APPELLANT
MICHAEL BURTON

By: _____

Dated: 3/5/17

RESPONDENT
STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK

By: _____

Dated: 5/9/17

17

STATE OF NEW JERSEY

In the Matter of County Correction Captain (PC1189P) and County Correction Lieutenant (PC1202P), Hudson County	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2017-2783	:	Court Remand

ISSUED: JUN 12 2017

The Superior Court of New Jersey, Appellate Division, has reversed and remanded the attached December 3, 2014 final decision of the Civil Service Commission (Commission) for further proceedings consistent with its decision.

The facts of this matter are thoroughly discussed in the attached decision. *See In the Matter of County Correction Captain (PC1189P) and County Lieutenant (PC1202P), Hudson County* (CSC, decided December 3, 2014). Maria Gaines, Helen Ford, Robert Kalb and Luis Oyola asserted that certain candidates for the PC1202P and PC1189P examinations did not meet the requisite year in grade requirement by the November 21, 2012 closing date. Specifically, they claimed that Christopher D'Andrea, Timothea Gabriel, Rene Felix, Miguel Matos, Paul Morales, Sharonda Murrell and Michael Ripp did not meet the time in grade requirement for PC1202P; and that Michael Conrad, John Geoghegan and Christopher Yurecko did not meet the time in grade requirement for PC1189P. The County indicated that due to implementation of a policy, these individuals received appointment dates effective August 6, 2011 for record purposes[1] but did not begin serving in their respective titles until March 23, 2012. The Commission determined that pursuant to *N.J.A.C.* 4A:4-2.6(a)1, Messrs. D'Andrea, Felix, Matos, Morales and Ripp and Mses. Gabriel

[1] The Commission noted that based on the information available in their respective employment records, the former Division of Selection Services determined that they were eligible for the subject examinations.

and Murrell must have actually served in and performed the duties of the County Correction Sergeant title during the requisite one-year period in order to be eligible for the PC1202P exam and that Messrs. Conrad, Geoghegan and Yurecko must have actually served in and performed the duties of the County Correction Lieutenant title in order to be eligible for the PC1189P exam. The Commission further determined that since these individuals did not did not perform the duties of their respective titles until March 2012, the appointing authority, in effect, inappropriately provided them with retroactive appointment dates.[2] However, the Commission noted that the appointing authority could have requested that the year in grade requirement be reduced to the completion of the working test period, pursuant to *N.J.A.C.* 4A:4-2.6(g)3, at time of the subject announcements. Further, since the affected individuals applied and sat for the subject examinations based on good faith understanding that they were eligible and the basic tenet of the Civil Service Act is that appointments and promotions be awarded based on merit and fitness which is measured by competitive examinations, increasing the applicant pool by three eligibles for the PC1189P exam and by eight eligibles for the PC1202P exam did not negatively impact those applicants who were originally eligible without waiving the time in-grade requirement. Accordingly, the Commission determined, based on equitable grounds, to reduce the one-year service requirement for the County Correction Captain (PC1189P), Hudson County, and County Correction Lieutenant (PC1202P), Hudson County, examinations to the completion of the working test period for County Correction Lieutenant and County Correction Sergeant, respectively.

Thereafter, Mses. Gaines and Ford and Messrs. Kalb and Oyola, represented by Matthew R. Curran, Esq., pursued an appeal with the Appellate Division. In *In the Matter of County Correction Captain (PC1189P) and County Lieutenant (PC1202P), Hudson County*, Docket No. A-2162-14T3 (App. Div. March 9, 2017), the court reversed the decision of the Commission and ordered that Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Yurecko and Mses. Gabriel and Murrell be removed from the PC1202P eligible list and Messrs. Conrad, Geoghegan and Yurecko be removed from the PC1189P eligible list. Specifically, the court found that retroactively amending the subject announcements to the completion of the working test period was contrary to Commission regulations and was not a reasonable application of legislative policies. In this regard, the court found that absent evidence that the affected individuals had successfully completed their working test periods, it could not be presumed that they did so. The court concluded that such a presumption was contrary to the requirements and purpose of working test periods.

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[2] As a result, the Commission determined that Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Mses. Gabriel and Murrell should receive regular appointment dates of March 23, 2012 to the County Correction Sergeant title; and Messrs. Conrad, Geoghegan and Yurecko should receive regular appointments to the County Correction Lieutenant title effective March 23, 2012.

In addition, the court determined that the announced requirements could not be retroactively reduced and the affected individuals' good faith understanding that they were eligible was undermined by the fact that the appointing authority recorded their August 6, 2011 appointment dates but that the individuals were aware that they did not serve in their respective titles until March 23, 2012. Finally, the court found that "competition is not the sole 'philosophy and public policy behind the Civil Service Act'" [citation omitted].

During the pendency of this matter in the Appellate Division, the first and only certification of the County Correction Captain (PC1189P) list was issued on July 22, 2015 (Certification No. PL150840) containing the names of the eligible appearing at ranks 1 through 8. In disposing of the certification, the appointing authority appointed the eligibles appearing at ranks 1 through 3, *i.e.*, Messrs. Geoghegan, Yurecko and Conrad, effective November 28, 2015. In addition, the first and only certification of the County Correction Lieutenant (PC1202P) list was issued on July 15, 2015 (Certification No. PL150829) containing the names of the eligibles appearing at ranks 1 through 10. In disposing of the certification, the appointing authority appointed the eligibles appearing at ranks 1 through 5, *i.e.*, Messrs. Matos, Morales, Ripp, D'Andrea and Ms. Murrell, effective November 28, 2015. Regarding the appellants, it is noted that Ms. Gaines retired effective June 1, 2015, Mr. Oyola effective July 1, 2016 and Mr. Kalb effective December 1, 2016.

By letter dated April 3, 2017, all of the parties to this matter were provided with the opportunity to supplement the record with any additional information and argument that they wanted the Commission to consider.

Ms. Ford requests that she receive a retroactive appointment to the County Correction Lieutenant title effective November 30, 2015 and be granted back pay. Ms. Gaines and Messrs. Kalb and Oyola request that they "receive retroactive promotions as of November 30, 2015 and back pay from November 30, 2015 to the date of their retirement so that their pension benefits can be adjusted accordingly." In support of their appeal, they submit additional documentation including: an email sent March 13, 2017 from Ms. Gaines to Mr. Curran; an email sent March 28, 2014 from Ms. Gaines to DARA staff; an email sent July 9, 2014 from Ms. Gaines to Abe Antun, Hudson County Administrator; and an email sent July 24, 2015 from Ms. Gaines to "jmaldonado@hcnj.us."

In response, the County presents "the potential remedies available to the Commission in addressing the unique circumstances attributable to this case." Specifically, the County indicates, with regard to the retirees, that it "is amenable to retroactively promoting those eligible individuals, who were on the promotional list for lieutenants and captains, and retroactively paying them their lost pay for the period commencing on November 28, 2015 . . ." Regarding Messrs. Geoghegan, Yurecko and Conrad, the County proposes "keep[ing] [Mr.] Geoghegan in the post of

captain" and allow Messrs. Yurecko and Conrad "to continue to serve in the position of captain" or appoint them provisionally to the County Correction Captain title and "issue a notice for a new promotional test." With regard to Messrs. Matos, Morales, Ripp, D'Andrea and Ms. Murrell, the County proposes demoting them and retroactively appointing other eligibles on the PC1202P list, including Ms. Ford. Finally, the County notes that since Mr. Felix and Ms. Gabriel are on the County Correction Lieutenant (PC2556T), Hudson County, eligible list, "no further action is needed as to them."

Mr. Geoghegan requests that an "email string . . . from myself to the [C]omission dated May 1, 2013" which "was not entered into the record during the original [C]omission appeal process" or at the Appellate Division be considered "to refute any inference that the applicants in question did not make earnest attempts to seek clarification from the [C]ommission on our eligibility to take the promotional exams prior to taking the promotional exams." In this regard, Mr. Geoghegan provides a copy of an email sent May 6, 2013 from Susan Mannix to Mr. Geoghegan regarding the eligibility of Mses. Gabriel and Murrell and Messrs. Conrad, D'Andrea, Felix, Geoghegan, Matos, Morales, Ripp and Yurecko for the PC1189P and PC1202P exams, respectively.

CONCLUSION

In remanding this matter, the Appellate Division ordered that the "appellants' request for removal of the Applicants from the August 22, 2013 promotional lists" be granted. As such, Messrs. Conrad, Geoghegan and Yurecko should be removed from the PC1189P eligible list and Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Mses. Gabriel and Murrell should be removed from the PC1202P eligible list. Furthermore, as previously noted, some of these affected individuals received appointments to the County Correction Captain and County Correction Lieutenant titles, respectively. Accordingly, Messrs. Conrad, Geoghan and Yureko are to be returned to the County Correction Lieutenant title and Messrs. D'Andrea, Matos, Morales and Ripp and Ms. Murrell are to be returned to the County Correction Sergeant title. It is not clear from the record whether the County has vacancies available to accommodate the return of these individuals to the County Correction Lieutenant and County Correction Sergeant titles. In this regard, if the County does not have sufficient vacancies, in accordance with *N.J.A.C.* 4A:8, the County must utilize layoff procedures for any individuals who may be displaced. This includes implementing pre-layoff actions and filing a layoff plan with the Division of Agency Services. *See N.J.A.C.* 4A:8-1.3 and *N.J.A.C.* 4A:8-1.4.

With respect to the remedies proposed by the appellants and the County, it is noted that the Appellate Division did not mandate the appointment of the appellants or any other individuals. Rather, the Appellate Division only ordered the removal of the above noted individuals from the PC1189P and PC1202P

promotional lists. Furthermore, regarding Ms. Gaines and Messrs. Kalb and Oyola, in order to achieve permanent appointment, an individual must successfully complete a working test period. *See N.J.S.A.* 11:4-15 and *N.J.A.C.* 4A:4-5.1. Given that these individuals have separated from employment, there is no opportunity for them to serve a working test period. Moreover, the Commission cannot assume, as noted by the court in this matter, that they would have successfully completed their respective working test periods as the County did not observe or evaluate any of them as evidenced by progress reports or performed the duties of the respective titles. Accordingly, it would be improper to provide Ms. Gaines and Messrs. Kalb and Oyola with "retroactive promotions." With respect to Ms. Ford, it is noted that she is the fourth ranked eligible on the County Correction Lieutenant (PC2556T), Hudson County, eligible list, which is set to expire on November 16, 2019. Should she receive an appointment to the County Correction Lieutenant title and successfully complete a working test period, she or the appointing authority may petition the Commission, upon the successful completion of her working test period, for a retroactive appointment date.

It is noted that the most recent announcements for County Correction Captain (PC2530T), Hudson County and County Correction Lieutenant (PC2556T), Hudson County, were issued on November 1, 2015 and closed November 21, 2015.[3] As noted previously, Certification No. PL150840 and Certification No. PL150829 were issued on July 22, 2015 and July 15, 2015, respectively. Those individuals whose names appeared on these certifications could have applied for the PC2530T or PC2556T exams, as appropriate. However, since their names were certified, they may not have determined it necessary to apply for these promotional exams. Given that those affected individuals who were appointed are now being returned to their prior titles, they should have the opportunity to be on these eligible lists. Based on the foregoing, in accordance with *N.J.A.C.* 4A:4-2.6(a)2, the PC2530T and PC2556T announcements were amended to permit an extended period for application filing[4] and eligible candidates filing timely applications were tested in the current cycle.[5]

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[3] The resultant eligible lists promulgated on November 17, 2016 and are set to expire on November 16, 2019. It is noted that to date, no appointments have been made from the PC2530T or PC2556T lists and there are no current certifications pending. In addition, certification holds have been placed on these lists pending the scoring of any make-up examinations.

[4] The amended application filing deadline was April 24, 2017. It is noted that the requirements provided in the announcements remained unchanged and all applicants must have met the requirements as of the November 21, 2015 closing date. It is further noted that Thomas Burke, Michael Conrad and Christopher Yurecko submitted applications by the extended application filing deadline for the PC2530T exam and were admitted; and Christopher D'Andrea, James Nieves, Michael Ripp and Sharonda Murrell submitted applications for the PC2556T exam and were admitted.

[5] It is noted that in *In the Matter of Police Sergeant (PM3776V), City of Paterson*, 176 *N.J.* 49 (2003), the New Jersey Supreme Court ordered the Civil Service Commission, for future exams, to

With respect to Mr. Geoghegan, whether the affected individuals "ma[d]e earnest attempts to seek clarification from the [C]ommission on [their] eligibility to take the promotional exams prior to taking the promotional exams" is immaterial in the instant matter as the Appellate Division has determined that the affected individuals were ineligible for the PC1189P and PC1202P tests, respectively.

ORDER

Therefore, it is ordered that Messrs. Conrad, Geoghegan and Yurecko be removed from the PC1189P eligible list and Messrs. D'Andrea, Felix, Matos, Morales, Ripp and Mses. Gabriel and Murrell be removed from the PC1202P eligible list. It is further ordered that Messrs. Conrad, Geoghan and Yureko be returned to the County Correction Lieutenant title and Messrs. D'Andrea, Matos, Morales and Ripp and Ms. Murrell be returned to the County Correction Sergeant title.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 7TH DAY OF JUNE, 2017

Robert M. Czech
Chairperson
Civil Service Commission

"administer make-up exams that contain substantially different or entirely different questions from those used in the original examination." *Id.* at 66. As a result, public safety candidates are given a make-up exam when the next regularly scheduled exam for their particular title is administered. In this regard, the make-up test is typically the same as that to be taken by candidates who apply for the next cycle of announcements and make-up candidates are directed to refer to the Orientation Guide associated with the next cycle of tests. It is noted that the 2017 County Correction Captain and County Correction Lieutenant examinations were administered on May 4, 2017.

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

c: Michael Curran, Esq.
Sean D. Dias, Esq.
Louis C. Rosen, Esq.
Michael Conrad
Christopher D'Andrea
Rene Felix
Timothea Gabriel
John Geoghegan
Miguel Matos
Paul Morales
Sharonda Murrell
Michael Ripp
Christopher Yurecko
Todd Wigder, DAG
Clerk, Appellate Division
Michael Johnson
Kelly Glenn
Records Center

6-7-17

STATE OF NEW JERSEY

In the Matter of Daniel DeSoucey
Monmouth County,
Department of Parks

CSC DKT. NO. 2016-2050
OAL DKT. NO. CSV 00758-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 00758-16

AGENCY DKT. NO. 2016-2050

IN THE MATTER OF DANIEL DESOUCEY, MONMOUTH COUNTY, DEPARTMENT OF PARKS.

Barry D. Isanuk, Esq., for Daniel DeSoucey, appellant

Steven W. Kleinman, Esq., Special County Counsel, for Monmouth County Department of Parks, respondent

Record Closed: May 8, 207 Decided: May 9, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on January 8, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

This case concerns the appeal of Daniel DeSoucey from the actions of the respondent, Monmouth County Department of Parks. On May 8, 2017, the parties fled

a fully executed Agreement and Complete Release in this matter. The Agreement and Complete Release is attached and fully incorporated herein. (J-1).

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures to J-1.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 9, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5/10/17

Date Mailed to Parties: 5/10/17

/lam

LIST OF EXHIBITS

J-1 Agreement and Complete Release

J-1

AGREEMENT AND COMPLETE RELEASE

This Agreement and Complete Release ("Agreement") is entered into this 20th day of April **2017**, and is by and between Monmouth County and the Monmouth County Board of Recreation Commissioners (collectively, "County"), Daniel DeSoucey ("DeSoucey" or "Employee"), and CWA Local 1075 ("Union").

RECITALS

WHEREAS, DeSoucey is employed by the County as a Carpenter, and is a member of the Union; and,

WHEREAS, on September 24, 2015, the County issued DeSoucey a Preliminary Notice of Disciplinary Action (DPF-31A) (the "Disciplinary Action"); and,

WHEREAS, the Disciplinary Action charged DeSoucey with violating N.J.A.C. 4A:2-2.3(a)(6), (a)(7) and (a)(12); County Policies 501, 522, 701 and 703; and the County Policy Prohibiting Work Place Discrimination and Harassment; and,

WHEREAS, based on the charges and specifications contained in the Disciplinary Action, the County determined that a ninety (90) working day unpaid suspension was the appropriate penalty; and,

WHEREAS, following a departmental hearing conducted on November 12, 2015, the charges and proposed penalty of a ninety (90) working day unpaid suspension were sustained; and,

WHEREAS, the County thereafter administratively adjusted DeSoucey's disciplinary penalty to a ninety (90) calendar day unpaid suspension, resulting in DeSoucey actually serving an unpaid suspension from January 2, 2016 through April 3, 2016, a total of sixty-one (61) working days; and,

WHEREAS, DeSoucey timely filed an appeal of the Disciplinary Action to the New Jersey Civil Service Commission ("Commission"), which was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number CSV 00758-2016S; and,

WHEREAS, prior to the scheduling of a hearing date at the OAL on the Disciplinary Action, the parties engaged in settlement discussions; and,

WHEREAS, the County, DeSoucey and Union now desire to resolve all outstanding issues with respect to the Disciplinary Action via this Agreement.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the County, DeSoucey and Union hereby agree as follows:

1. **RESOLUTION OF THE DISCIPLINARY ACTION.**

   a. The Disciplinary Action shall be resolved by the County administratively withdrawing the charges in their entirety. The parties acknowledge that no final determination had been reached as to whether or not the charges contained in the Disciplinary Action were ultimately sustained or the penalty was appropriate. As DeSoucey has already served the entirety of the sixty (61) working day unpaid suspension, he shall be reimbursed ten (10) working days of back pay by the County. For record-keeping purposes, this reimbursement shall compensate him for the last ten (10) working days he was suspended without pay: March 21, 22, 23, 24, 25, 28, 29, 30, 31 and April 1, 2016. The total amount of gross back pay he shall receive for these ten (10) days is $1600.40. The remaining fifty-one (51) working days during which he was suspended, starting on January 4, 2016 and

ending on March 18, 2016, shall be amended in his employment records to reflect an approved, but unpaid administrative leave. The County, DeSoucey and Union will take whatever additional action is necessary to effectuate the terms of the Agreement, if any, including, but not limited to, the execution of any further documents that may be needed to ensure that the disciplinary charges are formally withdrawn by the County at the Commission and/or OAL.

b. DeSoucey, by signing this Agreement, does not concede or admit in any way to any of the allegations contained in the Disciplinary Action.

c. DeSoucey waives any and all claims arising from or relating to the Disciplinary Action, including, but not limited to, back pay, benefits, seniority, and attorneys' fees and/or costs, except as specifically provided in Section 1(a), above. The payment provided for in Section 1(a), above, shall be made no later than thirty (30) days after this Agreement is approved by the Commission.

d. The parties acknowledge that no pension or seniority time may be credited for periods for which DeSoucey is not paid by the County.

e. The County will ensure its records conform to the terms of the Agreement. All internal County records will remain intact.

f. The County shall have the right to revoke this Agreement within fourteen (14) days after its execution of this Agreement, in the event that DeSoucey has failed to simultaneously execute a separate settlement agreement relating to a separate disciplinary action filed against him on September 21, 2016. In such instance the parties shall reserve their rights to proceed with the Disciplinary Action at the Commission and/or OAL.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE.**

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, DeSoucey, along with his successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the County of Monmouth, the Monmouth County Board of Recreation Commissioners, and all of their officers, agents, employees, agencies and instrumentalities (collectively, "**Releasees**"), regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to DeSoucey's employment with the County, including the events, information or disputes giving rise to this matter, the Disciplinary Action or the Agreement.

This full release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States Constitution, the federal Fair Labor Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the

federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This full release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, seniority credit, attorneys' fees, equitable relief, or any other relief.

This full release also specifically includes, but is not limited to, the right to receive any monetary relief in connection with the prosecution of a charge or suit brought on the Releasor's behalf by a third party, including any federal, state or local governmental agency or entity.

Nothing in this release shall apply to any vested benefits or any claims to determine or enforce rights with respect to said benefits, nor with respect to any claim currently filed or filed in the future under the New Jersey Workers Compensation Act.

3. **OLDER WORKERS BENEFIT PROTECTION ACT REVOCATION PERIOD.**

This Agreement is intended to comply with the federal Older Workers Benefit Protection Act (OWBPA), and DeSoucey acknowledges he specifically is waiving rights and claims under the OWBPA. Therefore, this Agreement and Release shall not be

effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the OWBPA.

4. **ACKNOWLEDGEMENT.**

DeSoucey acknowledges that this Agreement shall resolve all issues related to the Disciplinary Action and that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed herself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

6. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

7. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

8. **AMBIGUITIES.**

Each party and their counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

9. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

10. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between DeSoucey, the County, and the Union, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

11. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

12. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor

shall it be binding with respect to any other employee of the County. The Union expressly agrees not to use this Agreement as evidence of "past practice" in any forum.

13. **CONFIDENTIALITY.**

The parties agree that this document constitutes a confidential personnel record under OPRA and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. DeSoucey and the Union agree that they will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case they agree to notify the County before doing so to provide for an opportunity to oppose such a request), relating to the terms or execution of this Agreement.

14. **APPROVALS.**

The parties acknowledge that this Agreement is subject to approval by the Commission and shall be provided to the Commission and/or the assigned Administrative Law Judge for approval. Any disapproval by the Commission shall not interfere with the rights of either party to pursue the matter further.

15. **Daniel DeSoucey** agrees to and acknowledges the following:

(a) I agree and acknowledge that I was represented by and consulted with an attorney of my choosing throughout the negotiation and execution of this Agreement and Release. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement and Release before signing it.

(b) I agree and acknowledge that I have the right to reflect upon this Agreement and Release for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) days after executing the Agreement and Release to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: *Steven W. Kleinman, Special Monmouth County Counsel, Hall of Records, 1 East Main Street, Freehold, NJ 07728.*

(c) I understand and acknowledge that if I sign this Agreement and Release, along with the waiver attached hereto, prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

16. **ACKNOWLEGEMENT.**

By signing this Agreement and Release, Daniel DeSoucey acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE COUNTY TO CONSULT WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND REPRESENT THAT I HAVE IN FACT CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Daniel DeSoucey executed the foregoing Agreement this 20th day of April 2017.

Sworn and subscribed to before me this 20th **day of** April **2017**

Notary Public of the State of New Jersey
Barry D. Isanuk, Esq.

Date: 4/27/2017

DANIEL DESOUCEY

County of Monmouth

By: Steven Kleiman, Special County Counsel for Monmouth County & the Board of Recreation Commissioners

Monmouth County Board of Recreation Commissioners

Date: 4-20-2017

By: Barry D. Isanuk, Esq., Attorney for **CWA Local 1075**

Date: N/A

By: N/A

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 15(c) of this Agreement.

DANIEL DESOUCEY

Date: 4-20-2017

6-7-17

STATE OF NEW JERSEY

In the Matter of Daniel DeSoucey
Momouth County,
Department of Parks

CSC DKT. NO. 2017-2081
OAL DKT. NO. CSV 00741-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 00741-17

AGENCY DKT. NO. 2017-2081

IN THE MATTER OF DANIEL DESOUCEY, MONMOUTH COUNTY, DEPARTMENT OF PARKS.

Barry D. Isanuk, Esq., for Daniel DeSoucey, appellant

Steven W. Kleinman, Esq., Special County Counsel, for Monmouth County Department of Parks, respondent

Record Closed: May 8, 2017 Decided: May 9, 2017

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on January 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared an Agreement and Complete Release (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 9, 2017
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 5/11/17

Date Mailed to Parties: 5/11/17

/lam

LIST OF EXHIBITS

Jointly Submitted:

J-1 Agreement and Complete Release, received by the Office of Administrative Law on May 8, 2017

J-1

SEPARATION AGREEMENT AND COMPLETE RELEASE

This Separation Agreement and Complete Release ("Agreement") is entered into this 20th day of April **2017**, and is by and between Monmouth County and the Monmouth County Board of Recreation Commissioners (collectively, "County"), Daniel DeSoucey ("DeSoucey" or "Employee"), and CWA Local 1075 ("Union").

RECITALS

WHEREAS, DeSoucey is employed by the County as a Carpenter, and is a member of the Union; and,

WHEREAS, on September 16, 2016, the County immediately suspended DeSoucey and on September 21, 2016, the County issued DeSoucey a Preliminary Notice of Disciplinary Action (DPF-31A) (the "Disciplinary Action"); and,

WHEREAS, the Disciplinary Action charged DeSoucey with violating N.J.A.C. 4A:2-2.3(a)(2), (a)(3), (a)(6), and (a)(12); County Policies 104, 501, 701, 702 and 704; the County Vehicle Policy; and the County Substance Abuse Policy; and,

WHEREAS, based on the charges and specifications contained in the Disciplinary Action, the County determined that removal from employment, effective and retroactive to September 16, 2016, was the appropriate penalty; and,

WHEREAS, following a departmental hearing conducted on October 13, 2016, the charges and proposed penalty of removal, effective and retroactive to September 16, 2016, were sustained; and,

WHEREAS, DeSoucey timely filed an appeal of the Disciplinary Action to the New Jersey Civil Service Commission ("Commission"), which was transmitted to the Office of

Administrative Law ("OAL") for hearing as a contested case under docket number CSV 00741-2017S; and,

WHEREAS, prior to the scheduling of a hearing date at the OAL on the Disciplinary Action, the parties engaged in settlement discussions; and,

WHEREAS, the County, DeSoucey and Union now desire to resolve all outstanding issues with respect to the Disciplinary Action and agree upon the terms of DeSoucey's amicable, permanent separation from employment with the County via this Agreement.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the County, DeSoucey and Union hereby agree as follows:

1. **RESOLUTION OF THE DISCIPLINARY ACTION; GENERAL RESIGNATION OF DANIEL DESOUCEY.**

   a. The Disciplinary Action shall by resolved by DeSoucey permanently and irrevocably resigning from his County employment, effective and retroactive to September 16, 2016, the date he was immediately suspended by the County. DeSoucey's resignation shall be recorded as a "general resignation" as defined in N.J.A.C. Title 4A. The parties acknowledge that no final determination had been reached as to whether or not the charges contained in the Disciplinary Action were ultimately sustained or the proposed penalty was appropriate.

   b. DeSoucey, by signing this Agreement, does not concede or admit in any way to any of the allegations contained in the Disciplinary Action.

   c. DeSoucey agrees that he will not be allowed to work for the County, or any of the County's agencies or instrumentalities, in any position, at any time in the future. However, this provision is not intended to limit in any way DeSoucey's ability to

seek either public or private employment other than with the County or its agencies or instrumentalities.

d. DeSoucey waives any and all claims arising from or relating to the Disciplinary Action, including, but not limited to, back pay, benefits, seniority, and attorneys' fees and/or costs, except that to the extent he may still be owed any compensation for accrued, but unused vacation or compensatory time under established County policy, he shall be entitled to receive the same upon his resignation.

e. If he has not already done so, DeSoucey agrees to immediately return all property of the County he may have in his possession, including, but not limited to, all identification indicating his employment with the County.

f. For purposes of any unemployment claim that DeSoucey may file, the parties agree his resignation was compelled by the County and was not voluntary. The County further agrees not to contest any such unemployment claim, however, it is acknowledged by the parties that the decision whether or not DeSoucey will be found eligible to receive unemployment is outside their control and this Agreement shall remain in full force and effect regardless of that decision.

g. The parties acknowledge that no pension or seniority time may be credited for periods for which DeSoucey is not paid by the County.

h. The County will ensure its records conform to the terms of the Agreement, including specifically that DeSoucey resigned from County employment, rather than was removed as a result of disciplinary action. All internal County records will remain intact.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE.**

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, DeSoucey, along with his successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the County of Monmouth, the Monmouth County Board of Recreation Commissioners, and all of their officers, agents, employees, agencies and instrumentalities (collectively, "**Releasees**"), regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to DeSoucey's employment with the County, including the events, information or disputes giving rise to this matter, the Disciplinary Action or the Agreement.

This full release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States Constitution, the federal Fair Labor Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the

federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This full release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, seniority credit, attorneys' fees, equitable relief, or any other relief.

This full release also specifically includes, but is not limited to, the right to receive any monetary relief in connection with the prosecution of a charge or suit brought on the Releasor's behalf by a third party, including any federal, state or local governmental agency or entity.

Nothing in this release shall apply to any vested benefits or any claims to determine or enforce rights with respect to said benefits, nor with respect to any claim currently filed or filed in the future under the New Jersey Workers Compensation Act.

3. **OLDER WORKERS BENEFIT PROTECTION ACT REVOCATION PERIOD.**

This Agreement is intended to comply with the federal Older Workers Benefit Protection Act (OWBPA), and DeSoucey acknowledges he specifically is waiving rights and claims under the OWBPA. Therefore, this Agreement and Release shall not be

effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the OWBPA.

4. **ACKNOWLEDGEMENT.**

DeSoucey acknowledges that this Agreement shall resolve all issues related to the Disciplinary Action and that he has had the right and opportunity to discuss all aspects of this Agreement with his legal counsel prior to entering into it and that he has availed herself of this right, that he has carefully read and fully understands all of the provisions of this Agreement, and that he is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. **UNION REPRESENTATION.**

DeSoucey acknowledges that was he has been advised by the Union of his options in this matter, including his right to further pursue the appeal of his removal to the New Jersey Civil Service Commission through the Office of Administrative Law. Understanding the foregoing, DeSoucey certifies that (1) he is satisfied with the representation the Union has provided him in this matter, (2) the Union has not made any representations concerning the terms or effects of this Agreement other than those contained herein; and (3) he has been advised by the Union that by entering into the Agreement, he is irrevocably giving up his right to further pursue the appeal of his removal to the New Jersey Civil Service Commission through the Office of Administrative Law. DeSoucey has informed the Union that with these understandings, he wishes to resign pursuant to the terms of the Agreement.

6. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

7. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

8. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

9. **AMBIGUITIES.**

Each party and their counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

10. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly

executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

11. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between DeSoucey, the County, and the Union, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

12. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

13. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other employee of the County. The Union expressly agrees not to use this Agreement as evidence of "past practice" in any forum.

14. **NON-DISPARAGEMENT.**

a. DeSoucey agrees that, unless required by legal process or applicable law, he (i) will not say anything to any person or entity that disparages or defames the County, or any of its officers, employees, agents, agencies or instrumentalities; (ii) will not advise or encourage any person or entity to bring a claim against the County, or any of its officers, employees, agents, agencies or instrumentalities; and (iii) will not assist any person or entity in connection with any such claim unless required to do so by law.

b. The County agrees that, unless required by legal process or applicable law, or unless the parties mutually agree otherwise, if it is contacted by any person or entity regarding DeSoucey's employment with the County, including, but not limited to, a request for a job or other reference, it will only confirm the information required to be made public by the New Jersey Open Public Records Act ("OPRA"), more specifically, DeSoucey's title, position, salary, payroll record, length of service, date of separation, the amount and type of any pension received, and that DeSoucey resigned his employment with the County.

15. **CONFIDENTIALITY.**

The parties agree that this document constitutes a confidential personnel record under OPRA and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. However, the parties specifically acknowledge that the County will disclose this agreement to the New Jersey Public Employees' Retirement System if so required by N.J.S.A. 43:1-3.3. DeSoucey and the Union agree that they will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case they agree to notify the County before doing so to provide for an opportunity to oppose such a request), relating to the terms or execution of this Agreement.

16. **APPROVALS.**

The parties acknowledge that this Agreement is subject to approval by the Commission and shall be provided to the Commission and/or the assigned Administrative

Law Judge for approval. Any disapproval by the Commission shall not interfere with the rights of either party to pursue the matter further.

17. **Daniel DeSoucey** agrees to and acknowledges the following:

(a) I agree and acknowledge that I was represented by and consulted with an attorney of my choosing throughout the negotiation and execution of this Agreement and Release. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement and Release before signing it.

(b) I agree and acknowledge that I have the right to reflect upon this Agreement and Release for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) days after executing the Agreement and Release to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: *Steven W. Kleinman, Special Monmouth County Counsel, Hall of Records, 1 East Main Street, Freehold, NJ 07728.*

(c) I understand and acknowledge that if I sign this Agreement and Release, along with the waiver attached hereto, prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

18. **ACKNOWLEGEMENT.**

By signing this Agreement and Release, Daniel DeSoucey acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE COUNTY TO CONSULT WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND REPRESENT THAT I HAVE IN FACT CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Daniel DeSoucey executed the foregoing Agreement this 20th day of April 2017.

Sworn and subscribed to before me this 20th **day of** April **2017**

Notary Public of the State of New Jersey
Barry D. Isanuk, Esq.
Attorney at Law, State of NJ

Date: 4/20/2017

DANIEL DESOUCEY

County of Monmouth

By: Steven Herman, Special County Counsel for Monmouth County & the Board of Recreation Commissioners

Monmouth County Board of Recreation Commissioners

Date: 4-20-2017

By:
Barry D. Isanuk, Esq, Attorney for **CWA Local 1075**

Date: N/A

By: N/A

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 17(c) of this Agreement.

DANIEL DESOUCEY

Date: 4- 20-17

6-7-17

STATE OF NEW JERSEY

In the Matter of Chrisann Egnatuk
Gloucester Township Municipal Utilities Authority

CSC DKT. NO. 2015-1709
OAL DKT. NO. CSV 03606-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03606-15

AGENCY DKT. NO. 2015-1709

IN THE MATTER OF CHRISANN EGNATUK, GLOUCESTER TOWNSHIP MUNICIPAL UTILITIES AUTHORITY.

Marisa J. Hermanovich, Esq., for appellant, Chrisann Egnatuk (Matthew S. Wolf, LLC, attorneys)

Douglas Diaz, Esq., for respondent, Gloucester Township Municipal Utilities Authority (Archer and Greiner, P.C., attorneys)

Record Closed: May 3, 2017 Decided: May 4, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 16, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 4, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5/5/17

Date Mailed to Parties: 5/5/17
/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on May 3, 2017

J-1

SETTLEMENT AGREEMENT AND MUTUAL GENERAL RELEASE

This Settlement Agreement and Mutual General Release ("Agreement") is entered into between Chrisann Egnatuk ("Egnatuk") and Gloucester Township Municipal Utilities Authority (the "Authority").

WHEREAS, Egnatuk filed an amended complaint against the Authority in New Jersey Superior Court, docketed as L-3693-15 (the "Complaint") and also an appeal of her termination from the Authority with the Civil Service Commission and which is pending before the Office of Administrative Law, docketed as CSV-03606-2015S (the "Appeal")(the Complaint and the Appeal are hereinafter referred to collectively as the "Actions");

WHEREAS, the Authority has sought its attorneys' fees and costs in connection with the Complaint;

WHEREAS, there have been no findings on the merits of the Actions; and

WHEREAS, the parties mutually desire to resolve amicably all of their respective claims, disputes, liabilities and obligations, including without limitation those set forth in the Actions, without further litigation, expenses, and time.

NOW, THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, and intending to be legally bound hereby, the parties agree as follows:

1. The foregoing recitals are incorporated herein as if set forth at length.

2. Egnatuk agrees to dismiss both the Civil Complaint and Administrative Appeal with prejudice and to file and/or submit all appropriate paperwork with both the New Jersey Superior Court and Office of Administrative Law for accomplishment of the same.

3. The Authority agrees not to seek recovery of its attorneys' fees and costs.

4. Egnatuk agrees, on behalf of herself and/or anyone else claiming through, under or by reason of their relationship to Egnatuk, intending to be legally bound, to fully, unconditionally and forever release, discharge and hold harmless the Authority, its past, present and future parents, subsidiaries, successors, affiliates, officers, directors, employees, shareholders, trustees and/or members of the Board, partners, agents, representatives, insurers, attorneys, financial and legal advisors, and each of their predecessors, successors, affiliates and assigns, in their corporate and individual capacities (individually and collectively, the "Releasees"), from and against any and all claims, demands, debts, actions, causes of action, suits, costs, damages, losses, compensations, penalties, liabilities, sums of money, attorneys' fees, accounts, rents, covenants, promissory notes, contracts, controversies, agreements, promises, rights and/or obligations between the parties of any kind or nature whatsoever, including without limitation those set forth in the Actions ("Claims"), whether known or unknown, suspected or unsuspected, contingent or fixed, liquidated or unliquidated, matured or unmatured, in law, equity or otherwise, that she ever had, now has or hereinafter can, shall or may have against the Releasees

which arise out of or relate to any matter, event, or omission existing or occurring prior to her execution of this Agreement, including, but not limited to: any Claims relating to or arising out of Egnatuk's employment with and separation from the Authority; any Claims of discrimination or retaliation based on age, disability, sex, race, religion, color, creed or any other factor protected by Federal, State or Local law (such as the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, Title VII of the Civil Rights Act of 1964, as amended, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, or the New Jersey Family Leave Act); and any Claims for attorneys' fees, costs or expenses.

5. The Authority agrees, intending to be legally bound, to fully, unconditionally and forever release, discharge and hold harmless Egnatuk and her counsel from and against any and all claims, demands, debts, actions, causes of action, suits, costs, damages, losses, compensations, penalties, liabilities, sums of money, attorneys' fees, accounts, rents, covenants, promissory notes, contracts, controversies, agreements, promises, rights and/or obligations between the parties of any kind or nature whatsoever, including without limitation those set forth in the Actions, whether known or unknown, suspected or unsuspected, contingent or fixed, liquidated or unliquidated, matured or unmatured, in law, equity or otherwise, that it ever had, now has or hereinafter can, shall or may have against Egnatuk or her counsel which arise out of or relate to any matter, event, or omission existing or occurring prior to its execution of this Agreement, including, but not limited to any claims for attorneys' fees, costs or expenses.

6. Nothing in this Agreement shall be construed as an admission or concession of any liability or wrongdoing by the Authority or any Releasee as defined above. Rather, the Agreement is acknowledged to be a compromise of disputed claims, and the Authority continues to deny any legal liability on all claims asserted in the Actions.

7. Egnatuk waives any right to reinstatement and specifically agrees not to apply for, or accept employment with, the Authority at any time in the future and agrees not to apply for reinstatement with the Authority. The Authority shall be entitled to reject, without cause or recourse, any application for employment made by Egnatuk and to terminate, without cause or recourse, any future employment by Egnatuk.

8. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous proposals, offers, negotiations, representations, promises, agreements, and understandings, whether oral or written, concerning the subject matter hereof.

9. This Agreement shall be governed by and construed in accordance with the laws of the state of New Jersey without regard to its conflicts of laws provisions.

10. This Agreement is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, personal or legal representatives, successors and/or assigns.

11. If any provision of the Agreement should be determined to be illegal and/or unenforceable by any court of law, the remaining provisions shall be severable and enforceable in accordance with their terms.

12. This Agreement is the joint work product of the parties hereto and, in the event of any ambiguity, no presumption shall be imposed against either party as the drafter of this Agreement.

13. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. Delivery of an executed counterpart of this Agreement by facsimile or e-mail transmission shall be as effective as delivery of a manually executed counterpart of this Agreement, followed by originals furnished by mail.

14. Egnatuk agrees and represents that:

a. She has read carefully the terms of this Agreement, including the General Release;

b. She has had an opportunity to review this Agreement, including the General Release, with her attorney and consult with her attorney regarding the Agreement;

c. She understands the meaning and effect of the terms of this Agreement, including the General Release;

d. She has had a reasonable amount of time to determine whether she wished to enter into this Agreement, including the General Release;

e. The entry into and the execution of this Agreement, including the General Release, is of her own free and voluntary act without compulsion of any kind;

f. No promise or inducement not expressed herein has been made to her; and

g. She has not filed any Claims of any kind against the Authority, except those in the Complaint and Appeal.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties, by their duly authorized representatives, affix their signatures hereto.

Chrisann Egnatuk

Dated: 5-3-17

GLOUCESTER TOWNSHIP MUNICIPAL UTILITIES AUTHORITY

By: _____ Dated: 5/3/2017

Richard P. Calabrese
Chairman

115920923v1

6-7-17

STATE OF NEW JERSEY

In the Matter of Momo Johnson
Greystone Park Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2017-1161
OAL DKT. NO. CSV 15925-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15925-16
Agency DKT. NO. 2017-1161

MOMO JOHNSON,

Appellant,

v.

NEW JERSEY DEPARTMENT OF HUMAN SERVICES, GREYSTONE PARK PSYCHIATRIC HOSPITAL,

Respondent.

Rashidah Hasan, Esq., for Appellant

Emily M. Bisnauth, Deputy Attorney General, for Respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: May 10, 2017 Decided: May 10, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

Petitioner appealed a Final Notice of Disciplinary Acton dated October 4, 2016, providing for his termination from employment, effective August 29, 2016.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on October 18, 2016.

A hearing was scheduled for May 10, 2017, whereupon the parties advised the undersigned that the matter was settled. The settlement agreement was placed upon the record.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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.

May 10, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: May 12, 2017

Date Mailed to Parties: MAY 12 2017

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DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. CSV 15925-16

SETTLEMENT AGREEMENT

MOMO JOHNSON,

Appellant,

v.

DEPARTMENT OF HUMAN SERVICES, GREYSTONE PARK PSYCHIATRIC HOSPITAL,

Respondent.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated October 4, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08, C3 Physical abuse of a patient	Removal (for all charges)	8/29/16
2. Admin. Order 4:08, C5 Inappropriate physical contact or mistreatment of a patient		
3. Admin. Order 4:08, E1 Violation of policy/procedure		
4. N.J.A.C. 4A:2-2.3a6 Conduct unbecoming a public employee		
5. N.J.A.C. 4A:2-2.3a12 Other sufficient cause		

B. Appellant Momo Johnson withdraws his appeal and request for a hearing and the Respondent Appointing Authority agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. Admin. Order 4:08, C3 Physical abuse of a patient	General Resignation (resolving all charges)
2. Admin. Order 4:08, C5 Inappropriate physical contact or mistreatment of a patient	
3. Admin. Order 4:08, E1 Violation of policy/procedure	
4. N.J.A.C. 4A:2-2.3a6 Conduct unbecoming a public employee	
5. N.J.A.C. 4A:2-2.3a12 Other sufficient cause	

C. The parties have agreed to the following:

1) Total number of work days of suspension without pay Respondent will impose on Appellant: not applicable.

2) The total number of days of back pay to be paid by the Appointing Authority to the Appellant is as follows: no back pay.

3) Any other days from the time of last suspension day until return to work shall be treated as follows: not applicable.

4) Appellant agrees to a general resignation pursuant to N.J.A.C. 4A:2-6.3, which shall be effective August 29, 2016. As of this date, Appellant is no longer under consideration for any disciplinary action. Any days from the effective date of removal on the Final Notice of Disciplinary Action, dated October 4, 2016, to the effective date of resignation shall be treated as follows: not applicable.

i. The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer.

ii. Appellant shall not seek or accept future employment with the Department of Human Services or any of ~~its~~ the Departments of Human Services and/or its subsidiaries.

iii. Respondent shall not intentionally interfere or obstruct Appellant's application for retirement.

D. The Appointing Authority shall amend Appellant's personnel records to reflect the terms of this agreement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with state or federal law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This agreement resolves any and all disciplinary actions pending against Appellant.

F. Nothing in this agreement shall constitute an admission or stipulation of facts regarding the charges listed in Section A. By entering into this agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This agreement shall not constitute precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act

of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims. Excluding Mr. Johnson's pending workers compensation claim under claim Petition # 2016-2761. PMB MA

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. By signing this Settlement Agreement, the signatories represent that they have read this agreement and fully understand its terms.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5-10-2017
DATE

Appellant
Mr. Momo Johnson

5/10/17
DATE

On Behalf of Appellant
Rashidah Hasan, Esq

5/10/17
DATE

On Behalf of Dept. of Human Services,
Greystone Park Psychiatric Hospital
Emily M. Bisnauth
Deputy Attorney General

CERTIFICATION

I, Momo Johnson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-10-2017

DATE

MOMO JOHNSON

6-7-17

STATE OF NEW JERSEY

In the Matter of Stephen M. Kromah, Sr.
New Lisbon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2598
OAL DKT. NO. CSV 03112-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03112-17

AGENCY DKT. NO. 2017-2598

IN THE MATTER OF
STEPHEN M. KROMAH, SR.,
DEPARTMENT OF HUMAN SERVICES,
NEW LISBON DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 16, 2017 Decided: May 16, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Faith Lawson, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 6, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 16, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 5/17/17

Date Mailed to Parties: 5/17/17

/nd

OAL DKT. NO. CSV 03112-2017
AGENCY DKT. NO. 20 – 2017-2598

SETTLEMENT AGREEMENT

IN THE MATTER OF

Stephen Kromah, Sr.

AND

New Lisbon Developmental Center
Department of Human Services

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated January 31, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.D. 4:08, E.1.3. Viol. Rule.		
2. NJAC 4A:2-2.3(a)6, 12	Removal	11/16/16
3.		
4.		
5.		

B. The Appellant Stephen Kromah withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1.		
2.	Parties accepted Resignation In Good Standing	
3.	With no DHS reemployment.	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 11/16/16 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. (Strike if not applicable) The appellant agrees to a

X resignation in good standing

____ general resignation

which shall be effective 11/16/16 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Stephen Kromah 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant agrees not to seek or accept reemployment with the Department of Human Services in the future.

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/16/17
DATE

Appellant

5/16/17
DATE

Respondent DHS

5-16-17
DATE

ON BEHALF OF Appellant

5-16-17
DATE

ON BEHALF OF New Lisbon D.C. EEC

OAL DKT. NO. CSV 3112-2017

CERTIFICATION

I, STEPHEN M. KROMAH, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/16/17
DATE

NAME

6-7-17

STATE OF NEW JERSEY

In the Matter of Faith Lawson
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-1173
OAL DKT. NO. CSV 16271-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16271-16

AGENCY DKT. NO. 2017-1173

IN THE MATTER OF FAITH LAWSON,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant, Faith Lawson, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director Employee Relations, for respondent, Departmnet of Human Services, Vineland Developmental Center, appearing pursuant to N.J.A.C. 1:1-5.4 (a)(2)

Record Closed: May 16, 2017 Decided: May 30, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on October 26, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

5-30-17
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 6/5/17

Date Mailed to Parties: 6/5/17

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on May 16, 2017

OAL DKT. NO. CSV (1) 16271-2016 | (2) 4598-201
AGENCY DKT. NO. 20 – 2017-1173 | 2017-2901

SETTLEMENT AGREEMENT

IN THE MATTER OF

FAITH LAWSON

AND

Kindland Development Center
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated (1) 9/29/16 & (2) 3/2/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
(1)	1. A.D.4:08, A.2.4/A.4.6/A.9.7/E.1.1.		
(1)	2. NJAC 4A:2-2.3(a)4,6,12	REMOVAL	9/29/16
(2)	3. A.D.4:08, A.2.5/A.4.7/A.9.8/E.1.2		
(2)	4. NJAC 4A:2-2.3(a)4,6,12	REMOVAL	9/29/16
	5.		

B. The Appellant FAITH LAWSON withdraws his/her appeal and request for a hearing, and the Respondent Department of HUMAN SERVICES agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
(1)	1. SAME AS ABOVE	SUSTAINED	3 mos. Suspension
(2)	2. SAME AS ABOVE	SUSTAINED	5 mos SUSPENSION
	3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 9/29/10 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Leave without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DEPARTMENT OF HUMAN SERVICES (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of HUMAN SERVICES will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of FAITH LAWSON 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of HUMAN SERVICES, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges she is given a fixed number of days off each year and understands the importance of reporting to work as scheduled. Appellant understands the seriousness of this disciplinary removal as a result of her chronic and excessive absences. In consideration of Appellant's acknowledgements above, Respondent agrees to give Appellant another chance. Appellant clearly understands that any further incident of chronic or excessive absenteeism (A.4.) shall result in her removal. If Appellant should be removed again and file an appeal, Respondent will not enter into another settlement agreement that would result in her return to work.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/14/2017
DATE

Faith Lawson
Appellant

5-16-17
DATE

Respondent DHS

5-16-17
DATE

ON BEHALF OF APPELLANT

DATE

ON BEHALF OF

CERTIFICATION

I, Faith Lawson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE 5/16/2017

NAME Faith Lawson

6-7-17

STATE OF NEW JERSEY

In the Matter of Faith Lawson
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2901
OAL DKT. NO. CSV 04598-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04598-17

AGENCY DKT. NO. 2017-2901

IN THE MATTER OF FAITH LAWSON,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 16, 2017 Decided: May 16, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Faith Lawson, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 3, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 16, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 5/17/17

Date Mailed to Parties: 5/17/17

/nd

OAL DKT. NO. CSV ① 16271-2016 | ② 4598-2017
AGENCY DKT. NO. 20 – ① 2017-1173 | ② 2017-2901
SETTLEMENT AGREEMENT

IN THE MATTER OF

FAITH LAWSON

AND

Vineland Developmental Center
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated ① 9/29/16 & ② 3/2/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
①	1. A.D.4:08, A.2.4/A.4.6/A.9.7/E.1.1.		
①	2. NJAC 4A:2-2.3(a)4,6,12	REMOVAL	9/29/16
②	3. A.D.4:08, A.2.5/A.4.7/A.9.8/E.1.2		
②	4. NJAC 4A:2-2.3(a)4,6,12	REMOVAL	9/29/16
	5.		

B. The Appellant FAITH LAWSON withdraws his/her appeal and request for a hearing, and the Respondent Department of HUMAN SERVICES agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
①	1. SAME AS ABOVE	SUSTAINED	3 mos. Suspension
②	2. SAME AS ABOVE	SUSTAINED	5 mos SUSPENSION
	3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 9/29/10 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Leave without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

N/A

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DEPARTMENT OF HUMAN SERVICES (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of HUMAN SERVICES will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of FAITH LAWSON 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of HUMAN SERVICES, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant ACKNOWLEGES SHE IS GIVEN A FIXED NUMBER OF DAYS OFF EACH YEAR AND UNDERSTANDS THE IMPORTANCE OF REPORTING TO WORK AS SCHEDULED. APPELLANT UNDERSTANDS THE SERIOUSNESS OF THIS DISCIPLINARY REMOVAL AS A RESULT OF HER CHRONIC AND EXCESSIVE ABSENCES. IN CONSIDERATION OF APPELLANT'S ACKNOWLEDGEMENTS ABOVE, RESPONDENT AGREES TO GIVE APPELLANT ANOTHER CHANCE. APPELLANT CLEARLY UNDERSTANDS THAT ANY FURTHER INCIDENT OF CHRONIC OR EXCESSIVE ABSENTEEISM (A.4.) SHALL RESULT IN HER REMOVAL. IF APPELLANT SHOULD BE REMOVED AGAIN AND FILE AN APPEAL, RESPONDENT WILL NOT ENTER INTO ANOTHER SETTLEMENT AGREEMENT THAT WOULD RESULT IN HER RETURN TO WORK.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/14/2017
DATE

Faith Lawson
Appellant

5-16-17
DATE

Respondent DHS

5-16-17
DATE

ON BEHALF OF APPELLANT

DATE

ON BEHALF OF

OAL DKT. NO. CSV 16271-2016 AND 7548-2017

CERTIFICATION

I, Faith Lawson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/16/2017
DATE

Faith Lawson
NAME

6-7-17

STATE OF NEW JERSEY

In the Matter of Alethia M. Lopez
Monmouth County,
Department of Transportation

CSC DKT. NO. 2015-1153
OAL DKT. NO. CSV 14568-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

IN THE MATTER OF ALETHIA M. LOPEZ, MONMOUTH COUNTY, DEPARTMENT OF TRANSPORTATION.

OAL DKT. NO. CSV 14568-14

AGENCY DKT. NO. 2015-1153

Jennifer Meyer-Mahoney, Esq., for appellant Alethia M. Lopez (Law Office of Jennifer Meyer-Mahoney)

Douglas J. Kovats, for respondent Department of Transportation (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: May 5, 2017 Decided: May 10, 2017

BEFORE **JEFF S. MASIN,** ALJ t/a:

Appellant, Alethia M. Lopez, appeals her removal as a motor vehicle operator from the Monmouth County Department of Transportation, effective July 10, 2014. This matter was transmitted to the Office of Administrative Law (OAL) on November 6, 2014, for determination as contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13, and assigned to The Honorable Robert Bingham. Upon Judge Bingham's appointment to Superior Court, the matter was reassigned to me.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

Jeff S. Masin

May 10, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 5/11/17

Date Mailed to Parties: 5/11/17

mph

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is entered into this 25th day of April, 2017, and is by and between the County of Monmouth ("County"), and Alethia M. Lopez ("Lopez").

RECITALS

WHEREAS, Lopez was employed by the Monmouth County Division of Transportation as a Special Citizens Area Transportation (SCAT) Motor Vehicle Operator Elderly and Handicapped Persons for approximately nine (9) years; and,

WHEREAS, on July 10, 2014, Lopez was suspended and, after a hearing on August 26, 2014, was terminated in accordance with a Final Notice of Discipline issued on October 9, 2014, for violations of the County's rules, regulations, policies or procedures; and,

WHEREAS, upon appeal captioned *In the Matter of Alethia M. Lopez, Monmouth County Department of Transportation,* OAL Dkt. No. CSV 14508-14, filed by Lopez to the Office of Administrative Law, a hearing was convened before the Honorable Robert W. Bingham, II, A.L.J; and

WHEREAS, Judge Bingham was unable to conclude the hearing, and accordingly, the matter was rescheduled before the Honorable Jeff F. Masin, A.L.J. (retired on recall) and continued on March 15 and March 17, 2017 and is presently pending; and

WHEREAS, as a result of her employment and cessation of employment with the County, Ms. Lopez has instituted an additional action filed before the Monmouth County Superior Court, Law Division, in the matter entitled *Alethia Lopez vs. County of Monmouth, Monmouth County Division of Transportation, Kathleen Lodato, Monmouth County Department of Personnel, Frank Tragno, Jr., Scott Climer, John Does 1-5* under Docket No.

MON-L-002431-16, (hereinafter with the matter presented before the Office of Administrative Law collectively referred to as the "Appeals"); and

WHEREAS, Lopez and the County believe it is appropriate to conclude any and all matters arising out of the termination of Lopez' employment with the County; and

WHEREAS, under the circumstances, the parties wish to formally set forth certain conditions of Lopez' settlement with, and return to employment for, the County;

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the County and Lopez herein agree as follows:

1. **DISCIPLINARY ACTION AND RETURN TO EMPLOYMENT.**

The County and Lopez agree as follows:

a. Lopez agrees that the charges contained in the Final Notice of Discipline referenced hereinabove are deemed sustained.

b. In lieu of removal, Lopez agrees that she will accept a major disciplinary penalty:

i. a three (3) month suspension, without pay; which for purposes of Lopez' employment record shall be from July 10, 2014 through October 10, 2014, consisting of sixty-six (66) workdays; and

ii. Lopez agrees to accept an additional three (3) month leave of absence, without pay, which for purposes of Lopez' employment record shall be from October 15, 2014 to January 13, 2015, consisting of sixty-three (63) workdays; provided further that all time not otherwise accounted for is to be considered approved leave of absence without pay; and

iii. Lopez is eligible to receive two (2) years of back pay, which for purposes of Lopez' employment record shall be from January 14, 2015 through January 13, 2017, provided, however:

1. Lopez will waive one (1) year of back pay for the January 2015-December 2015 term at a gross salary rate of $32,175; Lopez will receive one (1) year of back pay for the January 2016-December 2016 salary year in the amount of $33,574, provided, however, that Lopez shall receive payment of two (2) years of pension credit fully funded by the County, as well as receiving credit for two (2) years of contract seniority credit and sick leave. Lopez' salary shall be adjusted in accordance with the standard withholdings. Lopez' seniority credit and sick leave shall be adjusted in accordance with the provisions of the collectively negotiated agreement in force applicable to Lopez' employment; and

iv. Beginning April 17, 2017, Lopez will return to her position of employment with SCAT, at a prorated annual salary of $35,011, adjusted in accordance with standard withholdings and subject to a physical examination, inclusive of any alcohol and/or drug testing required by the County, for which Lopez agrees to cooperate in such physical examination and testing processes; and

v. Lopez acknowledges and agrees that her failure to cooperate and/or pass such testing administered to her, shall subject her to immediate removal; and

vi. Lopez will receive and review with designated SCAT personnel all County and SCAT policies relative to terms and conditions of employment and

operations within the County and SCAT (hereinafter "policies"); Lopez will acknowledge receipt and review of policies by "signing off" on the same in the presence of the SCAT Director or designee when presented.

vii. Lopez acknowledges that upon her return to active employment with the County, she will be evaluated by her supervisors at the Department of Health and Human Services and Division of Transportation consistent with any other employee in like circumstances, and nothing is this Agreement shall limit or preclude the County from taking future legitimate job-related action, including disciplinary action, related to Lopez' performance as a Motor Vehicle Operator Elderly and Handicapped Persons for the County. However, neither party shall retaliate against the other in any way because of any allegations raised in the Appeals or as a result of the Agreement; and

viii. Lopez will be eligible to receive a clothing allowance as provided for in the collectively negotiated agreement for this year.

c. Lopez waives any and all other claims arising from the disciplinary action, including any and all emoluments of employment or benefits not herein specifically referenced herein.

d. Lopez agrees that except for the assessment of the disciplinary penalty referenced hereinabove and in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed an admission of liability of either party, nor shall the settlement have any precedentual value or constitute binding practice by the County.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE.**

Complete Release and Relinquishment of Claims.

a. In consideration of the settlement hereinabove and to the fullest extent permissible by law, Lopez, along with her successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the County and all of its officers, agents, employees, agencies and instrumentalities, inclusive but not limited to, Kathleen Lodato, Frank Tragno, Jr. and Scott Climer (collectively, "**Releasees**"), regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to Lopez's employment with the County, including the events, information or disputes giving rise to this matter, or the Agreement.

This full and unconditional Release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full and unconditional Release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States

Constitution, the federal Fair Labor Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This full and unconditional Release also specifically includes, but is not limited to, any and all other claims concerning Lopez' employment by contract or recall rights, compensatory damages, punitive damages, back pay, overtime compensation, back benefits, back emoluments, attorneys' fees, equitable relief, or any other relief not specifically referenced within this Agreement.

This full and unconditional Release also specifically includes, but is not limited to, the right to receive any monetary relief in connection with the prosecution of a charge or suit brought on the Releasor's behalf by a third party, including any federal, state or local governmental agency or entity.

b. In consideration of Lopez's release and relinquishment of claims and other mutual promises contained in the Agreement, the County hereby agrees to irrevocably and unconditionally relinquish any and all causes of action, demands or claims, including claims for attorney's fees and costs, the County had, has or may have from

the beginning of time, up to the date this Agreement is executed, regardless of whether such claims are presently known or unknown to the County. This full and unconditional relinquishment and release claims includes, but is not limited to, any causes of action, demands or claims relating in any way to Lopez's employment with the County, including the events, information or disputes giving rise to this matter, or the Agreement.

3. **DISMISSAL OF CLAIMS.**

A Stipulation of Dismissal with Prejudice will be submitted by Lopez to the Law Division with respect to the action referenced hereinabove, within ten (10) days after the execution by all parties of this Agreement.

4. **PAYMENT OF BACK PAY.**

In exchange for and in consideration of Lopez's promises as set forth above and below, and in full and complete settlement, release and discharge of all of the actual and/or potential claims described above, including those asserted in the Superior Court action hereinabove referenced, the County agrees to remit the one (1) year of back payment to Lopez within forty-five (45) days of the date upon which this Agreement is fully executed,

5. **OLDER WORKERS BENEFIT PROTECTION ACT REVOCATION PERIOD.**

This Agreement is intended to comply with the federal Older Workers Benefit Protection Act (OWBPA), and Lopez acknowledges she specifically is waiving rights and claims under the OWBPA. Therefore, this Agreement and Release shall not be effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the OWBPA.

6. **ACKNOWLEDGEMENT.**

The parties agree and acknowledge that this Agreement shall resolve all issues relating to Lopez's employment and/or Appeals now pending, and that all parties have had the right and opportunity to discuss all aspects of this Agreement with their respective legal counsel prior to entering into it and have availed themselves of this right, that all parties have carefully read and fully understand all of the provisions of this Agreement, and that all parties are entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

7. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

8. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

9. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

10. **AMBIGUITIES.**

Each party and their designated representatives have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

11. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

12. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between Lopez and the County, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

13. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action taken in this matter was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

14. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement, except as set forth at paragraph (1)(d) hereinabove, shall be non-precedential, is limited to specific, unique facts and

circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other employee of the County. Except to enforce its terms, Lopez shall not use this Agreement as evidence in any other proceeding unless required by law or court order (in which she agrees to notify the County before doing so to provide for an opportunity to oppose such request).

15. **NON-DISPARAGEMENT.**

Lopez and the County agree that, unless required by legal process or applicable law, the parties (i) will not say anything to any person or entity that disparages or defames the County, Releasees or Lopez; (ii) will not advise or encourage any person or entity to bring a claim against the County or Lopez or any of its officers, employees, agents, agencies or instrumentalities; and (iii) will not assist any person or entity in connection with any such claim unless required to do so by law.

16. **CONFIDENTIALITY.**

The parties agree that this document constitutes a confidential personnel record under OPRA and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. However, the parties specifically acknowledge that the County will disclose this agreement to PERS if so required by N.J.S.A. 43:1-3.3. Lopez agrees that she will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case they agree to notify the County before doing so to provide for an opportunity to oppose such a request), relating to the terms

or execution of this Agreement. Lopez may also disclose the existence of this Agreement and the terms and conditions thereof to her accountants, attorneys, financial advisors and spouse.

17. **Alethia Lopez** agrees to and acknowledges the following:

(a) I agree and acknowledge that I consulted with representation of my choosing throughout the negotiation and execution of this Agreement and Release. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement and Release before signing it.

(b) I agree and acknowledge that I have the right to reflect upon this Agreement and Release for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) days after executing the Agreement and Release to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: *Frank Tragno, Jr., Director, Monmouth County Department of Human Resources, 1 East Main Street, Freehold, NJ 07728.*

(c) I understand and acknowledge that if I sign this Agreement and Release, along with the waiver attached hereto, prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

18. **ACKNOWLEGEMENT.**

By signing this Agreement and Release, Alethia M. Lopez acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE COUNTY TO CONSULT WITH AN ATTORNEY OF MY CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND REPRESENT THAT I HAVE IN FACT CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM NOT UNDER THE INFLUENCE OF ANY ILLNESS, INCLUDING MENTAL OR EMOTIONAL ILLNESS, MEDICAL CONDITION, DISABILITY OR IMPAIRMENT, OR OF PRESCRIPTION OR OTHER MEDICATION THAT WOULD AFFECT MY ABILITY TO REVIEW THIS AGREEMENT IN ITS ENTIRETY, UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILYAGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Alethia M. Lopez, executed the foregoing Agreement this 26th day of April 2017.

Sworn and subscribed to before me
this 26th day of April 2017

~~Notary Public of the~~ Attorney at Law
State of New Jersey

ALETHIA M. LOPEZ

County of Monmouth

Date: APRIL 26, 2017

By: _____
DOUGLAS J. KOVATS
SPECIAL COUNSEL
MONMOUTH COUNTY

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 18(c) of this Agreement.

ALETHIA M. LOPEZ

Date: 4.26.17

6-7-17

STATE OF NEW JERSEY

In the Matter of Linda Phoenix
Hudson County,
Department of Roads and Public Property

CSC DKT. NO. 2015-1308
OAL DKT. NO. CSV 15454-14

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15454-14

AGENCY DKT. NO. 2015-1308

IN THE MATTER OF LINDA PHOENIX, HUDSON COUNTY DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

Samuel Wenocur, Esq., for appellant (Oxfeld Cohen, attorneys)

Daniel W. Sexton, Esq., for respondent (Donato Battista, Hudson County Counsel, attorney)

Record Closed: April 28, 2017 Decided: May 2, 2017

BEFORE **RICHARD McGILL**, ALJ:

Linda Phoenix appeals from a thirty-day suspension on charges from the position of Clerk 1 with the Hudson County Department of Roads and Public Property. The matter was transmitted to the Office of Administrative Law on November 20, 2014, for determination as a contested case.

Prior to the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that proceedings in this matter be concluded.

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.

May 2, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 5-3-17

Date Mailed to Parties: MAY 3 2017

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE
Linda Renee Phoenix

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 2nd day of February, 2017, in the case arising out of the case in the Office of Administrative Law, Phoenix v. County of Hudson, CSV 15454-2014N, arising out of the Preliminary Notice of Disciplinary Action, 10/1/14, between the County of Hudson (hereinafter referred to as the "County") and Linda Renee Phoenix (hereinafter referred to as "Phoenix" or the "Employee" or "Releasor").

WHEREAS, the parties agreed to amicably resolve the within charges; and

WHEREAS, the parties agreed on the material terms of this amicable resolution on the eve of trial; and

WHEREAS, Linda Renee Phoenix has already voluntarily resigned from her position with the County of Hudson.

NOW, THEREFORE, in consideration of the premises and conditions set forth herein, the County and Phoenix agree as follows:

1. **DISCIPLINARY ACTION**

a. Phoenix dismisses the administrative appeal Phoenix v. County of Hudson, CSV 15454-2014N, arising out of the Preliminary Notice of Disciplinary Action, 10/1/14;

b. In consideration for this dismissal and the waivers and releases contained herein, the Respondent, County of Hudson, agrees to pay to Phoenix, $5,000.00 and further agrees for Phoenix that this can be considered to be pain and suffering;

c. Petitioner agrees and acknowledges that the tax obligations connected to this

payment are entirely her responsibility and agrees to hold the County of Hudson harmless in this regard.

d. It is agreed by both parties that the employee cannot apply to the County or serve as an employee again for the County of Hudson or any of its constituent parts, including the various quasi independent or related entities e.g. HCIA, s or other entities.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE**

In further consideration of the settlement hereinabove, the Employee, her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enters into this Agreement, and certifies that she has not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement related to the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute

or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other

things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits

discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare. The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NO DISPARAGING STATEMENTS and CONFIDENTIALITY.**

Parties agree that they will not make any statement(s) that has, have, or can be expected to have the effect of disparaging either the County, the employee, or any other employee. To the extent permitted by law, the terms of this Agreement shall be kept confidential, and the Parties agree not to disclose the existence, terms or amounts set forth in this Agreement, any discussions during negotiations of this Agreement, by any means of communication or media to any person other than the Parties' immediate family members, accountants, attorneys, income tax preparers or similar professionals, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction or required by government agency.

4. **NON ADMISSION OF LIABILITY.**

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation or of liability by Releasor, except as expressly provided in Paragraph 1 herein, or by the County, by whom any such liability is expressly denied.

5. **INDEMNIFICATION.**

If Releasor violates this Agreement in any way, Releasor agrees to pay in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the opposing party as a result of such violation, including reasonable attorney's fees.

6. **CONSULTATION WITH ATTORNEY**.

Releasor has consulted with his/her attorney and /or Union Representative with respect to this Agreement and has reviewed with his/her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

7. **REASONABLE PERIOD OF TIME.**

Releasor agrees that he/she has been given a reasonable period of time of at least 21 days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this 21 day period by signing in the space provided at the end of this Agreement.

8. **COMPLETE AGREEMENT**.

This Agreement contains the entire agreement between Releasor and the County, and each of them, with respect to the subject matter and supersedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the County to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey. It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice.

9. **MODIFICATION.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. **SEVERABILITY.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

11. **ATTESTATION.**

Releasor represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that he enters into this Agreement voluntarily, of her own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

12. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to the County, addressed to Denise D'Alessandro, Director Hudson County Department of Roads and Public

Property, County Plaza, 257 Cornelison Avenue, Jersey City, New Jersey 07302.

This seven (7) day revocation period may not be waived by Releasor

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Linda Renee Phoenix, execute the foregoing Agreement this 2nd day of February 2017.

Linda Renee Phoenix
Renee Phoenix, Employee

Samuel Wenocur
Counsel for Phoenix

Sworn and subscribed to before me this 2nd day of February 2017.

Attorney at Law
State of New Jersey
WILLIAM P. HANNAN

Date: 2/8/17

Denise D'Alessandro Director
Hudson County Department of Roads and Public Property

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in the 7th recital on page 6 of this Agreement.

Signature of Employee Linda Renee Phoenix

DATED Feb 2, 2017

6-7-17

STATE OF NEW JERSEY

In the Matter of Wali Thomas
Newark Public School District

CSC DKT. NO. 2015-2446
OAL DKT. NO. CSV 03144-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03144-15
Agency DKT NO. 2015-2446

IN THE MATTER OF WALI THOMAS,
NEWARK PUBLIC SCHOOL DISTRICT.

John H. Norton, Esq., for appellant

Adam S. Herman, Esq., for respondent (Adams, Guiterrez & Lattiboudere, LLC, attorneys)

Record Closed: May 11, 2017 Decided: May 15, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 29, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Release and Settlement Agreement were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 15, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 5-17-17

Date Mailed to Parties: MAY 17 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE

Wali Thomas v. Newark Public School District
OAL Docket No.: CSV 03144-2015N
Agency Reference No.: CSC Dkt. No.: 2015-2446

This Settlement Agreement and Release ("Agreement") is made this _____ day of February 2017, by and between Appellant Wali Thomas ("Thomas" or "Appellant") and Respondent State-Operated School District of the City of Newark, commonly known as Newark Public Schools ("NPS" or "Respondent") (collectively, the "Parties").

WHEREAS, on or about May 1, 2014, Respondent issued a revised Preliminary Notice of Disciplinary Action to Appellant, Supervisor of Custodians, asserting Charges of Conduct Unbecoming, Discrimination, Neglect of Duty, and Other Sufficient Cause; and

WHEREAS, the Departmental Hearings of the above Charges took place on June 18 and 19, July 1 and 10, and August 13, 2014, during which the Parties presented evidence before Hearing Officer James Cooney, Esq.; and

WHEREAS, Hearing Officer Cooney issued a Recommended Order dated February 12, 2015 dismissing Respondent's Charge of Conduct Unbecoming and Discrimination (including sexual harassment), sustaining the Charges of Neglect of Duty and Other Sufficient Cause, and imposing a 60-day unpaid suspension; and

WHEREAS, Appellant initiated the instant appeal with the Civil Service Commission ("CSC"); and

WHEREAS, without waiving their respective positions and without any admissions as to liability, the Parties wish to fully resolve the pending appeal and Administrative Law Hearing, and all related claims and defenses by and between them pursuant to the terms and conditions set forth below; and

NOW THEREFORE, the Parties hereby agree to the following terms as full and final settlement of the above matter:

1. This Agreement sets forth all of the terms and conditions of the Parties' agreement.

2. Respondent will return to Appellant the sixty (60) days' pay which was withheld pursuant to the suspension recommended by Hearing Officer Cooney. As the payment represents back pay, all usual and mandatory deductions and withholdings will be made by Respondent.

3. The payment under Paragraph 2 shall represent Respondent's entire financial obligation to Appellant in connection with this action.

4. The Parties agree that Appellant is not a prevailing party and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

5. The payment under Paragraph 2 shall be made to Appellant within thirty (30) days after approval of this Agreement by the Honorable Leslie Z. Celentano, A.L.J. The Parties understand this Agreement is subject to approval of Judge Celentano and the CSC. In the event that Judge Celentano approves this Agreement and NPS makes payment to Appellant under Paragraph 2, but the CSC ultimately does not approve this Agreement, then Appellant agrees to: (i) pay back Respondent in a lump sum the entire amount received under Paragraph 2 within thirty (30) days of the CSC's rejection of the Agreement, or (ii) permit Respondent to automatically deduct the entire amount he received from Respondent under Paragraph 2 directly from his paycheck(s) in the pay period(s) immediately following the CSC's decision until said amount is paid back in full.

6. Appellant agrees to voluntarily dismiss the instant Appeal with prejudice.

7. The Parties agree that the underlying disciplinary charges and April 10, 2014 final notice of disciplinary action cannot be referred to, or utilized, by Respondent in any future disciplinary action brought against Appellant.

8. In exchange for the consideration set forth in Paragraphs 2 and 7, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that he has or may have against Respondent, the Superintendent, Board of Education and Board members, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief. This waiver, release and discharge includes, without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Appellant's employment, up until the time that this agreement is fully executed and approved by the necessary administrative agencies. It specifically includes, without limitation, all claims which Appellant may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law;

the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, retaliation provisions of the New Jersey Workers' Compensation Law; the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, having any bearing whatsoever on his employment by and/or termination of his employment with the District, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Appellant does not waive or release any claim that cannot be waived or released as a matter of law.

9. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

10. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

11. This Agreement is subject to the approval of the Office of Administrative Law and the Civil Service Commission.

12. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.

13. This Agreement shall not serve as a precedent for any other employee or matter.

14. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

15. The Parties acknowledge that they have entered into this Agreement voluntarily, with the assistance of counsel, and hereby sign it without duress or coercion.

16. This Agreement shall be governed by the laws of the State of New Jersey.

17. This Agreement may be executed in counterparts with the same effect as if the signatures hereto and thereto were upon the same instrument. Each counterpart will be deemed an original, which taken together shall constitute a single instrument. Facsimile signatures or signatures in electronic Portable Document Format ("PDF") shall be construed and have the same force and effect as original signatures.

The Parties hereby acknowledge their agreement to the terms and conditions set forth above by signing below.

APPELLANT
WALI THOMAS

By: _____

Dated: 3-2-17

RESPONDENT
STATE-OPERATED SCHOOL DISTRICT FOR THE CITY OF NEWARK

By: _____

Dated: 5/9/17

6-7-17

STATE OF NEW JERSEY

In the Matter of Marion Wilson
Camden County,
Department of Corrections

CSC DKT. NO. 2017-74
OAL DKT. NO. CSV 10302-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The appeal of Marion Wilson, County Correction Sergeant, Camden County, Department of Corrections, demotion to County Correction Officer effective June 28, 2016, on charges, was heard by Administrative Law Judge Carl V. Buck, III, who rendered his initial decision on May 5, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 7, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Commission finds that the action of the appointing authority in demoting the appellant was justified. The Commission also affirms the Administrative Law Judge's decision to impose an additional five working day suspension. The Commission therefore affirms these actions and dismisses the appeal of Marion Wilson.

Re: Marion WIlson

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 10302-16
AGENCY DKT. NO. 2017-74

IMO MARION WILSON, CAMDEN COUNTY DEPARTMENT OF CORRECTIONS.

William B. Hildebrand, Esq., for Marion Wilson, appellant

Antonieta P. Rinaldi, Esq., for Camden County Department of Corrections, respondent (Christopher A. Orlando, County Counsel, attorney)

Record Closed: March 23, 2017 Decided: May 5, 2017

BEFORE **CARL V. BUCK, III**, ALJ:

STATEMENT OF THE CASE

The Camden County Department of Corrections Facility ("Camden" or "CCDOC" or "respondent") seeks to demote Sergeant Marion Wilson ("Wilson" or "appellant") from Sergeant to Corrections Officer. That action resulted from her actions on September 10, 2015, and from her posting of improper remarks in the "pass on" books maintained for her unit.

Sergeant Wilson contends that the penalty for the violation exceeds the level of reasonableness.

PROCEDURAL HISTORY

On June 28, 2016, the CCDOC issued a Final Notice of Disciplinary Action (31-B) sustaining the above charges, and demoting Wilson from Sergeant to Corrections Officer, effective June 28, 2016. (R-1)

Appellant appealed the demotion and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13 for hearing as a contested case. On March 23, 2017, a hearing was held and concluded. The record was closed on March 23, 2017.

FINDINGS OF FACT

(1) Failure to comply with CCDOC directives

The following facts are not in dispute. Appellant has been an employee of the CCDOC since August 26, 1996. She was promoted to Sergeant on November 28, 2004. On September 10, 2015, she was assigned to 2 South A Mod (2 S A), the special needs/high risk unit of the Camden County Correction's facility. Correction officers working in this unit must comply with additional safety precautions.

Lieutenant Douglas Grundlock has been employed by the CCDOC for approximately twenty years, the last two years as a Lieutenant. He was the shift commander for the 7:00 a.m.–7:00 p.m. shift on September 10, 2015. He testified as to the background of, information on, and specific procedures for employees on the 2 S A unit.

Those procedures were detailed in a directive to "All Personnel" from Deputy Warden James J. Simon (Simon) on "05, July 2006". This directive states, inter alia, that:

> The 2 South A, (B& C) officers will make checks every five (5) minutes, and note it in the composition book. If for any reason the officer cannot complete the check within the five minutes they will so note it in the logbook.
>
> And
>
> Supervisors must tour the area and if needed lend assistance to the assigned officers. The Shift Commander will tour the area at least once per shift, review logs and sign off on it. (R-3)

Further, clarifying procedures to be followed regarding 2 S A were detailed in a directive to "All Personnel" from Simon on "15, August 2006". This directive states, inter alia, that:

> The Officer will continue to place the inmates name along their assigned cells. As well a (sic) posting checks every five minutes. These logs will be reviewed, signed by the supervisor and turned in with the daily paperwork for each shift. (R-3)

Additional clarifying procedures to be followed regarding 2 S A were detailed in a directive to "All Personnel" from Simon on "08, September 2006". This directive states, inter alia, that:

> Close Watch checks must be maintained every 5 minutes, unless other direction is given by mental health or the medical department. Noe these checks will be logged on the respective logs.
>
> Supervisors must tour the area and if needed lend assistance to the assigned officers. (R-3)

Grundlock testified that on September 10, 2015, appellant was assigned as the second-floor supervisor on to 2 South A Mod on the 7:00 a.m. to 7:00 p.m. shift. He then narrated a video showing the chronology of events of that date. (R-4)

The video showed that at approximately 07:57:15 on September 10, 2017, appellant entered 2 S A and began to sign paperwork prepared by the two Correction

Officers detailed to 2 S A. These Officers were Christopher Burch and David Crossan. This paperwork is "CAMDEN COUNTY DEPARTMENT OF CORRECTIONS 2- SOUTH A (B-OFFICER) POST LOG" (R-5) and "CAMDEN COUNTY DEPARTMENT OF CORRECTIONS 2- SOUTH A (C-OFFICER) POST LOG." (R-6)

The post log(s) that appellant signed contained entries showing that Officers Burch and Crossan conducted close watch checks during the period appellant was in 2 S A. However, the video did not show that the officers conducted any close watch checks during the period 07:57:15 to 08:09:24. At approximately 08:09:24 appellant began a security check with Correction Officer's Burch and Crossan. At approximately 08:10:23 appellant exited 2 S A. (R-4)

Lieutenant Grundlock, as the "Shift Commander" for the 7:00 a.m. to 7:00 p.m. shift, had access to review cameras within the entire jail facility. At a certain point, Grundlock stated that he became aware that proper protocols on 2 S A were not being followed. Grundlock notified his superior, Captain Taylor who, in turn, notified Warden David Owens. Grundlock stated that he reassigned appellant at approximately 11:40 a.m. At that time appellant stated she threw everything away in her pockets. She also stated that she exited her computer. Lieutenant Grundlock requested that appellant turn over her tour notes and post logs for that morning. Appellant told Lieutenant Grundlock she did not have a post log. Lieutenant Grundlock then asked her for tour notes. Appellant told Lieutenant Grundlock that she had thrown everything she had in the trash.

Subsequently, Lieutenant Grundlock called the IT department which retrieved a draft of the supervisor's log from appellant's computer. (R-7) Lieutenant Grundlock also collected appellant's trash which trash did not reveal any notes.

Grundlock subsequently issued a Supervisor's Staff Complaint Report on 09-10-2015 regarding this incident. (R-2)

By a Preliminary Notice of Disciplinary Action (31-A), dated October 21, 2015, Respondent issued a notification to appellant that charges regarding this incident were made against appellant. The charges read:

> N.J.A.C. 42:2-3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4::2-2.3(a)(12) Other Sufficient Cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.1 Supervision; 3.2 Security; 3.6 Departmental reports; General Oder #73, #74; Supervisor General Order #001; et. al. (R-1).

(2) Failure to comply with Department of Corrections protocol regarding "pass on book"

Captain Linda Blackwell has been employed by the CCDOC for approximately 20 years, most recently as a Captain. She is familiar with this case and her primary job responsibility is to make sure that CCDOC policies are being followed. She testified she had received a call from Captain Karen Taylor (now Warden at CCDOC) regarding notations in the "pass on" books. Blackwell's investigation documented that on numerous occasions, appellant had made or written unprofessional and improper remarks in the 2 South Mod "pass on" book (R-9). The "pass on book" is intended to notify subsequent shifts of any conditions or issues in the unit which are of note. These remarks were made on September 20, 2015, September 29, 2015, October 7, 2015, October 16, 2015, October 18, 2015, October 22, 2015, and November 14, 2015.

Blackwell subsequently issued a Supervisor's Staff Complaint Report on 12-07-2015 regarding this incident. (R-9)

The complaint stated that "...[b]ooks are not for personal opinions and the information is strictly so that the oncoming (sic) shift knows if there were ... incidents that occurred. Sergeant Wilson is a Supervisor of this Department and is held to a

higher standard therefor I am recommending disciplinary charges against her for unprofessional comments made in the 'pass on' book." (R-9)

By a Preliminary Notice of Disciplinary Action (31-A), dated February 5, 2016, respondent issued a notification to appellant that charges regarding this incident were made against appellant. The charges read:

> N.J.A.C. 42:2-3(a)(1) incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4::2-2.3(a)(12) Other Sufficient Cause; C.C.C.F. Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.1 Supervision; 3.2 Security; 3.6 Departmental reports; General Oder #73, #74; Supervisor General Order #001; et. al. (R-1).

Warden Karen Taylor (Captain at the time of the incidents) has been employed by the CCDOC for approximately twenty years, being appointed as Warden approximately five months ago and before that as a Captain. She is familiar with this case and testified on behalf of the respondent.

She had spoken with Lieutenant Grundlock regarding the issue at 2 S A. Grundlock advised her of the actions he was taking regarding the 2 S A incident.

She had spoken with Captain Linda Blackwell regarding the notations in the "pass on" books. Blackwell's investigation documented that on numerous occasions, appellant had made or written unprofessional and improper remarks in the 2 South Mod "pass on" book. (R-9)

Warden Taylor discussed the various infractions for which petitioner was cited. In addition to the failure to perform, neglect of duty and conduct unbecoming, etc. there are very specific rules regarding the 2 S A unit. She detailed the violations to Rules 1.2, 1.3, 1.4, 3.1, 3.2, 3.6, and 2.0 and to General Orders 001, 073, and 074.

Warden Taylor discussed how the rules relate to security and safety at 2 S A. Petitioner was in charge of the second floor and was responsible for that floor and to guarantee that protocols were being followed and that appropriate close watch checks were being made. Warden Taylor's position was that the appellant's action(s) constituted a serious infraction, and that the resulting risk to safety and security of inmates and other officers to the extent that she lost faith in appellant being able to be a supervisor.

Marion Wilson testified on her own behalf. She is a Sergeant at the CCDOC, where she has worked since August 26, 1996, the first seven and a half years as a corrections officer. She did not dispute the information and time sequence revealed in the video. (R-4) She stated that she was at the 2 S A unit for thirteen minutes that she should only have been at the unit for two to three minutes. She stated that she takes responsibility for what happened during those thirteen minutes. She did state that she was unaware that Officers Burch and Crossan were falsifying information in the reports she had signed. (R-5, R-6) She further stated that when she signed the reports that notations before 07:56 were on the documents, but nothing after 08:00 was filled in.

She stated that Lieutenant Grundlock relieved her at 11:40 a.m. and at that time she threw everything away in her pockets. Grundlock then told appellant she was relieved and she stated that she then exited her computer. In the hall, Grundlock requested her log and she stated that she did not have the log (in the hall), so she stated she did not have the log. She stated that she did not believe she was being insubordinate during this exchange.

As to the comments written in the "pass on" books, appellant admitted that she had made the comments but she did not think they were bad. She did admit that the comments were unprofessional. She stated that there was no training on how to fill in pass on books and that she had been filling in information in pass on books for several years.

Appellant stated that she applied for retirement in December 2016.

Based on the record before me regarding the incident of September 10, 2015, I **FIND** that the appellant did not comply with the protocols and general orders of the CCDOC on September 10, 2015. Specifically, in that appellant did not perform her duties as a supervisor, did not follow the appropriate rules of conduct, was insubordinate to her supervisor, showed an inattentiveness to duty, failed to supervise those employees for whom she was responsible, did not file or prepare appropriate reports, did not comply with General Orders 073 and 074 and Supervisor General Order 001.

Based on the record before me regarding the incidents of comments placed in the "pass on" books of September 20, 2015, September 29, 2015, October 7, 2015, October 16, 2015, October 18, 2015, October 22, 2015, and November 14, 2015 I **FIND** that the appellant did not comply with the protocols and general orders of the CCDOC. Specifically, in that appellant did not comply with appropriate rules of conduct, did not file or prepare reports in an appropriate manner, engaged in conduct unbecoming a supervisor, did not comply with General Orders 073 and 074 and Supervisor General Order 001.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 11A:2-6 authorizes the Commission to remove, suspend, fine or demote a permanent career employee. Rules promulgated by the Department of Personnel set forth various reasons for discipline, including "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3. On appeals from disciplinary action, the Board may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Board is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Henry, supra, 81 N.J. at 579. In appeals from disciplinary actions, the appointing authority bears the burden of proof by a preponderance of the credible evidence. N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Respondent charged appellant, inter alia, with insubordination and neglect of duty. "Insubordination" is not defined in the regulation. Assuming that its presence is implicit, courts generally apply its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended. Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45-46 (App. Div. 2001). Black's Law Dictionary (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." To give one other example, Webster's New International Dictionary 1288 (2d Ed. 1943) defines insubordinate as "not submitting to authority; disobedient; mutinous." See also Jeffrey F. Ghent, J.D., Annotation, What Constitutes "Insubordination" As Ground for Dismissal of Public School Teacher, 78 A.L.R.3d 83 (1977); A. L. Schwartz, Annotation, Employee's Insubordination As Barring Unemployment Compensation, 26 A.L.R.3d 1333 (1969). Similarly, "neglect of duty" can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). Neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

Corrections officers are held to a high standard of conduct both on and off the job. In re Phillips, 117 N.J. 567, 577 (1990). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64 (App. Div.), certif. denied, 59 N.J. 269 (1971); Mayberry v. Massey, 93 N.J. Super. 317 (App. Div. 1967).

Respondent's rules of conduct detail rules to be followed by all employees of the Corrections Facility. R-10. Directives as to activity on the 2 S A Mod are given, with specificity, in the 08, September 2006 memorandum from Simon and states:

> Close Watch checks must be maintained every 5 minutes, unless other direction is given by mental health or the

> medical department. Noe these checks will be logged on the respective logs. (R-3)

These are not "suggestions" or "guidelines" - but directives. They are a subject of mandatory compliance and are required for the safety of the inmates who have an expectation of safety and care from CCDOC as well as the other employees of CCDOC for whom a level of safety and care is also expected.

This matter involves a major disciplinary action brought by the respondent against the appellant seeking a demotion from Sergeant to Officer. The appellant is charged with failure to perform duties, insubordination, conduct unbecoming, neglect of duty, and other sufficient cause. She is also charged with violating Rules of Conduct: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.1 Supervision; 3.2 Security; 3.6 Departmental reports; General Order #73, #74; Supervisor General Order #001; et. al.

The charges all relate to the appellant's activities relating to the event of September 10, 2015. Appellant does not dispute the forgoing violations, and I have found as fact that she did in fact violate all the foregoing rules. In addition to the undisputed testimony, there is a video which corroborates all the foregoing undisputed facts.

PENALTY

When determining the penalty to be imposed, the Commission must consider an employee's prior disciplinary actions. West New York v. Bock, 38 N.J. 500, 523 (1962). Respondent imposed a demotion from Sergeant to Officer for the cumulative charges as detailed. Appellant's past disciplinary record reflects several similar offenses committed within the preceding seventeen years (seven within the past seven years) and a number (approximately nine) of what would be classified as minor disciplinary charges within the same time frame.

Once a determination is made that an employee has violated a statute, rule,

regulation, etc., concerning his/her employment, the concept of progressive discipline must be considered. West New York v. Bock, 38 N.J. Super. 500 (1962). While this case did not specifically use the phrase "progressive discipline," its facts strongly suggest that a record of progressive discipline should precede the ultimate penalty, which is removal. The concept of progressive discipline involves consideration of the number of prior disciplinary infractions, the nature of those infractions and the imposition of progressively increasingly penalties. It is well settled that correction officers, like police officers are held to a higher standard of conduct than other public employees because of the sensitive nature of the position they occupy. Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert, denied, 47 N.J. Super. 80 (1966). It has also been noted in corrections cases, that failure to adhere to security precautions could have potentially serious consequences, which may give rise to a more serious penalty regardless of the lack of any past disciplinary consequences. I /M/O Martha Hicks and Antonio Price, OAL Dkt. Nos. CSV 11373 and CSV 11494-13; 2014 N.J. Agen. Lexis 469 (2014).

The appellant received a demotion from Sergeant to Officer for the foregoing violations. These violations were not only a violation of her specific duties, but critical to security and safety of inmates and fellow employees.

Appellant's attorney has argued, inter alia, that the severity of the penalty is not warranted as the demotion would prove a substantial financial hardship to appellant (who, since the events in question, has filed for service retirement). This is a fallacious argument. The safety and security of the CCDOC should be the utmost concern of any employee and particularly a supervisory employee. The financial impact of such penalty can in no way be compared to the potential impact of appellants' action (or inaction).

Appellant's attorney also compares the present incident to one for which appellant previously received a thirty-day suspension. The comparison is erroneous as the matter in question deals with violations of specific directives for an area of the jail facility known to warrant specific and direct attention (close watch checks) and is

specifically designated as the special needs/high risk unit of the facility.

With regard to the charges relating to the "pass on" books, appellants' attorney argues that the discipline relating to the "pass on book" does not rise to the level of demotion. In that argument, I concur.

I **CONCLUDE** that the penalty of demotion from Sergeant to Officer is appropriate under the circumstances as the charges relating to September 10, 2015 are sustained. Appellant's past disciplinary record reflects several similar offenses committed within the preceding seventeen years (7 within the past seven years) and a number (approximately nine) of what would be classified as minor disciplinary charges within the same time frame. I also note appellant's lack of remorse and the fact that these infractions jeopardized the security of inmates and other employees in the facility as aggravating factors in this case. I therefore, **CONCLUDE** that the demotion from sergeant to officer is appropriate under these circumstances.

I **CONCLUDE** that the penalty of demotion from sergeant to officer is not appropriate under the circumstances of the events as detailed in the complaint of December 7, 2015 and is not sustained. Although appellant's lack of remorse is evident, and these comments could have proved embarrassing to CCDOC, these infractions did not jeopardize the security of inmates or other employees in the facility. These statements as made by appellant in the "pass on" books do constitute a violation to the CCDOC General Order #001, Supervisor General Responsibility; General Order #073, Personal Conduct of Employees; and General Order #074 Professional Code of Conduct. I therefore, **CONCLUDE** that the demotion from sergeant to officer is not appropriate under the circumstances concerning comments in the pass on book and that a five-day suspension with counselling is warranted for those violations.

DECISION AND ORDER

I hereby **ORDER** that the charges be **AFFIRMED**, and the demotion from Sergeant to Officer be **SUSTAINED** and that a separate five-day suspension with

counselling be ordered.

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, P.O. 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.

May 5, 2017
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: 5/5/17

Date Mailed to Parties: 5/5/17

/lam

LIST OF EXHIBITS

For appellant:

P-1 Preliminary Notice of Disciplinary Action, dated October 12, 2015
P-2 Revised Preliminary Notice of Disciplinary Action, dated February 2, 2016
P-3 Final Notice of Disciplinary Action, dated June 28, 2016
P-4 Memo, dated September 8, 2006
P-5 Supervisors log, dated September 10, 2015
P-6 Respondent's Certified Interrogation Answers, dated November 4, 2016
P-7 Petitioner's Document Request, dated November 15, 2016
P-8 Petitioner's Second Document Request, dated November 16, 2016
P-9 Quotation of retirement benefits, dated January 6, 2017
P-10 Excerpts from State of New Jersey PFRS Member handbook
P-11 Life Expectancies Table for All Races and Both Sexes Appendix I to New Jersey Court Rules

For respondent:

R-1 Preliminary Notice of Disciplinary Action (31A), dated October 21, 2015
Preliminary Notice of Disciplinary Action (31A), dated February 5, 2016
R-2 Supervisor's Staff Complaint Report authored by Lieutenant Douglas Grundlock, dated September 10, 2015
R-3a Memorandum from Deputy Warden Simmons, dated July 5, 2016
R-3b Memorandum from Deputy Warden Simmons, dated August 15, 2006
R-3c Memorandum from Deputy Warden Simmons, dated September 8, 2006
R-4 Video and 2SA Chrono
R-5 2 South A (B-Officer) Post log authored by C/O Christopher Burch, dated September 10, 2015

R-6 2 South A (C-Officer) Post log authored by C/O David Crossan, dated September 10, 2015

R-7 Supervisor's Log by Sergeant Marion Wilson, dated September 10, 2015

R-8 2 South Mod pass on notes

R-9 Supervisor' Staff Complaint Report authored by Captain Blackwell, dated December 7, 2015

R-10 Camden County Department of Corrections Rules of Conduct

R-11 Camden County Department of Corrections General Order #001 Supervisor General Responsibility

R-12 Camden County Department of Corrections General Order #073 Personal Conduct of Employees

R-13 Camden County Department of Corrections General Order #074 Professional Code of Conduct

R-14 Sergeant Marion Wilson Chronology of Discipline

LIST OF WITNESSES

For appellant: Marion Wilson

For respondent: Douglas Grundlock
Linda Blackwell
Karen Taylor

6-7-17

STATE OF NEW JERSEY

In the Matter of Ernest Woolaston
Greystone Park Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2017-1320
OAL DKT. NO. CSV 19441-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 7, 2017 BW

The Civil Service Commission, at its meeting of June 7, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 7, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 19441-16

AGENCY DKT. NO. 2017-1320

IN THE MATTER OF ERNEST WOOLASTON,
DEPARTMENT OF HUMAN SERVICES
GREYSTONE PARK PSYCHIATRIC HOSPITAL

Rashidah N. Hasan, Esq., for appellant Ernest Woolaston

Elizabeth A. Davies, Deputy Attorney General for respondent Department of Human Services, Greystone Park Psychiatric Hospital (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: May 16, 2017 Decided: May 17, 2017

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 27, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for a hearing on May 25, 2017, but the date was adjourned because the parties reached a settlement of all issues in dispute. The signed Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on May 16, 2017 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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 Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

5/17/17
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 5-18-17

Date Mailed to Parties: MAY 18 2017
sej

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. CSV 19441-16

SETTLEMENT AGREEMENT

IN THE MATTER OF
ERNEST WOOLASTON
AND
GREYSTONE PARK PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated October 12, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 C-3 Physical or mental abuse of a patient, client, resident or employee.	Removal	July 26, 2016
2. Admin. Order 4:08 C-5 Inappropriate physical contact or mistreatment of a patient, client, resident or employee.	Removal	July 26, 2016
3. Admin. Order 4:08 E-1 Violation of a rule, regulation, policy procedure, order or administrative decision.	Removal	July 26, 2016
4. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee.	Removal	July 26, 2016

5. N.J.A.C. 4A:2-2.3(a)12 Removal July 26, 2016
Other sufficient cause.

B. The parties have agreed to the following:
The Appellant agrees to a general resignation which shall be effective July 26, 2016. Appellant agrees not to seek or accept employment with the Department of Human Services or its subsidiaries at any time in the future.

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Ernest Woolaston withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

May 11, 2017
DATE

Ernest Woolaston, Appellant

May 11, 2017
DATE

Rashida Hasan, Esq.
ON BEHALF OF Appellant

5/12/2017
DATE

Anita Pinkas
ON BEHALF OF Respondent

5/11/17
DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Ernest Woolaston, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

May 11, 2017
DATE

E Woolaston
Ernest Woolaston

6-21-17

STATE OF NEW JERSEY

In the Matter of Matthew Abrams
Burlington Township,
Department of Recreation

CSC DKT. NO. 2017-918
OAL DKT. NO. CSV 15260-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15260-16
AGENCY DKT. NO. 2017-918

IN THE MATTER OF MATTHEW ABRAMS, BURLINGTON TOWNSHIP DEPARTMENT OF RECREATION.

David Beckett, Esq., for appellant

Elizabeth M. Garcia, Esq., for respondent (Parker McCay, attorneys)

Record Closed: May 10, 2017 Decided: May 26, 2017

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 6, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

May 26, 2017
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 5/29/17

Date Mailed to Parties: 5/30/17

/cb

SETTLEMENT AGREEMENT
And
GENERAL RELEASE

THIS SETTLEMENT AGREEMENT and GENERAL RELEASE (hereinafter "this Agreement") is entered into by and between MATTHEW ABRAMS (hereinafter "Abrams" and TOWNSHIP OF BURLINGTON (hereinafter "Township") with the consent and acknowledgment of CWA Local 1036, the majority representative; and

WHEREAS, Abrams appealed his termination to the Civil Service Commission ("CSC"), which was transferred to the Office of Administrative Law for a hearing, entitled Burlington Township and Matthew Abrams, bearing OAL Docket Number CSV-15260-2016s; and

WHEREAS, the parties settled all controversies between them, including Abrams' claims bearing Docket No. CSV15260-2016s and Matthew Abrams v Township of Burlington, EEOC Docket No. 530-2016-03959, and including any and all related claims which could have been asserted as of the effective date of this settlement as defined herein, whether such claims are presently known or unknown; and

WHEREAS, all parties acknowledge that the merits of the controversy are in dispute and have not been fully adjudicated, and that no party admits any liability to any other, but all have reasons to desire amicable resolution of these matters, including to avoid the costs of litigation; and

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. **SEPARATION**: To allow for Abrams and the Township to mutually end their Employment Relationship effective immediately. In exchange for said termination of the Employment Relationship the Township shall provide Abrams the following:

   a. The Township shall pay Abrams the sum of Forty One Thousand Nine Hundred Twenty Three Dollars and Zero Cents ($41,923), which represents a severance payment that is equal to seven (7) months of salary within thirty days of execution of this Agreement and that is paid in exchange for the release of any and all claims filed at the EEOC or that could be filed in any court relative to his employment and the termination of that employment. All monies paid pursuant to this paragraph shall be paid upon issuance of a 1099 with no deductions or withholdings.

   b. The Township shall also pay Abrams the sum of Twenty One Thousand Eight Hundred Ninety One Dollars and Twelve Cents ($21,891.12), which represents accumulated sick (50%), vacation and personal time and paid in consideration for the

withdrawal of this appeal at the CSC. All monies paid pursuant to this paragraph shall be paid upon issuance of a 1099 with no deductions or withholdings.

c. With respect to any payments made by the Township where there are no state or federal tax withholdings on such monies, Abrams hereby agrees that he is solely responsible for any and all state and/or federal taxes which may arise as a result of these payment to him and that the Township shall have no responsibility for such tax liability.

d. Starting on or about June 1, 2017,tthe Township agrees that Abrams shall be permitted to enroll and upon enrollment the Township will pay for 75% of the health insurance premiums for health benefits for Abrams and his spouse with Abrams paying the remaining 25% of the health insurance premiums in accordance with the terms of the current collective bargaining agreement in force on this date as if he retired at the age of 50 and with 25 years of service with the Township. The Township and Abrams with the consent of CWA Local 1036 further agree that if Abrams obtains health benefits through another employer he may leave the Township's health insurance with the ability for him and his wife to enroll, leave, and then re-enroll in the Township's health insurance plan under the terms of this paragraph whenever needed with thirty days notice.

e. The Township also agrees to provide Abrams with a neutral reference for future employment, which shall include his name, title, years of service, salary, and that he resigned in good standing.

f. The Township also agrees to remove any references to the instant matter from Abrams' personnel file.

g. The parties agree that because the final approval of this agreement cannot be performed until the Township Council meeting in May 2017 that Abrams shall be deemed to have a retirement/resignation date on or about May 12, 2017.

Abrams agrees that, but for this Settlement Agreement and General Release, he would not be entitled to the aforesaid payments and other terms of settlement described herein. Abrams also agrees that he will not seek to be reemployed by the Township in the future.

2. **Dismissal of Action**. Abrams agrees that counsel shall file with the Office of Administrative Law and the Civil Service Commission a Stipulation of Dismissal with prejudice with regard to OAL Docket No. CSV15260-2016s, and that counsel shall also file with the EEOC a Stipulation of Dismissal with prejudice or other appropriate filing ending the EEOC complaint Docketed as Matthew Abrams v Township of Burlington, EEOC: 530-2016-03959. The parties agree that the resolution of the appeal pending at the Civil Service Commission is subject to approval by the Administrative Law Judge assigned to these consolidated appeals and the Civil Service Commission's review. Upon approval, personnel records shall be amended consistent with this Agreement. The parties understand and agree that the terms of the aforesaid

dismissals are expressly incorporated by reference within this Settlement Agreement and General Release as if fully set forth herein.

3. **Release in Consideration for Payment and Other Consideration provided for in this Agreement**: In consideration of the payment and other consideration provided for in this Agreement, Abrams, and for his estate and his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Township, its agents, officers, representatives and employees (present and former), and its respective successors and assigns, heirs, executors and personal or legal representatives, based upon any act, event or omission occurring before the execution of this Agreement, including, but not limited to, any events related to, arising from or in connection with Abrams employment and/or association with the Township. Abrams specifically waives, releases and gives up any and all claims arising from or relating to Abrams' employment and/or association with the Township based upon any act, event or omission occurring before the date of this Settlement Agreement, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations, civil service or common law. Abrams specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or relationship and/or association with the Township, based upon any act, event or omission occurring before the effective date of the Settlement, including, but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations and/or common law, ordinance or Township policy expressly including, but not limited to, any potential claim relating to the following (along with any amendments thereto):

a. Civil Service Act and regulations;
b. The National Labor Relations Act;
c. Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1971, The Civil Rights Act of 1991;
d. Sections 1981 through 1988 of Title 42 of the United States Code;
e. The Employment Retirement Income Security Act of 1974;
f. The Immigration Reform Control Act;
g. The Americans with Disabilities Act of 1990;
h. The Fair Labor Standards;
i. The Occupational Safety & Health Act;
j. The Family & Medical Leave Act of 1993;
k. The Equal Pay Act;
l. The New Jersey Law against Discrimination;
m. The New Jersey Minimum Wage Law;
n. The Equal Pay Law for New Jersey;
o. The New Jersey Worker Health & Safety Act;
p. The New Jersey Family Leave Act;
q. The New Jersey Conscientious Employee Protection Act;
r. The New Jersey Civil Rights Act,
s. Any anti-retaliation provision of any statute or law;
t. Any other federal, state of local, civil or human rights law of any other local, state or federal law, regulation or ordinance, Township policies or any provision of any federal state constitution, any public policy, contract, tort or common law, conversion, spoliation or any

losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages, attorneys' fees and litigation costs);

u. any claims for wrongful discharge, breach of contract, fraud, defamation, libel, slander, emotional distress, misrepresentation or any claims relating to compensation, benefits or equity, or any other claims under any statute, rule or regulation or under the common law, including compensatory damages, punitive damages, attorney's fees, costs, expenses and all claims for any other type of damage or relief; and

v. any and all claims for alleged unpaid and/or withheld wages, severance, bonuses and/or other compensation of any kind not contained or provided for in this Agreement.

4. **No Claims Permitted/Covenant Not to Sue**: Abrams waives his right to file any charge or complaint on his own behalf and/or participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on their behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency including the EEOC and the DCR, against the Township, except if such a waiver is prohibited by law. Should any charge or complaint be filed, Abrams agrees that he will not accept any relief or recovery therefrom. Abrams confirms that no such charge, complaint or action exists in any forum or form other than the complaint bearing OAL docket no. CSV15260-2016s and EEOC: 530-2016-03959 which he agrees to withdraw/dismiss with prejudice, and hereby covenants not to file any charge, complaint or action in any forum or form against the Township based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Abrams, it shall be dismissed with prejudice upon presentation of this Agreement.

5. **Attorneys' Fees and Costs**: Abrams agrees that the Township will not bear the responsibility to pay for his costs and attorneys' fees which have been incurred in connection with the within matter and in connection with the negotiation and preparation of this Agreement and that no amounts other than the payment to be made pursuant to ¶1 of this Agreement shall be sought by or owed to Abrams or his attorneys by the Township in connection with this matter; the parties also agree that no monies shall be sought by any the Township from Abrams.

6. **No Admission of Liability or Wrongdoing**: It is expressly understood that neither the execution of this Agreement nor any other action taken by Township in connection with Abrams alleged claims or this Settlement, constitutes an admission by the Township of any violation of any law, duty or obligation, or that any decisions or actions taken in connection with Abrams' employment were unwarranted, unjustified, retaliatory, discriminatory, wrongful or otherwise unlawful; at the same time, neither the execution of this Agreement nor the dismissal of the appeal at CSC or the EEOC charge shall be deemed an admission by Abrams of any wrongdoing or violation of law, duty or obligation, with respect to his employment or the subject matter of this appeal.

7. **Entire Agreement**: This Agreement contains the sole and entire agreement between the parties hereto and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof, and is intended to memorialize the settlement of Abrams' claims. Abrams represents and acknowledges that, prior to executing this Agreement, he/she

consulted his/her attorney, that he/she had ample time to do so, that he/she obtained the advice of counsel prior to making the decision to execute this Agreement that he is satisfied with the services of counsel, that he is satisfied with the representation of CWA Local 1036 and that he/she had not relied upon any representation or statement not set forth in this Agreement made by the Union, by counsel, or by Township's counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

8. **Severability**: The parties agree that if any court declares any portion of this Agreement unenforceable, the remaining portion shall be fully enforceable.

9. **Applicable Law**: This Settlement Agreement shall be construed and interpreted in accordance with the law s of the State of New Jersey. The parties agree that any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which parties hereby acknowledge and agree to the Superior Court of New Jersey in Burlington County.

10. **Effective Date**: This Agreement will become effective on the date on which all parties to this Agreement have executed this Settlement Agreement and General Release, it has been approved by the Township Council which is anticipated to be at the first meeting in May 2017, and has been approved or acknowledged by the Civil Service Commission. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null and void and shall not interfere with the rights of either party to pursue this matter further.

11. **Counterparts**. This Agreement may be executed in any number of Counterparts, each of which shall be an original, but all of which, taken together, shall constitute one and the same document. Signatures on any such counterparts may be communicated by facsimile or pdf transmission and shall have the same effect as if the original signatures had been delivered.

12. This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence of for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein or to enforce the terms of this Settlement Agreement and General Release.

13. To the extent permissible by law, the terms of this Settlement Agreement shall not be publicly disclosed and shall be held confidential by all parties and attorneys involved in this case.

14. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, ABRAMS ACKNOWLEDGES:

A. HE HAS READ IT;
B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP CERTAIN RIGHTS;

C. HIS ATTORNEY NEGOTIATED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE WITH HIS KNOWLEDGE AND CONSENT;
E. HE HAS BEEN ADVISED TO CONSULT WITH HIS ATTORNEY PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, AND HAS IN FACT DONE SO; AND
F. HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

Dated: 5-3-2017

Mayor Brian J. Carlin

Dated: 4-26-17

Matthew Abrams
S.S.#: xxx-xx-6777

On behalf of CWA Local 1036, the majority representative for employees in the bargaining unit that Matt Abrams is a part of, I hereby consent to the terms stated herein on behalf of the Local.

Adam Liebtag, President
CWA Local 1036

STATE OF NEW JERSEY:
COUNTY OF ~~BURLINGTON~~ Mercer SS.

I certify that on the 26th day of April, 2017, Matthew Abrams personally appeared before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

a. is named in and personally signed this document; and
b. signed, sealed and delivered this document as his/her act and deed.

Notary Public

EDNA M. HORAN
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES JULY 17, 2017

REQUEST FOR
WITHDRAWAL OF CHARGE OF DISCRIMINATION

You recently indicated your desire to withdraw your charge. In order to initiate such action, please furnish the information below and return in the enclosed envelope.

Please note that your charge is presently open with Pennsylvania Human Relations Commission (PHRC) and/or the Equal Employment Opportunity Commission (EEOC). If you desire to withdraw your charge from the agency/agencies, it will be necessary to so indicate in the space provided below. Since a request for withdrawal of a charge is subject to the approval of the agency/agencies named above, your request will be considered and acted upon when received. Please note that the agency/agencies is/are still prepared to proceed with your charge, if you so desire.

I am aware that the EEOC and/or the PHRC protect my right to file a complaint. I have been advised that it is unlawful for any person covered by Title VII of the Civil Rights Act of 1964, as amended, to threaten, intimidate or harass me because I have filed a complaint. I have not been forced to request this withdrawal. Also, I have been advised that it is unlawful for any person covered by the Pennsylvania Human Relations Act of 1955, as amended, to threaten, intimidate or harass me because I have filed a complaint.

Matthew Abrams v. Township of Burlington

EEOC Charge No.: 530.2016.03959

☒ I wish to withdraw my charge filed with the Pennsylvania Human Relations Commission and/or the Equal Employment Opportunity Commission.

Matthew Abrams
MATTHEW ABRAMS

May 10 2017
DATE

6-21-17

STATE OF NEW JERSEY

In the Matter of Nilza Campoverde
Middlesex County Sheriff's Department

CSC DKT. NO. 2017-2509
OAL DKT. NO. CSR 2074-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 2074-17
Agency DKT NO 2017-2509

IN THE MATTER OF NILZA CAMPOVERDE,
MIDDLESEX COUNTY SHERIFF'S OFFICE.

David J. Altieri, Esq., for appellant Nilza Campoverde (Galantucci, Patuto, DeVencentes, Potter & Doyle, attorneys)

Arthur R. Thibault, Esq., for respondent Middlesex County Sheriff's Office (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: May 16, 2017 Decided: May 23, 2017

BEFORE **JOSEPH LAVERY**, ALJ t/a:

Nilza Campoverde, a sheriff's officer with the Middlsex County Sheriff's Office, appeals her termination effective January 4, 2017. The appeal was filed with the Office of Administrative Law (OAL) on February 6, 2017, pursuant to N.J.S.A. 40A:14-202d.

The parties appeared before the undersigned on May 2, 2017, and prior to the start of the hearing resolved the matter. An executed settlement agreement was received in the OAL on May 16, 2017, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 23, 2017
DATE

Joseph Lavery
JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 5/24/17

Date Mailed to Parties: 5/24/17

mph

SETTLEMENT AGREEMENT AND RELEASE

NILZA CAMPOVERDE, on her own behalf and on behalf of her heirs, executors, administrators, and assigns (hereinafter collectively referred to as "Nilza Campoverde" or "Campoverde"), and the **MIDDLESEX COUNTY SHERIFF'S OFFICE**, on its own behalf and on behalf of its successors, assigns, departments, elected and appointed officials, employees, agents, representatives, attorneys, and insurance carriers (hereinafter collectively referred to as "County"), have reached the within Settlement Agreement and Release (hereinafter "Agreement") in final settlement of any and all disputes between and among them from the beginning of time until the present.

NOW THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the parties hereby agree as follows:

1. **Nilza Campoverde**, on her own behalf and on behalf of her heirs, executors, administrators, successors and assigns hereby releases and forever discharges the **County**, and all related entities, its successors, assigns, departments, and its elected and appointed officials, employees, agents, representatives, attorneys, and insurance carriers, including but not limited to their heirs, executors, administrators, successors and assigns, and the estates and/or heirs thereof from any and all claims, demands, damages, and causes of action, known and unknown, relating to or arising out of her employment or any other alleged conduct of the **County**, and resulting from anything which has happened from the beginning of time up to the date **Campoverde** executes this Agreement, including claims for attorneys' fees and cost of appeal or suit.

Without limiting the foregoing provision in any way, Campoverde releases all claims, benefits, demands, damages, and causes of action relating to or arising out of her employment or any other conduct of the County, including, but not limited to, all claims, benefits, demands, and

damages arising under Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. § 1981, et. seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, and 1986 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq.; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; 29 U.S.C. § 1001, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Rehabilitation Act of 1973, the False Claims Act, 31 U.S.C. § 3729, et seq.; the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., the False Claims Act, 31 U.S.C. §3729, et seq., and any other Federal, State or local laws, regulations, collective negotiations agreement, or ordinance; or claims of quasi-contract, tort, negligence, intentional act, civil conspiracy, harassment, fraud, defamation, intentional and/or negligent infliction of emotional distress; or any common law claim; or any claim for punitive damages, and any other duty or obligation of any kind or description to the fullest extent permissible by law. This Release waives any and all claims for discovery, whether asserted or unasserted, relating to materials or events that predate the execution of this Agreement. This Release shall apply to all known, unknown, unsuspected, and unanticipated claims, liens, injuries, and any contractual benefits and wages from the beginning of time up to and including the day of the date of this Agreement.

Nilza Campoverde represents that as of the date she executes this Agreement, she has not filed any charge, complaint, claim, or action with any court, organization, governmental entity, or administrative agency, or directed or authorized such charge, complaint, claim, or action to be filed on his behalf against the County, except the appeal referred to in paragraph 2 and paragraph 3 of this Agreement and any claim, if any, for worker's compensation benefits. Campoverde

does not hereby waive (1) her right to enforce the terms of this Agreement; (2) the right to file any unwaivable charge or complaint (although Campoverde does waive and release any right to recover damages or obtain reinstatement in connection with any such charge or complaint relating to anything which has happened up to the date she signs this Agreement, including the revocation period); and (3) rights or claims that cannot lawfully be released.

2. In consideration of the above Release and the other terms of this Agreement, the County agrees to settle the Final Notice of Disciplinary Action dated January 31, 2017 as follows:

a. The Final Notice of Disciplinary Action will be amended to reflect that Campoverde is pleading guilty to the charges of Conduct Unbecoming a Public Employee, contrary to N.J.A.C. 4A:2-2.3(a)(6), and Standard of Conduct, contrary to Departmental Rule 3:1.1, both supported by the allegation that, while off-duty, you confronted two individuals at their home while in uniform with your department-issued weapon on your person, when an argument ensued;

b. The remaining charges and allegations contained in the Final Notice of Disciplinary Action are hereby dismissed with prejudice;

c. As a result of her guilty plea, Campoverde accepts a six (6) month suspension without pay for the period of January 4, 2016 – July 4, 2016;

d. Between the period of July 5, 2016 and May 31, 2017, Campoverde's personnel records will reflect a leave of absence without pay. Campoverde specifically and knowingly waives any and all claims for back pay between the dates of July 5, 2016 – May 31, 2017. Campoverde also waives all other claims against the County during this period of time with regard to this matter, including any award of counsel fees or other monetary relief.

e. Effective June 1, 2017, Campoverde will be reinstated to full-duty, subject to her successfully passing a Fitness for Duty Examination at the Institute of Forensic Psychology, which shall be scheduled by the Sheriff's Office upon execution of this Agreement;

f. Upon the return to full duty, Campoverde agrees and understands that she shall check her department-issued duty weapon in and out every shift, as directed by the Sheriff's Office, and will not be permitted to take her duty-weapon home; and

g. The County agrees to return Campoverde to the same salary step set forth in the PBA collective negotiations agreement that she was at on January 4, 2016.

3. In accepting this Settlement, Campoverde acknowledges that she is waiving her right to proceed to a hearing on her appeal to the New Jersey Civil Service Commission pending at the Office of Administrative Law under Docket No. CSR 2074-17. Campoverde understands that this Agreement is contingent upon the approval of the Civil Service Commission and further understands that, once approved by the Civil Service Commission, the aforementioned appeal will be deemed resolved and the matter closed.

4. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

5. If any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties.

6. This Agreement shall inure to the benefit of, and may be enforced by, the parties hereto and all of their respective heirs, legal representatives, successors and assigns.

7. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement. The parties further agree that this Agreement shall not be filed with any court except in an action to enforce or challenge its terms.

8. Nilza Campoverde acknowledges that she has had ample time to consult with her attorney, David J. Altieri, throughout the negotiations that preceded her execution of this Agreement; that she has been represented by her attorney during the entirety of this matter; that she has carefully read and fully understands all of the provisions of this Agreement, including the Release; that she is voluntarily executing this Agreement without coercion or duress and in consultation with her attorney; that she has had adequate time to review this Agreement and the release contained in this Agreement; and that she understands and acknowledges that she is waiving any right to proceed to a hearing at the Office of Administrative Law by signing this Agreement.

9. The parties acknowledge that this Agreement is a joint product and shall not be construed for or against any party on the ground of sole authorship. This Settlement may be executed in multiple originals, each of which shall be considered an original instrument, but all of which shall constitute one (1) agreement, and shall bind the parties hereto and their successors, heirs, assigns, and legal representatives.

Date: 5-10-17

NILZA CAMPOVERDE

ACKNOWLEDGEMENT

STATE OF NEW JERSEY :
ss.:
COUNTY OF BERGEN :

I certify that on MAY 10, 2017, Nilza Campoverde personally came before me and acknowledged under oath to my satisfaction, that she:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

Notary Public of the State of New Jersey

ALICE M. COONEY
Notary Public of New Jersey
ID No. 15983
My Commission Expires 03/07/2022

MIDDLESEX COUNTY SHERIFF'S OFFICE

By: Mildred S Scott

Print Name: Mildred S. Scott

Title: Sheriff

Date: 5/15/17

RECEIVED
2017 MAY 16 P 2:22
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

6-21-17

STATE OF NEW JERSEY

In the Matter of Antonio Cruz, City of Newark

CSC Docket No. 2017-1988
OAL Docket No. CSR 00047-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 14 2017 (HS)

The appeal of Antonio Cruz, a Fire Fighter with the City of Newark, of his removal, effective June 25, 2016, on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia (ALJ), who rendered his initial decision on May 4, 2017. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 21, 2017, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission upheld the removal.

DISCUSSION

The appointing authority removed the appellant on charges of incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. Specifically, it asserted that the appellant reported late for duty, missed assignments, was unfit for duty and tested positive for alcohol and drugs. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision and based on the testimonial and documentary evidence presented, the ALJ found that the appellant received a regular

appointment to the title of Fire Fighter on October 27, 2014. On June 25, 2016, the appellant was assigned to Engine 5, Tour 3 under the command of Orlando Alvarez, Fire Captain. On that date, the appellant reported at 8:07 a.m. for an 8:00 a.m. shift and missed roll call. After finishing a fire engine maintenance check, the appellant joined Alvarez in the firehouse kitchen and sat down with a cup of coffee. Shortly thereafter, the appellant fell asleep and dropped the coffee cup onto the floor. After cleaning the spilled coffee, the appellant left the kitchen and thereafter did not respond and could not be located when a call came in to the firehouse. The appellant missed both a response to an emergency call from St. James Hospital and an assignment at the Prudential Center. Alvarez later found the appellant sleeping in a spare room in the firehouse and contacted Steven P. DeCeuster, Battalion Fire Chief, who responded to the firehouse and observed the appellant sleeping on duty. DeCeuster and Alvarez both suspected the appellant of being under the influence of narcotics, and DeCeuster contacted his supervisor, Richard Zieser, Deputy Fire Chief, to report his observations and his suspicion of the appellant's drug use. Zeiser then contacted his supervisor, Richard Gail, Deputy Fire Chief, and advised him of the appellant's behavior and the suspicion that he may be under the influence of narcotics. Gail contacted the health officer, Ronnie L. Coco, Battalion Fire Chief, to arrange for the appellant to have his urine tested at Concentra, a private facility with which the appointing authority contracts to perform urine tests and other physical examinations. The appellant was escorted to Concentra by Kevin Aikens, Fire Fighter, a member of the Arson Squad. Justice Ntim, a nurse at Concentra, administered the appellant's urine test. The urine test results showed that the appellant was under the influence of cocaine, benzodiazepines and alprazolam, all controlled dangerous substances. Ntim also testified that he administered two breath alcohol tests and that the legal limit for blood alcohol content is 0.02%. Ntim's report reflected a reading of 0.023% on the screening test, and 0.017% on the confirming test. The ALJ found that the appellant reported for duty while under the influence of a controlled dangerous substance and was never charged with a crime.

Additionally, the ALJ found that PDP-19A is a 1992 addendum to the appointing authority's Disciplinary Action Policy (PDP-19) and that PDP-19A requires that a letter of conditional employment be issued prior to the removal of any employee suspected of drug usage. In pertinent part, PDP-19A states:

> The purpose of creating a drug testing policy is to eliminate the dangers caused by on-the-job drug use/abuse by: (i) mandating testing where reasonable individualized suspicion exists and (ii) providing addicts[1] with an opportunity for rehabilitation.

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1 PDP-19A defines an addict as "[a]n individual with a disease or disability that involves a physical or mental dependency on drugs or the habitual inclination to use drugs and/or alcohol to the extent that it causes a problem in any area of life."

PDP-19A was negotiated by the union with the appointing authority and has been the working policy since 1992 and was the policy in place at the time of the appellant's removal. Raul Malave, Deputy Fire Chief, testified that he was aware of PDP-19A and the past practice of issuing a letter of conditional employment but noted that the appointing authority chose not to follow that protocol. Malave also testified that it was the appointing authority's position that it had discretion to implement PDP-19A or not. The ALJ found that the appointing authority never offered the appellant a letter of conditional employment.

The ALJ also distinguished *In the Matter of Paul Andrade*, Docket No. A-3149-14T4 (App. Div. October 12, 2016), a case that dealt with the same appointing authority and policy (PDP-19A). There, the Fire Fighter was removed for sale and distribution of controlled dangerous substances, and the removal was affirmed by the court. The court noted that PDP-19A specifically regarded the sale of narcotics as a terminable offense. Here, as the appellant was only involved in the use of narcotics, the ALJ concluded that PDP-19A should apply. Based on the foregoing, the ALJ determined that the penalty of removal should be reversed and that the appellant should be reinstated under a letter of conditional employment.

In its exceptions, the appointing authority argues that the ALJ's summary of Malave's testimony is factually inaccurate. In this regard, Malave never testified that the appointing authority had a "protocol" of automatically issuing a letter of conditional employment. Malave testified that PDP-19 is primarily used by non-uniform departments because there is no set uniform policy. Rather, the Fire Department is governed by the Rules and Regulations due to its nature as a paramilitary organization. The Rules and Regulations set forth a particular code of conduct to ensure safety. He testified that when instituting discipline of a Fire Fighter, the appointing authority looks at the Rules and Regulations, not PDP-19. All Fire Fighters are responsible for knowing the Rules and Regulations, and Malave testified that they specifically provide that a Fire Fighter may be terminated for being under the influence of drugs and alcohol. Malave testified that the offer of a letter of conditional employment is, and has always been, at the appointing authority's discretion.

The appointing authority also contends that PDP-19A does not require the issuance of a letter of conditional employment to any employee suspected of drug use, prior to removal. In this regard, it notes that PDP-19A is an addendum to PDP-19. PDP-19 contains a specific "Disclaimer" that, in part, states:

> This policy is subject to modification or cancellation, by the City in whole or in part, at any time, and it is not intended nor should it be construed as providing any employee with past practice or vested rights.

Therefore, the appointing authority argues, an employee cannot infer any requirement of a letter of conditional employment. The appointing authority asserts that it is arbitrary and capricious for the ALJ to dictate that a letter of conditional employment is required under any circumstances excepting criminal matters.

The appointing authority further points to the Commission's decision in *In the Matter of Michael Larino* (CSC, decided May 4, 2011), wherein the Commission affirmed the removal of a Fire Fighter who reported to work under the influence of drugs. In *Larino,* the Commission noted that under *In the Matter of Daniel Cahill,* 245 *N.J. Super.* 397 (App. Div. 1991), the refusal to employ a handicapped person is lawful where it would be hazardous to the person or others and that Larino had not made any requests for reasonable accommodations prior to the reasonable suspicion drug testing. Similarly, the appellant in this case never indicated that he had a substance abuse issue prior to the date in question. Thus, the appointing authority maintains that he was not entitled to any accommodation. Further, as the appellant is a Fire Fighter, the handicap he alleges places himself, his fellow Fire Fighters and the public at risk. The appointing authority notes that Charles West, Fire Fighter, testified that in his capacity as President of the Firefighter's Union, no Fire Fighter came to work under the influence in the past 12 years.

In his reply to exceptions, the appellant disputes the appointing authority's claim that Malave's testimony was inaccurately summarized. He notes that Malave testified that PDP-19 covers "all of the employees for the City of Newark . . . including fire." Malave confirmed that the Fire Department's use of letters of conditional employment for disciplinary actions involving positive drug or alcohol tests was part of the policy contained in PDP-19 and PDP-19A and that this policy works in conjunction with the Fire Department's Rules and Regulations. Moreover, in *Andrade, supra,* the appointing authority did not argue that PDP-19 and PDP-19A were inapplicable to Fire Fighters. Rather, the appointing authority argued that the letter of conditional employment did not apply to Andrade because he was terminated for his drug-related criminal offenses, not for failing a drug test. The appellant notes that under the Rules and Regulations, termination of a Fire Fighter for being under the influence of drugs and alcohol is not mandated but may be justified in cases of addiction, while a positive test for drugs or alcohol while on duty is not addressed. He argues that the Rules and Regulations are consistent with the letter of conditional employment, which requires treatment and rehabilitation in order to avoid addiction, which could lead to dismissal.

The appellant also disputes the appointing authority's claim that case law supports his removal. He notes that the concept of a "second chance" has been a long-established policy of the appointing authority as found in court decisions. *Cahill, supra*; *Andrade, supra.* The appellant also distinguishes *Larino, supra,* stating that unlike the circumstances in that case, here there was a current policy

in existence, PDP-19A, that provided for a second chance. He maintains that the policy must be applied to him and states that more than 50 Fire Fighters over the last 25 years have been given second chances pursuant to PDP-19A. The appellant argues that PDP-19A has established that a first-time positive test for a controlled dangerous substance is not egregious. Rather, it is conduct that triggers progressive discipline in the form of the offer of a letter of conditional employment.

The appellant further notes that courts have held that addiction to drugs or alcohol renders a person handicapped under the New Jersey Law Against Discrimination (LAD) and entitles that person to its protections. *Clowes v. Terminex Intern., Inc.*, 109 *N.J.* 575, 590-595 (1988). He argues that providing him with an accommodation for this handicap is not inconsistent with prior cases where Fire Fighters were given one opportunity for treatment before removal. *Cahill, supra*; *In the Matter of Henry Jackson*, 294 *N.J. Super.* 233 (App. Div. 1996).

Based on its *de novo* review of the record, the Commission disagrees with the ALJ's assessment of this matter. The appellant claims that he is an addict rendered handicapped under the LAD, which, similar to the situation in *Cahill, supra*, requires the appointing authority to provide him with an accommodation. In *Cahill*, the court acknowledged that addiction, habituation or dependency that results from use of one drug or a combination of drugs renders a person handicapped. However, the court emphasized that *N.J.S.A.* 10:5-4.1 prohibits discrimination against a handicapped person "unless the nature and the extent of the handicap reasonably precludes the performance of the particular employment." It also underscored that Cahill was a Fire Fighter and that:

> the negligent or improper performance of that function can result in serious harm to persons and property . . . The nature of Cahill's job duties satisfies the city's burden of proving with a reasonable certainty that his handicap would probably cause injury to himself or to others.

Cahill at 400-401. The court in *Cahill* also noted that a Fire Fighter is subject to being called when needed, anytime of the day or night, and that a Fire Fighter under the influence of drugs cannot do the job. While the court in *Cahill* did consider that an employer, where feasible, should afford an opportunity for rehabilitation to an employee handicapped by substance abuse, it did not mandate that a Fire Fighter should not be removed for a first positive drug test. In this regard, the court stated that "refusal to continue employment of a handicapped person is lawful where employment in a particular position would be hazardous to that individual or to others." *Id.* While in this case, PDP-19A provided for the issuance of a letter of conditional employment, the appointing authority has persuasively argued that the policy was discretionary. In this regard, the appointing authority indicates that PDP-19A is an addendum to PDP-19. PDP-19, in turn, includes a "Disclaimer" that, in part, provides:

> This policy is subject to modification or cancellation, by the City in whole or in part, at any time, and it is not intended nor should it be construed as providing any employee with past practice or vested rights.

Therefore, as also noted by the appointing authority, an employee could not infer a requirement that a letter of conditional employment be issued. Even if PDP-19A was to be applied, it bears noting that its stated purpose was to eliminate the dangers caused by on-the-job drug use/abuse by mandating testing where reasonable individualized suspicion exists and "providing *addicts* with an opportunity for rehabilitation" (emphasis added). However, there is no evidence in the record either that the appellant is an addict or that he requested an accommodation or sought assistance of any kind for his asserted handicap prior to his drug test that was based on the appointing authority's reasonable suspicion. Further, second chances for drug related infractions are not generally afforded public safety employees, who, as compared with non-public safety employees, are held to a stricter standard of conduct. *See In the Matter of John Simpson* (MSB, decided March 26, 2008) (Removal of a Truck Driver modified to a four-month suspension and appellant ordered to undergo a return to work drug test prior to reinstatement and be required to undergo monthly random drug testing for a period of one year); *In the Matter of Brian Huntley* (CSC, decided February 12, 2014) (Heavy Equipment Operator); *In the Matter of John Daraklis* (MSB, decided June 11, 2008) (Laborer Heavy); *In the Matter of Glenn Steiger, Borough of Rutherford* (MSB, decided July 11, 2007) (Truck Driver); *In the Matter of Richard Wilkins, Jr., Township of Irvington* (MSB, decided September 21, 2005) (Police Aide).

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

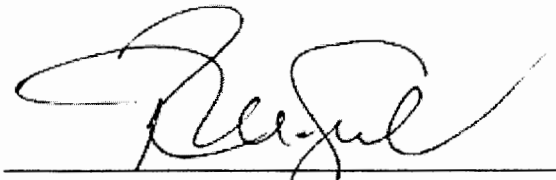
The Commission has long recognized that Fire Fighters hold very unique positions, and any disregard for the law is unacceptable in a Fire Fighter who operates in the context of a paramilitary organization. *See In the Matter of Bart Giaconia* (MSB, decided February 22, 2006); *In the Matter of James Alessio* (MSB, decided March 9, 1999). Fire Fighters "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." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 552 (1998). This is especially true where, as here, the appellant is a Fire Fighter who has tested positive for drug use. Indeed, as noted in *In the Matter of Russell Strother* (MSB, decided December 6, 2006), any use of an illegal drug constitutes a violation of the law and of a Fire Fighter's duty to exhibit conduct, both on and off duty, that is commensurate with his position. Here, along with illegal drugs, the appellant had alcohol in his system (albeit not over the legal limit). Moreover, the actual alleged misconduct, sleeping on duty and missing assignments, was not disputed. Finally, the appellant was not a long term employee as he had been serving as a Fire Fighter for less than two years prior to the date in question. Under these circumstances, the appellant's offense is sufficiently egregious to warrant his removal. Accordingly, the Commission concludes that the penalty imposed by the appointing authority is neither unduly harsh nor disproportionate to the offense and should be upheld.

ORDER

The Civil Service Commission finds that the appointing authority's action in removing the appellant was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JUNE, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
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Civil Service Commission
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 00047-17

IN THE MATTER OF ANTONIO CRUZ,
CITY OF NEWARK FIRE DEPARTMENT.

Craig S. Gumpel, Esq., for appellant Antonio Cruz (Law Offices of Craig S. Gumpel, LLC)

France Casseus, Assistant Corporation Counsel, for respondent, City of Newark (Kenyatta K. Stewart, Acting Corporation Counsel, attorney)

Record Closed: April 3, 2017 Decided: May 4, 2017

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Antonio Cruz appeals his removal by the City of Newark Fire Department (Department). On June 25, 2016, Cruz reported late for duty and was found sleeping on the job while under the influence of a controlled dangerous substance. The Department removed Cruz without first issuing him a "last chance agreement," also known as a "letter of conditional employment." Can the Department remove a suspected drug user without first issuing him a letter of conditional employment? No. PDP-19A of Newark's disciplinary policy and procedures requires that the Department issue a letter of conditional employment before removal.

PROCEDURAL HISTORY

Appellant, Antonio Cruz, served as a Newark City firefighter from October 27, 2014. On June 25, 2016, appellant was served with a notice of suspension effective immediately. (R-2.) On June 27, 2016, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) seeking a suspension effective June 25, 2016, and a removal with the effective date to be determined. (R-3.) Appellant was charged with violating the following Newark Fire Department Rules and Regulations, in addition to the New Jersey Administrative Code:

> **Article 6:** Members of the Department shall not violate the Oath of Office, nor be guilty of neglect or cowardice or shirk any duty.
>
> **Article 11:** Members shall at all times appear neatly attired and clean in person, and shall set examples to subordinates and peers in dignity, sobriety, courtesy, skill and the observance of discipline.
>
> **Article 14:** Punctuality shall be strictly insisted upon and only the best of reasons that a member's delay in reporting for duty on time was unavoidable will be accepted
>
> **Article 15:** Members shall devote their entire time while on duty to the work of the department.
>
> **Article 17:** Members shall not absent themselves from Quarters or any assignment of duty without permission of a Superior Officer.
>
> **Article 58:** Members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.
>
> **Article 59:** Members whose performance is demonstrably inadequate or unsuitable and fails to meet, obtain or produce the effects or results mandated by Department Rules and Regulations, shall be deemed in violation of the Department Rules and Regulations.
>
> N.J.A.C. 4A:2-2.3(a)(1) Incompetency, inefficiency or failure to perform duties;

N.J.A.C. 4A:2-2.3(a)(3)	Inability to perform duties;
N.J.A.C. 4A:2-2.3(a)(4)	Chronic or excessive absenteeism or lateness;
N.J.A.C. 4A:2-2.3(a)(6)	Conduct unbecoming a Public Employee;
N.J.A.C. 4A:2-2.3(a)(7)	Neglect of Duty;
N.J.A.C. 4A:2-2.3(a)(11)	Other sufficient cause.

SPECIFICATIONS OF CHARGES

1. On June 25, 2016 you, Firefighter Antonio Cruz, were late reporting for duty at your assignment, Engine 5, Tour 3.

2. On June 25, 2016 you, Firefighter Antonio Cruz, did not fulfill your duties as a Firefighter and missed an assignment that Engine 5, Tour 3 was given. The company was forced to respond without you.

3. On June 25, 2016 the Captain and Battalion Chief observed your condition and demeanor to be unfit for duty.

On June 28, 2016, appellant requested a departmental hearing. (A-2.) The departmental hearing was held on August 23, 2016, and on December 16, 2016, the Department served a Final Notice of Disciplinary Action via certified mail removing appellant retroactive to June 25, 2016. (A-1.) His appeal was filed at the Office of Administrative Law on December 27, 2016 (N.J.S.A. 40A:14-202(d)), and was heard on February 24, and 27, 2017. Post-hearing submissions were received on April 3, 2017, on which date the record closed.

TESTIMONY

Captain Orlando Alvarez

Newark Fire Department captain Orlando Alvarez testified on behalf of the Department. He stated that he has been employed by the Department for twenty-seven

and a half years and that his current duties include monitoring and commanding his "crew" and overseeing day-to-day activities, including administering roll call at precisely 8:00 a.m. every morning. Alvarez testified that appellant was assigned to his command on June 25, 2016. Alvarez noted that appellant had recently transferred from another firehouse and that June 25, 2016, was appellant's second day working under his command.

Appellant was not present for roll call at 8:00 a.m. on June 25, 2016. Alvarez instructed one of the firefighters under his command to contact appellant via cell phone at approximately 8:01 a.m. Appellant arrived to the firehouse within five or six minutes of roll call. Alvarez stated that upon arrival appellant apologized for being late and immediately went about his duties. Alvarez testified that it was appellant's turn to drive the fire engine that day and that appellant's first set of duties was to conduct a daily maintenance check of the fire engine.

After finishing the maintenance check appellant joined Alvarez in the kitchen area of the firehouse. Appellant poured himself a cup of coffee and sat down. Shortly thereafter appellant fell asleep and dropped the cup of coffee he was holding onto the floor. Alvarez instructed appellant to clean the coffee off the floor. Appellant proceeded to clean the spill with a mop and then exited the kitchen with the mop. Upon exiting the kitchen appellant was out of Alvarez's range of vision, and appellant did not return for an extended period of time.

Captain Alvarez testified that during this time a "run" came into the firehouse. Alvarez explained that a "run" is a response to an emergency call. This particular "run" was in response to an internal alarm at St. James Hospital, which is located in close proximity to the firehouse. Alvarez recounted that he and his crew got into the fire engine and that appellant was absent. Appellant's absence was particularly notable because it was appellant's turn to drive, and there was no one there to drive the fire engine. Alvarez ordered a crew member to blow the horn and sound the siren in order to alert the appellant of the run. Alvarez then ordered a crew member to call for the appellant over the intercom. The appellant did not respond. Alvarez then ordered a

crew member to drive the fire engine in Cruz's absence, and the company responded to the call without Cruz.

After returning to the firehouse from the run (approximately twenty minutes), Captain Alvarez, along with several members of his crew, searched the firehouse but were unable to locate appellant. Alvarez then notified his supervisor, battalion chief Steven P. DeCeuster, of the situation. Chief DeCeuster informed Captain Alvarez that he would come to the firehouse as soon as possible.

Captain Alvarez then testified that the company had received orders to report for duty at a Korean cultural festival taking place near the Prudential Center in downtown Newark. The assignment was to last from 9:00 a.m. to 10:00 a.m. Alvarez stated that the company reported to the event without appellant.

Upon returning to the firehouse the company once again looked for Cruz, and eventually found him upstairs sleeping on a loveseat in a spare room. It was about this time that Chief DeCeuster arrived at the firehouse. Alvarez informed DeCeuster that they had located Cruz sleeping in a spare room and that they could not wake him up. DeCeuster accompanied Alvarez to the spare room where Cruz was sleeping, and both attempted to wake him up by shouting his name, but could not wake him. DeCeuster then kicked appellant's boot, which woke him up for a short moment. Cruz looked at the officers and went back to sleep. Deputy Chief DeCeuster then notified Deputy Chief Zeiser of the situation. Alvarez and DeCeuster proceeded to the kitchen area of the firehouse, where they were soon met by Deputy Chief Zeiser and Deputy Chief Gail.

Alvarez testified that appellant eventually came downstairs into the kitchen area, accompanied by a member of the Newark Fire Department Arson Squad. He stated that appellant eventually left the firehouse, along with the arson detective.

Battalion Chief Steven P. DeCeuster

Newark Fire Department battalion chief Steven P. DeCeuster testified on behalf of the Department. He stated that he has been employed by the Newark Fire

Department for over thirty-two years and that he currently serves as battalion chief of the fifth battalion, supervising nine companies, including the company to which appellant was assigned on June 25, 2016 (Engine 5).

DeCeuster's testimony corroborated that of Captain Alvarez, in that it reiterated many of the same facts. DeCeuster testified that he witnessed appellant sleeping in the spare room at the firehouse. DeCeuster noted that though he did not detect the odor of any alcohol around the appellant, based on his observations he determined that appellant was not able to perform his duties as a firefighter, and therefore called his supervisor, Deputy Chief Zeiser, to inform him of the situation. Deputy Chief Zeiser informed DeCeuster that he was going to notify his supervisor, Deputy Chief Gail, of the situation. Shortly thereafter both deputy chiefs responded to the firehouse.

DeCeuster testified that he was following the protocol in place for when a member of the Department is suspected of reporting for duty while under the influence of alcohol or a controlled dangerous substance. He testified that protocol includes reporting the incident up the chain of command, and usually results in the suspected member being taken by the Department to Concentra. DeCeuster explained that Concentra is a private facility that the City of Newark contracts with to perform urine tests and other physical examinations.

Deputy Chief Richard Zeiser

Newark Fire Department deputy chief Richard Zeiser testified on behalf of the Department. He stated that he has been employed by the Newark Fire Department for thirty-eight years and that he currently serves as the deputy chief in charge of the third tour.

Zeiser's testimony corroborated that of Captain Alvarez and Battalion Chief DeCeuster, in that it reiterated many of the same facts. He testified that he received a phone call from Battalion Chief DeCeuster concerning Captain Alvarez's concern for firefighter Cruz. Zeiser instructed DeCeuster to go to Engine 5 in order to see if he agreed with Captain Alvarez's assessment of the situation. Zeiser noted that it is

common protocol for two officers to assess a situation of a firefighter suspected of being under the influence of drugs or alcohol. Zeiser contacted his supervisor, Chief Gail, and alerted him of the situation. Chief Gail indicated that he was going to contact the Arson Squad to escort Cruz to get "tested." Zeiser noted that by the time he arrived at the firehouse, the appellant had already left with a member of the Arson Squad to go "get tested."

Deputy Chief Richard Gail

Newark Fire Department deputy chief Richard Gail testified on behalf of the Department. He stated that he has been employed by the Newark Fire Department for twenty-three years, and that he currently serves as the chief of operations for the Department.

Deputy Chief Gail's testimony corroborated that of Captain Alvarez, Battalion Chief DeCeuster and Deputy Chief Zeiser, in that it reiterated many of the same facts. Gail testified that he received a phone call from Deputy Chief Zeiser informing him of the situation regarding firefighter Cruz. Gail was told by Zeiser that Cruz was acting out of sorts, and that both he and DeCeuster suspected that Cruz was under the influence of drugs or alcohol. Deputy Chief Gail relayed this information to the fire chief (Centanni), who then told Gail to contact Battalion Chief Coco (the health officer) in order to schedule a drug/alcohol screening at Concentra. Gail then communicated with Battalion Chief Coco as instructed, and traveled to Engine 5 to meet with detective Kevin Aikens, a member of the Newark Fire Department Arson Squad. Gail instructed Aikens that he was to transport/escort Cruz to Concentra, which he did.

Justice Ntim

Justice Ntim has been employed by Concentra as a nurse for four years. Ntim is certified by Concentra to perform drug screenings and breath alcohol tests. (See R-4; R-4(a).) Ntim testified that Concentra conducts drug and alcohol tests for the City of Newark, and that he administered two breath alcohol tests and a urine analysis/drug test on appellant on June 25, 2016. (R-8.) Ntim testified that the legal limit for blood

alcohol content is 0.02% and that any result above that amount is considered a failed test. Ntim testified that appellant failed both tests. This statement conflicts with Ntim's report (R-5), which reflects a reading of 0.023 on the first test and 0.017 on the second (R-6). Nevertheless, it is undisputed that appellant's urine analysis/drug test was positive for the following drugs: cocaine, benzodiazepines, and alprazolam. (R-7.) Ntim testified that these last two drugs, benzodiazepines and alprazolam, are commonly prescribed as antidepressants. No evidence or testimony was provided that appellant had a prescription for these or any drugs. Ntim testified that appellant was compliant at all times.

Deputy Director Raul Malave

Raul Malave testified for the Department. He has been a firefighter for the City of Newark for approximately twenty-two years and has served as the assistant public safety director for almost one year.

Malave stated that he was familiar with appellant's case and was familiar with cases similar to it that have occurred in the past. He stated that he is aware of PDP-19A and the Department's past practice of issuing a "last chance letter," but noted that the director in this case chose not to follow that protocol. Upon direct inquiry by the judge, Malave testified that it was the Department's position that the director had the discretion to either implement PDP-19A of the City of Newark's Disciplinary Action Policy or not.

David Giordano

David Giordano testified on behalf of appellant. Giordano was a Newark firefighter from November 1985 to July 1, 2006. He testified that during his career as a firefighter he served as the Newark Firefighter Union's financial director (1990–1992), vice president (1992–1993), and president (1993–2006).

Giordano recalled the circumstances surrounding the adaptation of PDP-19A to Newark's disciplinary policy back in 1992. He testified that at that time there was a

problem in the Department regarding firefighters suffering from drug addiction, and the City of Newark enacted PDP-19A to address this issue. Giordano testified that he was involved in the negotiations between the Firefighter's Union and the City of Newark regarding the drug-testing policy. He further testified to twelve specific instances wherein a Newark firefighter was disciplined under PDP-19A after being suspected of drug abuse, and testified that in all instances the firefighter was given a letter of conditional employment and an opportunity to rehabilitate, as required by PDP-19A. Giordano then identified and discussed four specific letters of conditional employment issued by the Department (A-4; A-5; A-6; A-7). He testified that it was always his understanding that the Department was obligated to adhere to PDP-19A.

Charles West

Charles West testified for appellant. Charles West has been a Newark firefighter for twenty-eight years, and currently serves as the Firefighter's Union president. He testified that he is familiar with PDP-19A, and identified and discussed two specific letters of conditional employment (A-8; A-9) that he was familiar with. He further testified that the Department cannot change disciplinary policy without first notifying and negotiating the changes with the union. He further testified that no such notification or negotiation regarding the Department's current decision to disregard PDP-19A had occurred.

FINDINGS OF FACT

The facts in this case are largely undisputed, and after carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I **FIND** the following critical **FACTS**:

1. Appellant became a Newark firefighter On October 27, 2014.

2. On June 25, 2016, appellant was assigned to Engine 5, Tour 3, under the command of captain Orlando Alvarez.

3. On June 25, 2016, appellant reported at 8:07 a.m. for an 8:00-a.m. shift on Engine 5, Tour 3, and missed roll call.

4. After finishing a maintenance check of a fire engine, appellant joined Alvarez in the kitchen area of the firehouse. Appellant poured himself a cup of coffee and sat down. Shortly thereafter appellant fell asleep and dropped the cup of coffee he was holding onto the floor.

5. After cleaning up the spilled coffee, appellant left the kitchen area, and thereafter he did not respond and could not be located when a call came in to the firehouse.

6. Appellant missed a run to St. James Hospital.

7. Appellant missed an assignment at the Prudential Center.

8. Captain Alvarez ultimately located appellant sleeping in a spare room in the firehouse.

9. Captain Alvarez contacted Battalion Chief DeCeuster, who responded to the firehouse and observed appellant sleeping while on duty.

10. DeCeuster and Alvarez both suspected Cruz of being under the influence of narcotics, and DeCeuster contacted his supervisor, Deputy Chief Zeiser, to report his observations and his suspicion of Cruz's drug use.

11. Zeiser than contacted his supervisor, Deputy Chief Gail, and advised him of Cruz's behavior and of the suspicion that he may be under the influence of narcotics.

12. Gail contacted the Department's health officer, Chief Coco, to arrange for Cruz to have his urine tested at Concentra.

13. Cruz was escorted to Concentra by Detective Aikens of the Arson Squad.

14. Justice Ntim, a nurse at Concentra, administered the urine test on appellant.

15. The results of the urine test administered at Concentra showed that appellant was under the influence of the following controlled dangerous substances: cocaine, benzodiazepines, and alprazolam.

16. The appellant was never charged with a crime.

17. Appellant reported for duty while under the influence of a controlled dangerous substance.

18. PDP-19A is a 1992 addendum to the Disciplinary Action Policy of the City of Newark.

19. PDP-19A requires that a letter of conditional employment be issued to any employee suspected of drug usage prior to removal.

20. The Department never offered the appellant a letter of conditional employment.

21. The aforementioned policy was negotiated by the union with the City and has been the working policy since 1992, and was the policy in place at the time of Cruz's removal.

LEGAL DISCUSSION AND CONCLUSION

In a disciplinary action, the burden of proof is on the appointing authority, which must prove its case by a preponderance of the believable evidence. In re Polk, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In order for evidence to

meet that threshold, it must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). That is to say, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). The greater weight of credible evidence in the case—preponderance—depends not only on the evidence of the greater number of witnesses, but on that evidence that "carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted).

The general causes for this discipline are set forth in N.J.A.C. 4A:2-2.3(a). In the case at bar, the appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties; N.J.A.C. 4A:2-2.3(a)(4), chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(11),[1] other sufficient cause. He is also charged with violating various provisions of the Newark Fire Department Rules and Regulations.

Appellant Cruz argues that all of the alleged bad acts that gave rise to the disciplinary action against him were the direct result of his being under the influence of a controlled dangerous substance. He argues that under the City of Newark's Drug Testing Policy, PDP-19A, he is entitled to a letter of conditional employment and must be afforded a chance at rehabilitation before he can be removed.

PDP-19A states in pertinent part: "The purpose of creating a drug testing policy is to eliminate the dangers caused by on-the–job drug use/abuse by: (i) mandating testing where reasonable individualized suspicion exists and (ii) providing addict with the opportunity for rehabilitation." (R-1 at 1.) In the case at bar, the Newark Fire Department did not provide appellant with an opportunity for rehabilitation as provided by PDP-19A.

[1] Former N.J.A.C. 4A:2-2.3(a)(11) was recodified as N.J.A.C. 4A:2-2.3(a)(12) effective March 5, 2012.

The Department's position is that its adherence to PDP-19A is discretionary, and that appellant should be terminated in the interest of public safety. In furtherance of its argument, the Department points to a recent unpublished Appellate Division case, In re Andrade, No. A-3149-14T4 (App. Div. October 12, 2016), <http://njlaw.rutgers.edu/collections/courts/>. Though unpublished, given that the case deals with the same City of Newark Fire Department, addresses the same disciplinary regulation (PDP-19A), and contains many of the same facts, the opinion is persuasive and it cannot be ignored in the discussion of this case. In Andrade, the firefighter was removed upon investigation and incitement for sale and distribution of controlled dangerous substances. The removal was ultimately upheld by the administrative law judge (ALJ) and affirmed by the Appellate Division. Both the ALJ and the Appellate Division cited the distinction between the sale of narcotics and the personal use of narcotics in their reasoning. The Appellate Division cites PDP-19A, which regards the sale of narcotics as a terminable offense, distinct from the personal use of narcotics:

> The City had adopted an addendum to its disciplinary policy and procedures in 1992 entitled "Drug Testing Policy." The addendum incorporated the concept of a last chance agreement. See, e.g., Watson v. City of E. Orange, 175 N.J. 442, 444 (2003) (generally explaining these type of agreements). However, the City's policy had no application to this case since it explicitly provided that "[i]t [was] a terminable offense for a City employee to dispense, sell, traffic, or facilitate in the sale of, any controlled dangerous substance or possess any drug paraphernalia."
>
> [In re Andrade, supra, No. A-3149-14T4 (App. Div. October 12, 2016), <http://njlaw.rutgers.edu/collections/courts/>.].

The Department now argues that just as the firefighter's removal was upheld in Andrade, so should the appellant's removal in the current case be upheld. I reject the City's argument, because in Andrade the Appellate Division made it clear that PDP-19A allowed for termination without a chance for rehabilitation where the employee was involved in the sale or distribution of narcotics, and not just the use of same.

Therefore, based upon the above facts and applicable law, I **CONCLUDE** that PDP-19A should apply.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that appellant's appeal be and is hereby **GRANTED**, and appellant should be reinstated as a Newark firefighter under a conditional letter of employment.

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. 40A:14-204.

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, P.O. 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.

May 4, 2017

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

MAY 4 2017

Date Mailed to Parties:

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

id

APPENDIX

LIST OF WITNESSES

For Appellant:

David Giordano
Charles West

For Respondent:

Captain Orlando Alvarez
Battalion Chief Steven P. DeCeuster
Deputy Chief Richard Zeiser
Deputy Chief Richard Gail
Justice Ntim
Deputy Director Malave

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 Final Notice of Disciplinary Action dated December 13, 2016, with specification of charges attached

A-2 Letter from Antonio Cruz to Public Safety Director Anthony Ambrose dated June 28, 2016

A-3 Letter from Public Safety Director Anthony Ambrose to Antonio Cruz dated August 11, 2016

A-4 Conditional Letter of Employment from Newark to G.M. dated June 19, 2015

A-5 Conditional Letter of Employment from Newark to M.C. dated April 26, 2012

A-6 Conditional Letter of Employment from Newark to J.R. dated October 26, 2006

A-7 Conditional Letter of Employment from Newark to A.D. dated November 1, 2006

A-8 Conditional Letter of Employment from Newark to R.S. dated July 22, 1993

A-9 Conditional Letter of Employment from Newark to S.C. dated April 10, 2007

For Respondent:

R-1 Drug Testing Policy PDP–19A

R-2 Letter to Antonio Cruz from Public Safety Director Anthony Ambrose dated June 25, 2016

R-3 Preliminary Notice of Disciplinary Action dated June 27, 2016

R-4 Certificate of Completion of Justice Ntim dated December 6, 2012

R-4(a) Breath Alcohol Certificate of Justice Ntim dated December 6, 2012

R-5 Custody Control Form

R-6 Breath Alcohol Testing Form (results)

R-7 Urine testing results

6-21-17

STATE OF NEW JERSEY

In the Matter of Jobani Dumeng
City of Newark Police Department

CSC DKT. NO. 2012-3549
OAL DKT. NO. CSV 08734-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08734-12
AGENCY DKT. NO. 2012-3549

IN THE MATTER OF JOBANI DUMENG,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., for appellant Jobani Dumeng (Fusco & Macaluso, attorneys)

France Casseus, Assistant Corporation Counsel, for respondent City of Newark (Acting Kenyatta K. Stewart, Corporation Counsel)

Record Closed: May 19, 2017 Decided: May 22, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Jobani Dumeng filed an appeal from a Final Notice of Disciplinary Action dated June 5, 2012, issued by respondent City of Newark Police Department providing for his suspension for seven days. The Civil Service Commission transmitted the matter to the Office of Administrative Law for determination as a contested case. The matter was originally assigned to Administrative Law Judge Mumtaz Bari-Brown and later reassigned to the undersigned. Following the adjournment of several hearing dates at the parties' request, the matter was placed on the inactive list by order issued on July 15, 2016. Prior to the commencement of the hearing scheduled for June 7,

2017, the parties reached an amicable resolution and counsel for appellant submitted the attached Settlement Agreement and General Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

May 22, 2017
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 5-26-17

Date Mailed to Parties: MAY 26 2017
jb

Laura Sachs
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JOBANI DUMENG,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
	:	
	:	
v.	:	**OAL DOCKET NO.: CSV 08734 - 2012 N**
	:	
	:	
CITY OF NEWARK,	:	
	:	**SETTLEMENT AGREEMENT AND**
Respondent.	:	**GENERAL RELEASE**
	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Jobani Dumeng ("Dumeng" or "Appellant"), the Newark Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (Dumeng, the Union and the City, are collectively referred to hereinafter as the "Parties"). This agreement is made and entered into by the parties in full settlement of Dumeng's appeal regarding the above matter.

Departmental disciplinary charges were brought against Dumeng by the Newark Police Department. The Final Notice of Disciplinary Action dated June 5, 2012 (hereafter "FNDA"), contained the following charges: Neglect of Duty (2 Counts), in violation of Newark Police Department Rules and Regulations Chapter 18:6 and New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3(a) 7; for which Dumeng was suspended seven (7) days beginning June 18, 2012 and ending June 26, 2012.

It is agreed as follows:

1. The charges listed in the FNDA are upheld.
2. Dumeng agrees to accept three (3) suspension days. The City will amend Dumeng's disciplinary record to reflect the 3 days suspension.
3. The total number of days of back pay to be paid by the Appointing Authority to the appellant is four (4).

4. The parties acknowledge Dumeng will be credited with pension and seniority time for the four days in which he had been suspended.

5. Dumeng further waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.

6. Dumeng and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

7. Dumeng and the Union each further agree that there is no consideration due Dumeng, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

8. Except for the assessment of Dumeng's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.

9. Dumeng and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting

arbitration, that is in any manner grounded, based upon, or related to the FNDA.

10. Dumeng is bound by this Agreement. Anyone who succeeds to Dumeng's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

11. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

12. Dumeng and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

13. This Agreement contains the sole and entire agreement between Dumeng, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Dumeng specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

14. Dumeng agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

15. Dumeng agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representation and he enters into same knowingly and voluntarily.

16. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

17. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

18. By signing this Settlement Agreement, Dumeng states that:

a) He has read it;

b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c) He agrees with everything in it;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) He has been given at least 21 days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of 7 days following the execution of this Agreement he may revoke this Agreement and

the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

Date 4/18/2017 BY: Department of Public Safety

Date 5/10/17 BY: Union Representative/Attorney

Date 5/14/17 Johan Dumeng

Approved as to Form and Legality:

Date 4/18/17 Law Department

CERTIFICATION

I, Jobani Dumeng, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE 5/14/17

NAME J. Dumeng.

6/21/17

STATE OF NEW JERSEY

In the Matter of Keyon Gaddist, Hudson County, Department of Roads and Public Property

CSC DKT. NO. 2017-358
OAL DKT. NO. CSV 12790-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUN 23 2017 **BW**

The appeal of Keyon Gaddist, Building Maintenance Worker, Hudson County, Department of Roads and Public Property, 40 working day suspension, on charges, was heard by Administrative Law Judge Michael Antoniewicz, who rendered his initial decision on May 15, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 21, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 40 working day suspension to a 30 working day suspension.

Since the penalty has been modified, the appellant is entitled to 10 working days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty

was modified by the Commission, charges were sustained and major discipline was imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

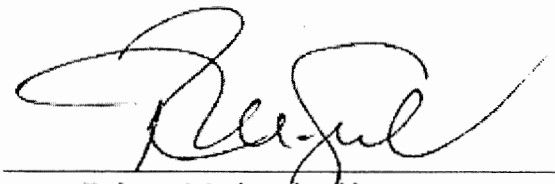
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 40 working day suspension to a 30 working day suspension. The Commission further orders that appellant be granted 10 days of back pay, benefits, and seniority. 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 shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 12790-16
AGENCY DKT. NO. 2017-358

IN THE MATTER OF KEYON GADDIST,
HUDSON COUNTY, DEPARTMENT
OF ROADS AND PUBLIC PROPERTY.

John Branigan, Esq., for appellant Keyon Gaddist (Law Offices of Oxfeld Cohen, attorneys)

Nidara Y. Rourk, Assistant County Counsel, for respondent Hudson County (Donato J. Battista, County Counsel)

Record Closed: April 24, 2017 Decided: May 15, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

The respondent, County of Hudson, Department of Roads and Public Property, brought a major disciplinary action against appellant Keyon Gaddist (Gaddist). Appellant appeals the substantiated charges and a forty-day suspension imposed by respondent alleging that appellant violated N.J.A.C. 4A:2-2.3(a)(6), conduct

unbecoming a public employee, insubordination, neglect of duty, and other sufficient cause.

PROCEDURAL HISTORY

On June 16, 2016, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA) that noted a suspension effective June 8, 2016, without pay. Appellant requested an internal disciplinary hearing, which was held on June 21, 2016. On July 20, 2016, a Final Notice of Disciplinary Action (FNDA) was approved and served upon appellant by way of certified mail. The FNDA sustained the charges of conduct unbecoming a public employee, insubordination, neglect of duty and imposed a forty-day suspension was upheld. Appellant requested an appeal within twenty days of receiving the FNDA.

The New Jersey Civil Service Commission, Division of Appeals and Regulatory Affairs, transmitted the within matter to the Office of Administrative Law (OAL), for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, where it was filed on August 23, 2016. On September 27, 2016, a prehearing conference was held. A hearing was held in this matter on April 24, 2017, and the record closed thereafter.

FINDINGS OF FACT

The basic facts of this case are not in dispute except for some small variations of a small number of material facts. Based on the documents admitted, the testimony presented, and having had the opportunity to observe the demeanor of the witnesses and assess their crediblity, I **FIND** the following **FACTS**:

1. Appellant was hired as a maintenance worker for the respondent and worked as same for a period of nearly eleven years.

2. Appellant's duties included vacuuming, taking out the garbage, mopping, general cleaning and, at the appropriate time, shoveling snow.

3. Appellant's daily shift begins at 3:00 p.m. and ends at 11:00 p.m. His location of work is in the Administration Building/Hudson County Courthouse in Jersey City, New Jersey.

4. On June 8, 2016, appellant arrived at work on time and at a little after 3:00 p.m., appellant's Supervisor, Acosta, asked Gaddist to mop a back area.

5. Gaddist replied that he would mop it later, as was his regular practice as he normally mopped the building at the end of his shift when less people were present in the building.

6. It was not normal practice for Supervisor Acosta to direct appellant to do certain duties first and appellant did not inquire as to why Acosta directed him to perform such tasks at that time.

7. Supervisor Acosta referenced a spill in the back area which needed to be addressed when he directed the appellant to mop this area.

8. At the time appellant arrived at work on June 8, 2016, and began his work duties, he was not wearing his uniform supplied by Hudson County and required by policy to be worn at all times by the employees at work. The purpose of this policy is to identify such employees and for security purposes. The appellant's uniform shirt was in a bag, which appellant had with him but he was not wearing at the beginning of his shift on June 8, 2016.

9. Gaddist did not mop the area as directed by Supervisor Acosta, but performed other tasks such as sweeping and taking out the garbage. Gaddist informed Acosta that he would do the mopping later.

10. After being told to mop the spill area, appellant was sitting at a desk, not in uniform, and using his cell phone.

11. Acosta then reported Gaddist's actions and the failure of Gaddist to mop up as directed to Acosta's Supervisor, Kim Cardella, who was in her office.

12. Cardella then went down to where Gaddist was sitting and found him, not mopping as directed and using his cell phone and eating.

13. Cardella then directed Gaddist to do the tasks he was directed to do and Gaddist responded to Cardella not to yell at him and to watch her tone. Gaddist told Cardella not to speak to him as if he were her child.

14. Gaddist was upset and began yelling back at both Acosta and Cardella and told Cardella to "stop talking to me." Gaddist acted in an aggressive manner.

15. Gaddist continued to engage Cardella in an argument and stated: "Don't talk to me that way." This argument continued in Cardella's office and Gaddist's mother appeared in the area and calmed Gaddist down.

16. After much argument, Gaddist stated that "They were going to get theirs," referring to the two supervisors, i.e., Acosta and Cardella.

17. Based on the tone and tenor of Gaddist's remarks, both Acosta and Cardella took Gaddist's remarks to be a threat directed to them.

18. Cardella then immediately suspended Gaddist based on his threats and contentious behavior.

19. A Notice of Immediate Suspension was issued on June 10, 2016, by Supervisor Kim Cardella which stated that: "an immediate suspension is necessary to maintain safety, health, order or effective direction of public services." (R-2.)

18. After Gaddist's statement, Cardella asked for and received the assistance of a Sheriff's Officer, who directed Gaddist to exit the building.

19. In compliance with the Sheriff Officer's directive, Gaddist then exited the building.

LEGAL DISCUSSION

Credibility Determinations

When the testimony of witnesses is in disagreement, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514, 521-22 (1950).

The testimony in this case is consistent with respect to the basic facts. The inconsistency is whether a threat was made to Gaddist's Supervisors. Gaddist denies making such a threat. However, based on the credible testimony of Acosta and Cardella, along with the testimony of Gaddist's mother which, to a certain degree, supports the recollection of Acosta and Cardella, I **FIND** that Gaddist made a threat to both supervisors, whether it was intended a threat or not. I **FIND** that during the argument between the parties, Gaddist made a threat to both Acosta and Cardella,

when he said: "He is going to get it and she is going to get it" as testified by Acosta and Cardella, or "Their time will come," as testified by Gaddist's mother. One can easily interpret such statements as a threat even if not intended in such a manner. In this day and age, we all must be cautious in addressing threats of violence even from people with no history of actual violence.

Based upon the demeanor of the witnesses and the testimony of same, it is clear that appellant was upset when directed by Acosta to mop the back area and then Cardella who also directed Gaddist to follow the directive of Supervisor Acosta to mop the back area. I do question the peaceful manner that Cardella stated she delivered her directive to Gaddist and **FIND** it more credible that it was delivered more in the manner described by Gaddist in his testimony, i.e., in a loud, forceful manner. However, this in no way justifies Gaddist's reaction which I **FIND** to be aggressive, combative, and containing threats.

I further **FIND** that appellant was not innocent in how the situation escalated. I also **FIND** that Cardella was not totally blameless and spoke to Gaddist in a manner which did not and would not defuse the situation, but rather created a greater conflict. Again, I stress that this in no way excuses Gaddist's reaction, leading to threats against Cardella and Acosta.

Importantly, appellant's conduct was clearly inappropriate in that he could have simply followed Acosta's directive and the matter would have ended. If he had done so, there would not have been any further argument. Gaddist's position that he wanted to mop at the end, as he always does, is no justification for his insubordinate behavior.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law

provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended, or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in West New York v. Bock, 38 N.J. 500, 519 (1962). In Bock, the officer had received a thirty-day suspension and seventeen minor disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In disciplinary cases the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the officer and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://njlaw.rutgers.edu/collections/oal/ (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

Conduct Unbecoming a Public Employee

"Conduct unbecoming" a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that appellant engaged in conduct unbecoming a public employee.

Insubordination

Gaddist is also charged with insubordination. The Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, Initial Decision (November 12, 2010), modified, CSC (March 18, 2011) (citing In re Stanziale, A-3492-00T5 (App. Div. April 11, 2002), <http://njlaw.rutgers.edu/collections/courts/> (appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (July 21, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 23, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 8804-07, Initial Decision (March 13, 2008), modified, Merit System Board (May 21, 2008), <http://njlaw.rutgers.edu/collections/oal/>. (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor.)

The Civil Service Commission also has determined that an appellant is required to comply with an order of his or her superior, even if he or she believed the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, A-5408-05T3 (App. Div. February 28, 2005), <http://njlaw.rutgers.edu/collections/courts/>; Compare, In re Allen, CSV 11160-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05 Initial Decision, (November 22, 2005), adopted, Merit System Board (January 26, 2006) <http://njlaw.rutgers.edu/collections/oal/> (in which the Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal).

In this case, there is really no dispute that Gaddist was insubordinate in dealing with Acosta and Cardella. In fact, at the close of the case, Gaddist's attorney basically conceded as much. There is no dispute by Gaddist that he received a clear directive

from Acosta (to mop the floor at that time) and that he decided not to obey that directive. This is by definition insubordination.

I further **CONCLUDE** that appellant engaged in conduct which amounted to insubordination.

Neglect of Duty

Neglect of duty is not defined under the New Jersey Administrative Code, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). It has been applied both to not fully carrying out duties and to acting incorrectly. See, e.g., In re Marucci, CSV 07241-09, Initial Decision (January 1, 2010), modified, CSC (March 6, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-3607-09T1 (App. Div. January 3, 2012), <http://njlaw.rutgers.edu/collections/courts/> (removal of a police officer with no disciplinary record where he failed to remove drugs from under a sewer grate and then lied about his actions); see also In re Dona, CSV 10782-08, Initial Decision (August 3, 2009), modified, CSC (August 8, 2009), <http://njlaw.rutgers.edu/collections/oal/> (affirming twenty-day suspension for failing to pat down inmate properly, missing a wooden shank). Certainly, the failure to mop a spill or to mop as needed as told by a Supervisor constitutes a significant omission, and, thus, I further **CONCLUDE** that the respondent has met its burden with regard to the charge of neglect of duty.

Chronic Lateness

No evidence was presented at the hearing regarding chronic lateness that was contained in the Final Notice of Disciplinary Action (R-7). This charge appears to be rescinded and the charge of chronic lateness was withdrawn at the end of the hearing by the respondent.

PENALTY

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. The concept of progressive disciplinary action is described in Bock, supra, 38 N.J. at 519. In Bock, the officer had received a thirty-day suspension and seventeen minor-disciplinary actions during eight years of service. The prior disciplinary actions and the suspension of thirty days were strongly considered in determining if the thirty-day suspension was warranted. A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). Depending upon the incident complained of and the employee's past record, major discipline may include suspension, removal, etc. Bock, supra, 38 N.J. at 522-24.

In disciplinary cases the appointing authority has both the burden of persuasion and production and must demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to discipline the employee and lodge the charges. See Coleman v. E. Jersey State Prison, CSV 1571-03, Initial Decision (February 25, 2004), http://njlaw.rutgers.edu/collections/oal/ (citations omitted); see also N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971); N.J.S.A. 11A:2-6(a)(2), -21; N.J.A.C. 1:1-2.1, "burden of proof"; N.J.A.C. 4A:2-

1.4. A preponderance of evidence has been defined as that which "generates belief that the tendered hypothesis is in all human likelihood the fact." Martinez v. Jersey City Police Dep't, CSV 7553-02, Initial Decision (October 27, 2003), http://njlaw.rutgers.edu/collections/oal/ (quoting Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959)).

In the present case, appellant had two previous disciplinary actions of a similar nature for which he received two separate five-day suspensions with the County taking no progression in order to make the discipline more severe. In light of this inaction by the respondent and the facts set forth in the hearing, I **CONCLUDE** that the appropriate penalty in this matter is a thirty-day suspension, which I believe to be more in accordance with the principles of progressive discipline.

ORDER

Based upon the foregoing and the Notice of Final Disciplinary Action, it is hereby **ORDERED** that the charges of conduct unbecoming an employee, neglect of duty, and insubordination are all **SUSTAINED**.

It is further **ORDERED** that the determination of respondent, Hudson County, Department of Roads and Public Property, to suspend appellant for forty days, effective June 8, 2016, be **REVERSED** and a suspension of thirty days be imposed.

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, P.O. 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.

5/15/17
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 5/15/17

Date Mailed to Parties: MAY 16 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

WITNESSES

For Appellant:

Keyon Gaddist

Jamie Gaddist

For Respondent:

Orestes Acosta

Kim Cardella

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Memo written by Supervisor Acosta dated June 10, 2016

R-2 Notice of Immediate Suspension dated June 10, 2016

R-3 E-mail from Kim Riscart (Cardella) to Denise Dalessandro and Ralph Sax dated June 10, 2016

R-4 Memorandums from Kim Riscart-Cardella dated May 11, 2016, and dated October 15, 2015, with sign-in sheet

R-5 Notice of Minor Disciplinary Action dated December 23, 2009

R-6 Notice of Minor Disciplinary Action dated August 20, 2008

R-7 Final Notice of Disciplinary Action (31-B) dated July 20, 2016

6-21-17

STATE OF NEW JERSEY

In the Matter of Michelina Giuliano
Superior Court of New Jersey,
Somerset/Hunterdon/Warren Vicinage

CSC DKT. NO. 2016-4073
OAL DKT. NO. CSV 08067-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT.NO. CSV 08067-16
AGENCY DKT. NO. 2016-4073

IN THE MATTER OF MICHELINA GIULIANO, SUPERIOR COURT OF NEW JERSEY SOMERSET/ HUNTERDON/ WARREN VICINAGE,

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John T. Doyle, Esq., for Appellant

Thomas Russo, Esq., for Respondent, (New Jersey Courts)

Record Closed: May 19, 2017 Decided: May 23, 2017

BEFORE **LELAND S. McGEE**, ALJ:

On May 31, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Prior to completion of the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

Therefore, I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

May 23, 2017
DATE

LELAND S. McGEE, ALJ

Date Received at Agency:

Mailed to Parties: MAY 24 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

Attachment

CSV 08061-16

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is made and entered into by and between Michelina L. Giuliano (hereinafter referred to as the "Employee") and the State of New Jersey Judiciary, Somerset/Hunterdon/Warren Vicinage (hereinafter referred to as the "Vicinage"), with its principal offices located in Somerville, New Jersey.

WITNESSETH:

WHEREAS, the Employee was employed by the Vicinage in the capacity of a Judiciary Clerk 2 assigned to the Vicinage's Probation Division (Warren County); and

WHEREAS, the Vicinage terminated the Employee's employment, effective April 29, 2016, at the conclusion of an unsuccessful extended working test period; and

WHEREAS, the Employee appealed the termination to the Civil Service Commission of the State of New Jersey (hereinafter referred to as "CSC"), which has transmitted the appeal to the Office of Administrative Law of the State of New Jersey (hereinafter referred to as "OAL"), which has scheduled the matter for a settlement conference on August 11, 2016; and

WHEREAS, the parties to this Agreement desire to fully and finally settle all matters in dispute between them regarding the Employee's employment and release at the end of the extended working test period; and

WHEREAS, in consideration for the settlement of all claims that have, or could have, been raised by the Employee relating to her employment and release at the end of the extended working test period, and for other good and valuable consideration, including the mutual promises and terms and conditions contained in this Agreement;

IT IS AGREED AS FOLLOWS:

1. The Vicinage will deem the Employee to have resigned from the above-referenced position, effective April 29, 2016. The Vicinage agrees that the Employee's records will reflect a general resignation, in accordance with N.J.A.C. 4A:2-6.3.

2. The Employee agrees not to seek or accept employment now or in the future, in any capacity, with the State of New Jersey Judiciary, including the Administrative Office of the Courts, all Vicinages and all municipal courts.

3. The Employee agrees to withdraw the pending appeal filed with the CSC, wherein she challenges the release from employment. The appeal, which is captioned Michelina Giuliano v. Superior Court of N.J., Somerset/Hunterdon/Warren Vicinage, Agency Ref. No. 2016-4073; OAL Dkt. No. CSV 08067-2016S, is hereby withdrawn with prejudice.

4. In the event the Vicinage is contacted in the future by a prospective employer regarding the Employee, it will provide a neutral job reference consisting of the following information: (a) the Employee's dates of service in the Vicinage; (b) her job title; (c) her salary history and (d) that she resigned. The Vicinage will not comment on the Employee's job performance.

5. In consideration of the promises made herein by the Vicinage, the Employee agrees to release and forever discharge all potential and existing claims arising out of her employment with the Vicinage and release at the end of the extended working test period, including, but not limited to, any alleged violation of the Fair

Labor Standards Act, Title VII of the Civil Rights Act of 1964, Section 1981 et seq. of Title 1974, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the Family and Medical Leave Act, the New Jersey Family Leave Act, the New Jersey Employer-Employee Relations Act, each of the foregoing as amended, and any and all other federal, State or local wage and hour laws, civil or human rights laws, or any other alleged violation of any local, State or federal law, regulation, or ordinance, and/or public policy, collective negotiations agreement, contract or tort or common law claim and/or any claim for attorneys' fees having any bearing whatsoever on this matter that the Employee now has or may have as of the date of this Agreement. The Employee acknowledges and agrees that this release extends to anyone who succeeds to her rights and responsibilities, including but not limited to, heirs, assignees or successors in interest, and that this release is given for the benefit of the State of New Jersey Judiciary, the Vicinage and such entities' employees, agents and representatives.

6. The Employee acknowledges that she has carefully read and fully understands all of the provisions of this Agreement and was afforded the opportunity to review and discuss each provision with an attorney and/or union representative.

7. To the extent that the Employee utilized the services of an attorney and/or union representative, she acknowledges that she is satisfied with the advice and services provided by said individual(s).

8. The Employee acknowledges that she is voluntarily executing this Agreement.

9. The parties acknowledge and agree that each party shall be responsible for their own attorney's fees and costs, if any.

10. The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of New Jersey.

11. This settlement shall not be considered binding or serve as precedent in any other matter, except as set forth herein.

12. This Agreement contains the entire agreement between the parties and fully supersedes any and all prior agreements or understandings pertaining to the subject matter addressed in this Agreement. The parties represent and acknowledge that, in executing this Agreement, no one has relied upon any representation or statement not set forth herein with regard to the subject matter of this Agreement.

13. The parties acknowledge and agree that neither party is to be regarded as the prevailing party in the aforementioned proceeding. The parties further acknowledge and agree that nothing contained herein shall be construed in a court or agency of competent jurisdiction or in any other legal matter or proceeding to be an admission of liability or wrongdoing by either party, except as otherwise specifically provided herein.

14. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, but all of which together shall constitute one and the same instrument. Any signatory hereto may

indicate acceptance of this Agreement with a facsimile signature, provided that an original signature is provided to all other parties thereafter.

15. If any term or condition of this Agreement shall be declared invalid or unenforceable, to any extent or in any application, by a court or agency of competent jurisdiction, then such term or condition shall automatically, and without any further action, be reformed so as to retain the fullest extent of any restriction therein permitted by law and the remainder of this Agreement, and such term or condition, except to such extent or in such application, shall not be affected thereby, and each and every term and condition of this Agreement shall be valid and enforced to the fullest extent and in the broadest application permitted by law.

16. The parties understand and agree that this Agreement is subject to, and shall take effect upon, its approval by the OAL and the CSC. Both parties agree to waive the right to file exceptions and cross-exceptions in the above-referenced appeal.

Michelina L. Giuliano

Michelina L. Giuliano, Employee

Dated: ~~August __, 2016~~ May 19, 2017

John T. Doyle

John T. Doyle, Esq.
Attorney for Employee

Dated: ~~August __, 2016~~ May 19, 2017

Adriana M. Calderon

~~Rachel Morejon,~~ ADRIANA M. CALDERON
~~Human Resources Division Manager,~~ Trial Court Administrator
Somerset/Hunterdon/Warren Vicinage

Dated: ~~August __, 2016~~ May 19, 2017

Thomas Russo, Esq.
Staff Attorney,
Administrative Office of the Courts
Attorney for Employer

Dated: ~~August __, 2016~~ May 19, 2017

6-21-17

STATE OF NEW JERSEY

In the Matter of Aregawi Kishen
City of Passaic,
Department of Public Works

CSC DKT. NO. 2016-2238
OAL DKT. NO. CSV 03285-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03285-16

AGENCY DKT. NO. 2016-2238

IN THE MATTER OF KISHEN AREGAWI, CITY OF PASSAIC DEPARTMENT OF PUBLIC WORKS.

Eric V. Kleiner, Esq., for appellant

Steven Siegler, Esq., for respondent (Eric M. Bernstein, Esq., attorney)

Record Closed: May 23, 2017 Decided: May 25, 2017

BEFORE **RICHARD McGILL**, ALJ:

Kishen Aregawi appeals from a removal on charges from the positin of Traffic Maintenance Worker with the City of Passaic Department of Public Works. The matter was transmitted to the Office of Administrative Law on February 29, 2016, for determination as a contested case.

Prior to the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that proceedings in this matter be concluded.

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.

May 25, 2017
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency: 5-31-17

MAY 31 2017

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE, YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS.

LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE ("AGREEMENT" or "Last Chance Agreement"), made this ___ day of _____, 2017 by and between the City of Passaic, a governmental entity created under the laws of the State of New Jersey, with its principal offices located at Passaic City Hall, 330 Passaic Street, Passaic, New Jersey 07055 ("CITY") and Aregawi Abraham Kishen, an individual with a mailing address of 88 Pennington Avenue, Passaic, New Jersey 07055 ("KISHEN"), sets forth the terms and conditions of this AGREEMENT between the CITY and KISHEN as follows:

1. The CITY, as defined and used herein, shall at all times mean the CITY OF PASSAIC, its departments, divisions, affiliates, predecessors, successors, representatives and assigns of any and/or all of them, their present and former directors, officials (elected and/or appointed), officers (elected and/or appointed), representatives, associates, partners, servants, employees, agents, attorneys, designees, successors, heirs, executors and administrators (all of them past, present and future), whether in their individual or official capacities, and any and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. KISHEN, as defined and used herein, shall mean AREGAWI ABRAHAM KISHEN, his heirs, family (of any relation), representatives, privies, executors, administrators, designees, assigns, successors-in-interest and predecessors-in-interest.

3. The parties agree that this AGREEMENT is contingent upon and subject to execution by KISHEN and approval and execution by the CITY.

4. In consideration of the mutual promises of this AGREEMENT and for other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree to resolve all pending disciplinary and administrative actions between them under the terms of this AGREEMENT.

a. KISHEN was formerly employed by the CITY in the title of Traffic Maintenance Worker.

b. On or about December 8, 2015, KISHEN was served with a Final Notice of Disciplinary Action (the "DISCIPLINARY NOTICE"), which effected a removal of KISHEN from his employment from the CITY, effective October 14, 2015, for violations of N.J.A.C. 4A:2-2.3(a), including (a)(1) (Incompetency, inefficiency or failure to perform duties; (a)(2) (Insubordination); (a)(3) (Inability to perform duties); (a)(6) (Conduct unbecoming a public employee); (a)(7) (Neglect of duty); (a)(8) (Misuse of public property, including motor vehicles); and, (a)(12) (Other sufficient cause), in addition to violations of the City of Passaic Employee Handbook and City of Passaic Department of Public Works Rules and Regulations.

c. KISHEN appealed the termination of his employment to the Office of Administrative Law ("OAL") in a matter entitled Aregawi Kishen v. City of Passaic Department of Public Works, OAL Docket No. CSV 03285-2016, Agency Ref. No. CSC Dkt# 2016-2238.

5. In order to avoid the time and expense of such proceedings, KISHEN and the CITY, through their respective attorneys and/or representatives, agree to enter into the within AGREEMENT upon the following terms and conditions, which are now to be made effective:

a. KISHEN shall dismiss his OAL appeal entitled Aregawi Kishen v. City of Passaic Department of Public Works, OAL Docket No. CSV 03285-2016, Agency Ref. No. CSC Dkt# 2016-2238, with prejudice and without costs to either party.

b. KISHEN shall plead guilty to the charges of Insubordination, N.J.A.C. 4A:2-2.3(a)(2), and Neglect of Duty, N.J.A.C. 4A:2-2.3(a)(3), as set forth in the DISCIPLINARY NOTICE.

c. Based upon such guilty plea, the CITY shall issue, and KISHEN shall serve, a six (6) month suspension without pay, which suspension shall be deemed to have been served between October 14, 2015 and April 14, 2016.

d. Starting April 15, 2016, KISHEN's time off from the CITY shall be converted to an unpaid leave of absence, which shall remain in effect until the date KISHEN returns to full-time employment with the CITY, pursuant to Paragraph 5.h., below.

e. KISHEN shall not accrue any leave time (sick leave, personal leave, vacation leave, holiday leave, etc.) while he is on the unpaid suspension and the unpaid leave of absence nor shall KISHEN be able to use any current and/or accumulated paid leave time to provide compensation during the period he is on unpaid suspension and the unpaid leave of absence. However, KISHEN shall accrue six (6) months of service/seniority for the period set forth in paragraph 5c above only.

f. For purposes of the disciplinary record of KISHEN, the discipline imposed is a six (6) month unpaid suspension.

g. KISHEN understands and agrees that, if at any time subsequent to the parties' execution of this AGREEMENT, he receives a discipline other than a verbal or written reprimand for any infraction whatsoever and such charge is sustained by the appointing authority in accordance with Title 4A of the New Jersey Administrative Code, the CITY shall immediately terminate KISHEN from his employment. The level of discipline to be imposed upon KISHEN is at the sole discretion of the CITY. KISHEN shall have the right to appeal said termination to the New Jersey Civil Service Commission and/or pursue a civil remedy, if applicable.

h. KISHEN shall return to work for the CITY in the title of Traffic Maintenance Worker at the same salary he earned as of October 13, 2015, with his return to work date to be within seven (7) days of the CITY'S execution of this AGREEMENT.

i. KISHEN hereby gives up, releases and waives prospectively all grievances, i.e., complaints alleging violations of his rights under the applicable collective bargaining agreement, or any other judicial, quasi-judicial, administrative or contractual actions, that he could file with respect to work assignments or job duties which the CITY may give him for the remainder of his employment with the CITY. Furthermore, KISHEN shall not allow any person, entity or organization to file any such actions on his behalf.

j. KISHEN agrees not to contest, in any judicial, quasi-judicial or administrative or contractual forum, any of the terms and conditions of this AGREEMENT.

6. KISHEN understands that the resolution of all matters presently pending between him and the CITY does not shield or immunize him from any subsequent layoffs, demotions, lateral rights and/or discipline by the CITY.

7. KISHEN and the CITY acknowledge that the parties enter into this AGREEMENT solely to avoid further expensive and burdensome disciplinary/administrative proceedings. This AGREEMENT is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the compromise between KISHEN and the CITY as set forth herein or to enforce the terms of this AGREEMENT. Other than as noted in Paragraph 5.b., above, no party hereto admits to any wrongdoing and/or any liability as to any and/or all of their actions regarding each other.

8. KISHEN releases, acquits, gives up and forever discharges any and all claims and rights which he may have against the CITY and any and all of its officials (elected and/or appointed), officers, employees, representatives, assigns, successors and designees, up to the time

of complete execution of this AGREEMENT by all parties. This releases any and all claims, including those of which KISHEN, his family, designees, representatives and assigns are not aware and those not mentioned in this Agreement. This AGREEMENT applies to claims resulting from anything which has happened from KISHEN'S first date of application for employment with the CITY through the date of complete execution of this AGREEMENT by all parties. KISHEN specifically releases the following claims:

a. Any collective bargaining agreement with the CITY covering KISHEN and/or any other resolution, ordinance, policy, practice and/or procedure addressing, specifically or generally, KISHEN'S employment with the CITY;

b. The National Labor Relations Act;

c. Title VII of the Civil Rights Act of 1964;

d. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

e. Civil Rights Act of 1991;

f. The Americans with Disabilities Act ("ADA");

g. The Rehabilitation Act of 1973;

h. The Age Discrimination in Employment Act ("ADEA");

i. The Fair Labor Standards Act ("FLSA");

j. The Occupational Safety and Health Act ("OSHA") and the New Jersey Public Employee Occupational Safety and Health Act ("NJPEOSHA");

k. The Equal Pay Act;

l. The Employee Retirement Income Security Act ("ERISA");

m. The New Jersey Law Against Discrimination ("LAD");

n. The New Jersey Conscientious Employee Protection Act ("CEPA");

o. The Family and Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

p. The Federal and New Jersey State Wage and Hour Acts;

q. The Federal and New Jersey State Equal Pay Law;

r. The New Jersey Civil Rights Act;

s. The New Jersey Employer-Employee Relations Act;

t. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

u. Any claims under public policy, contract (express, written, implied or oral), tort and/or common law;

v. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the CITY;

w. Any allegation for costs, fees or other expenses, including but not limited to attorneys' fees; and/or,

x. ANY AND ALL CAUSES OF ACTION, CLAIMS OR DAMAGES, WHETHER KNOWN OR UNKNOWN AS OF THE DATE OF EXECUTION OF THIS AGREEMENT, ARISING FROM OR RELATING IN ANY WAY TO ANY AND/OR ALL PORTIONS OF KISHEN'S EMPLOYMENT WITH THE CITY, FROM THE FIRST (1st) DATE OF HIS EMPLOYMENT WITH THE CITY THROUGH AND INCLUDING THE DATE OF COMPLETE EXECUTION OF THIS AGREEMENT BY ALL PARTIES.

This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations.

9. KISHEN agrees that the within waiver and release in favor of the CITY shall also include his waiver and release from joining or being included in any class or collective action

litigation in which any claim is asserted against the CITY, involving any event that has occurred on or before KISHEN's execution of this Agreement, unless KISHEN is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the CITY for its records and response.

10. The waiver by KISHEN and the CITY of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

11. This AGREEMENT contains the full agreement of KISHEN and the CITY and may not be modified, altered, changed or terminated, except upon the express prior written consent of KISHEN and the CITY, which consent must be in writing and signed by KISHEN and the CITY and/or their duly authorized agents.

12. If any term, provision or condition of this AGREEMENT is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this AGREEMENT.

13. This AGREEMENT shall be construed and interpreted in accordance with the laws of the State of New Jersey.

14. KISHEN and the CITY agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and intent of this AGREEMENT.

15. This AGREEMENT shall become effective immediately as to KISHEN following execution by KISHEN and shall become effective upon the CITY after approval and signature by all applicable CITY officials.

16. KISHEN and the CITY shall bear all costs and expenses arising from the actions of their own counsel and/or representatives in connection with this AGREEMENT.

17. This AGREEMENT contains the entire agreement between KISHEN and the CITY with regard to all matters and shall be binding upon and inure to the benefit of their officials (elected and/or appointed), officers (elected and/or appointed), directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

18. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

FOR THE CITY OF PASSAIC:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

WITH A COPY TO:

Rick Fernandez, Business Administrator
Passaic City Hall
330 Passaic Street
Passaic, New Jersey 07055

FOR AREGAWI ABRAHAM KISHEN:

Eric V. Kleiner, Esq.
385 Sylvan Avenue # 29
Englewood Cliffs, NJ 07632

19. KISHEN understands and agrees that the CITY has given him twenty-one (21) calendar days from the date of his receipt of this AGREEMENT to consider and review this AGREEMENT with his attorney and/or representative and that following his execution of this

AGREEMENT, KISHEN has a period of seven (7) calendar days to revoke this AGREEMENT. Revocation of the AGREEMENT must be undertaken in accordance with Paragraph 18, above.

20. In entering into this AGREEMENT, KISHEN has relied upon the legal advice of his attorney and/or representative, who is the attorney and/or representative of his own choosing, as to the terms of this AGREEMENT, which have been completely read and explained by his attorney and/or representative and those terms are fully understood and voluntarily accepted by KISHEN. By executing this AGREEMENT, KISHEN also warrants and affirms that, at the time of said execution, he was not suffering from any mental or psychological disorder, nor was he under the influence of alcohol or any drug and/or medication, prescribed by a physician or otherwise, which would prevent him from understanding the terms of this AGREEMENT. Furthermore, KISHEN, by executing this AGREEMENT, warrants and affirms that he was not under any mental duress and was not coerced by any individual or other party to enter into this AGREEMENT. KISHEN expressly acknowledges, represents and warrants that: (a) he has carefully read this AGREEMENT; (b) he fully understands the terms, conditions, and significance of this AGREEMENT; (c) he has had ample time to consider and negotiate this AGREEMENT; (d) he has had a full opportunity to review this AGREEMENT; (e) he is able to make an informed decision and is not physically, medically or mentally incapacitated so that he is able to make an informed decision to accept the AGREEMENT; and, (f) he has executed this AGREEMENT voluntarily and knowingly, and with the advice of his own counsel and/or representative.

[THIS SPACE LEFT INTENTIONALLY BLANK]

IN WITNESS WHEREOF, AREGAWI ABRAHAM KISHEN and THE CITY OF PASSAIC have hereunto set their hands this 07 day of February, 2017.

Witness:

AREGAWI ABRAHAM KISHEN

Aregawi Abraham Kishen

Dated: 02-07-2017

Dated: 02-07-17

Attest:

CITY OF PASSAIC

By: Ricardo Fernandez

Dated: 2/10/17

Dated: 2/10/17

STATE OF NEW JERSEY :

: SS.:

COUNTY OF PASSAIC :

I, ANTONIA SANCHEZ, a Notary Public, do hereby certify that Aregawi Abraham Kishen, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 07 day of February, 2017 2016.

ANTONIA SANCHEZ
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES AUG. 6, 2019

Notary Public

6-21-17

STATE OF NEW JERSEY

In the Matter of Daymar Leonard
City of Trenton,
Department of Public Works

CSC DKT. NO. 2017-1801
OAL DKT. NO. CSV 737-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 737-17
AGENCY DKT. NO. 2017-1801

IN THE MATTER OF DAYMAR LEONARD, CITY OF TRENTON, DEPARTMENT OF PUBLIC WORKS.

Debbie Parks, Union Representative, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danita C. Minnigan, Esq., for respondent (Becker LLC, attorneys)

Record Closed: May 17, 2017 Decided: May 18, 2017

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, who 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.

May 18, 2017
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 5/25/17

Date Mailed to Parties: 5/25/17

/cb

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

BECKER LLC
Wesley Bridges, Esq.
Danita C. Minnigan, Esq.
354 Eisenhower Parkway
Plaza II, Suite 1500
Livingston, New Jersey 07039
(973) 422-1100
Attorneys for Defendant

DAYMAR LEONARD, Petitioner, vs. CITY OF TRENTON, DEPARTMENT OF PUBLIC WORKS, Respondent.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DKT. NO. CSV 00737-17** **AGENCY REF. NO.: 2017-1801** **CONFIDENTIAL SETTLEMENT AGREEMENT AND RELEASE**

This Confidential Settlement Agreement and Release (the "Agreement") is made between Petitioner Daymar Leonard ("Petitioner") and Respondent City of Trenton, Department of Public Works ("City of Trenton") on behalf of themselves and their past, present and future heirs, successors, representatives, assignees, assignors, predecessors, subsidiaries, parent organizations, affiliates, employees, agents, officers and directors. This Agreement shall be effective as of the date it is signed by the last party hereto ("Effective Date").

WHEREAS on or about _____, Petitioner filed an appeal ("Appeal") of the final November 7, 2016 hearing terminating his employment for violations of N.J.A.C. 4A:2-2.3 conduct Unbecoming a Public Employee and Misuse of Public Property ("Hearing"); and

WHEREAS the subject matter of the Hearing stem from an October 21, 2016 Police Crash Investigation Report involving a City of Trenton owned vehicle, driven by Petitioner,

where Petitioner was found near the scene of sleeping in aid vehicle and smelling of alcohol ("Subject Matter of the Hearing");

WHEREAS the parties desire to make a full and final settlement of any and all claims raised or which could have been raised with respect to the Subject Matter of the Hearing, without any adjudication of any issue of law or fact and without any admissions regarding any issues or allegations raised in the Hearing;

NOW THEREFORE, in consideration of the promises set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is hereby agreed as follows:

1. **Resignation.** Petitioner shall resign in good standing from his Laborer position with Trenton Water Works Department of Public Works in consideration of dismissal of the within appeal with prejudice and without costs. Petitioner shall forever be precluded from applying and/or considered for employment with any department, branch or subsidiary of the City of Trenton.

2. **Release.** Petitioner and the City of Trenton, their respective past, present and future heirs, successors, representatives, assignees, assignors, predecessors, subsidiaries, parent organizations, affiliates, employees, agents, officers, directors, owners, franchisors, insurers and attorneys (the "Releasing Parties") hereby fully release, acquit and forever discharge each other, their respective past, present and future heirs, successors, representatives, assignees, assignors, predecessors, subsidiaries, parent organizations, affiliates, employees, agents, officers, directors, owners, franchisors, insurers and attorneys, and all other persons participating in or providing information in connection with this Appeal (the "Released Parties") from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever, whether known or

unknown, which the Released Parties have ever had, now have or may have against any and all of the Released Parties from the beginning of time up until the Effective Date of this Agreement arising out of the Subject Matter of the Hearing. The released claims include but are not limited to (i) any and all claims, demands, action or actions, counterclaims, crossclaims, causes of action or suits, debts, demands, obligations, and liabilities, of whatever kind or nature, whether known or unknown, suspected or claimed, to date hereof related in any way to Subject Matter of the Hearing; (ii) all other claims based on constitutional, common law, statutory, contract, tort or any other legal theory relating to the Subject Matter of the Hearing and (iv) all other claims for monetary damages of any kind, including, but not limited to, attorneys' fees and costs relating to the Subject Matter of the Hearing, or that the Released Parties had, have or could ever have, that could have or should have been asserted in the Appeal, with regard to the Subject Matter of the Hearing, whether known or unknown, including, but not limited to, any claims that could have been asserted up to and including the Effective Date.

3. **Covenant Not To Sue.** Petitioner agrees that he will not commence suit in connection with the Subject Matter of the Hearing.

4. **Confidentiality.** The parties hereto agree that neither they nor anyone acting on their behalves will discuss, communicate, publish, publicize, disseminate, confirm or otherwise disclose the terms of this Agreement or the negotiations antecedent thereto (collectively "Confidential Information") to any third-party individual or entity. Notwithstanding the foregoing, the parties hereto shall be permitted to disclose Confidential Information: (a) to such of their officers, directors, employees agents and representatives as need to know such Confidential Information in order to carry out the terms of this Agreement; (b) to the extent required by applicable law, or by subpoena or similar legal process; (c) as reasonable to enforce

the terms of this Agreement, or to defend against a claim to enforce the terms of this Agreement, should that be necessary; (d) to the extent such Confidential Information becomes publicly available other than as a result of a breach of this Agreement; or (e) to the extent the other party hereto shall have consented to such disclosure in writing.

5. **No Admission of Liability**. This Agreement shall not in any way be construed as an admission by any party hereto of any wrongful conduct whatsoever against any person or party hereto. It is acknowledged by all parties that this Agreement is mutually sought and for the benefit of each to resolve all disputed claims and controversies between and among the parties related to the Subject Matter of the Hearing as heretofore defined. It is further acknowledged that no party hereto intends for any non-party to be deemed a third-party or incidental beneficiary hereof, except as set out herein.

6. **Fair Construction**. The parties acknowledge that this Agreement is the product of joint negotiation and input by and among the parties' legal representatives, and as such the language of all parts of this Agreement shall, in all cases, be construed as a whole, according to its fair meaning, and not strictly for or against any party.

7. **Choice of Law and Forum Selection**. The parties agree that New Jersey law shall govern the enforcement of this Agreement, and that any claim arising out of the enforcement of this Agreement shall be brought in the Superior Court of New Jersey, Law Division.

8. **Acknowledgement**. This Agreement is entered into without force or duress, in the free will of the parties, and in consideration of the receipt of substantial consideration. All parties acknowledge that they have not entered into this Agreement in reliance upon any inducement or promise not otherwise contained herein. The parties have consulted extensively

with counsel regarding the terms of this Agreement and have resolved any questions they may have had as to the meaning, effect or interpretation of this Agreement. The decision of the parties to execute this Agreement is a fully informed decision, and the parties are aware of all legal and other ramifications of such decision.

9. **Integration.** This Agreement contains the entire understanding of the parties and shall be modified only by an instrument in writing signed on behalf of each party hereto. No waiver of a breach of any provision of this Agreement shall be construed to be a waiver of any breach of any other provision of this Agreement or of any succeeding breach of the same provision. No delay in acting with regard to any breach of any provision of this Agreement shall be construed to be a waiver of such breach.

WHEREFORE, to signify their agreement to the terms herein, the undersigned have executed this Confidential Settlement Agreement and Release on the date set forth below, and the signatories hereto warrant that he or she has authority to execute this Settlement Agreement and Release.

Daymar Leonard

Daymar Leonard

Date: May 8, 2017

Joseph McIntyre, General Superintendent, Water And Sewer

Date:

May 10, 2017

William Mitchell, Water Treatment Plant Superintendent

Date:

6-21-17

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Jose Morales,
Hudson County, Division of Roads and
Public Property

CSC Docket No. 2015-3209
OAL Docket No. CSV 19280-15

ISSUED: JUL 14 2017 (EG)

The appeal of Jose Morales, a Stationary Engineer with Hudson County, Division of Roads and Public Property, of his six-month suspension on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on March 27, 2017. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the attached ALJ's initial decision, and having reviewed the testimony and evidence presented before the Office of Administrative Law (OAL), and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on June 21, 2017, did not adopt the ALJ's recommendation to reverse the suspension. Rather, the Commission imposed a five working day suspension.

DISCUSSION

The appellant was charged with conduct unbecoming a public employee, neglect of duty, insubordination and other sufficient cause. Specifically, the appointing authority asserted that the appellant falsified his timesheet and had been doing so for some time. Upon the appellant's appeal, the matter was transmitted to the OAL for a hearing as a contested case.

The ALJ set forth in her initial decision that the appellant worked the overnight shift at the Powerhouse. Kim Riscart-Cardella, an Executive Assistant, testified that the appointing authority had become suspicious that the appellant

and a co-worker were covering for each other's shifts and skipping out on some shifts. She indicated that when she reviewed a timesheet on March 4, 2015, before his shift had started, the appellant had already signed in and out for that day. She also identified log book entries wherein the appellant was improperly signing it on days he wasn't scheduled to work. However, Riscart-Cardella also testified that there was no evidence that the appellant actually worked fewer than five days per week. The ALJ noted that Thomas Manfredi, an Assistant Chief Stationary Engineer, the appellant's supervisor, testified that he had a discussion with the appellant about the differing interpretations of the overnight shift days in February 2014 and again in January 2015. Manfredi also denied that the appellant had ever advised him about his parental obligations or provided him with a court order regarding the same.

The appellant testified that he needed to work Saturday through Wednesday so he could take his son to school two days per week following his divorce. He indicated that he had Thursday and Friday off for many years without any problems until 2015. He acknowledged that Manfredi did discuss his revised schedule interpretation in January 2015 but he was advised by his union representative to wait until it was posted on formal letterhead before grieving the matter. Since no such posting occurred, the appellant never filed a formal grievance. Further, the appellant testified that in March 2015, Manfredi gave him an oral warning about following the schedule. The appellant asserted that at the same time, Manfredi agreed that if all the shifts were covered, it would not be a problem and that he could keep his schedule as it had been for many years until his son graduated in June.

Based on the foregoing, the ALJ found that the supervisors and the employees read the schedules differently. If the schedule indicated the overnight shift started Sunday at 11:00 p.m. and ended Monday at 7:00 a.m., the supervisors considered this a Sunday workday, while the employees considered it a Monday work day. The ALJ stated that this explained why it appeared that the appellant had signed in and out before his shift started. In this regard, the ALJ found that there was no evidence that the appellant signed in or out of his payroll sheet except contemporaneously or that he worked fewer than five shifts per week on a regular basis. Further, the ALJ concluded that while the supervisors had the authority to make changes to the long-standing practice of viewing the overnight schedule the way the employees viewed it, the appellant testified that he had asked Manfredi to keep his schedule the same until his son graduated in a few months. Although Manfredi denied this discussion, the ALJ found the appellant more credible in this regard. Accordingly, the ALJ found that the appointing authority had not met its burden of proof and dismissed the charges.

In its exceptions, the appointing authority argues that the ALJ's credibility determinations were not supported by the documentary evidence. It claims that the

schedules and sign-in sheets clearly show the appellant was not working his assigned shifts. Additionally, it contends that as of January 2015, the appellant acknowledged that he had been advised of the correct schedule to follow. Further, it argues that the ALJ improperly found the appellant more credible than Manfredi with regard to the appellant's schedule and the alleged request to keep the schedule the same until the appellant's son graduated.

In his reply to exceptions, the appellant argues that the ALJ's credibility determinations were amply supported by the record. In this regard, he states that the ALJ provided seven pages of summation of testimony. He also argues that Manfredi's testimony was inconsistent and not credible. He asserts that Manfredi testified that he had not heard of the appellant's court order until the May 2015 departmental hearing, yet he mentioned the court order in a letter he authored on March 6, 2015.

Upon its *de novo* review of the record, the Commission does not agree with the ALJ's recommendation to dismiss the charges and reverse the six-month suspension. Regarding the charges, the Commission finds that the appellant did not follow the schedule as presented by his supervisors. A review of the testimony clearly indicates that the appellant knew what the proper schedule to follow was in January 2015 but chose not to follow the schedule due to his parental obligations. There was no evidence presented that the appellant approached his supervisor requesting to keep his prior schedule at any time between January 2015 and March 2015, when the appellant was confronted by Manfredi on March 6, 2015. Therefore, even if the appellant asked Manfredi to keep his schedule the same for a few more months, the appellant worked the wrong schedule without authorization on March 4, 5, and 6, 2015, as indicated in the Final Notice of Disciplinary Action.

In its exceptions, the appointing authority challenges the ALJ's determinations based on witness testimony. In instances such as this, the credibility of the witnesses plays a major role in determining the outcome of the case. In this regard, 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 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 the credible evidence or was

otherwise arbitrary. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A.* 52:14B-10(c) provides, in part, that:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also, N.J.A.C. 1:1-18.6(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004).

In the instant matter, the appointing authority argues that the ALJ's credibility determinations were not proper and not supported by credible evidence. The Commission disagrees. The appellant's testimony regarding his request to keep his schedule for a few more months and his claim that he mentioned a court order to Manfredi were credible. Further, Manfredi's March 6, 2015, letter clearly mentions the appellant's court order. This same letter also contradicts Manfredi's assertion that he did not know about a court order until the May 2015 departmental hearing. Thus, finding the appellant more credible than Manfredi is supported in the record. Therefore, a review of testimony reveals that the ALJ's conclusions based on the witness testimony are reasonable and supported by the credible evidence in the record. However, the testimony also establishes that the appellant did not follow the schedule correctly, as noted previously.

In determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, the appellant had no prior disciplinary actions since his employment began in 1998. Additionally, it is clear that the appellant had been working what he believed to be the correct schedule for years without issue. Further, the appellant had relied on his particular days off in order to meet his parental obligations. Given these particular circumstances, the Commission finds that a five working day suspension is the proper penalty.

Accordingly, the appellant is entitled to back pay, benefits and seniority after the imposition of the five working day suspension. With regard to counsel fees, since the appellant has not prevailed on the primary issues on appeal he is not entitled to an award of counsel fees. *See N.J.A.C.* 4A:2-2.12. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert* Dean (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, while the penalty was modified, charges were upheld and discipline imposed. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a six-month suspension was not justified. Therefore, the Commission modifies the six-month suspension to a five working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period after the imposition of the five working day suspension. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF JUNE, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF JOSE MORALES, COUNTY OF HUDSON, DIVISION OF ROADS & PUBLIC PROPERTY.

OAL DKT. NO.CSV 19280-15
AGENCY REF. NO. 2015-3209

Robin Bernstein, Esq., for appellant Jose Morales (Bernstein Law Firm, attorneys)

John A. Smith, III, Assistant County Counsel, for respondent County of Hudson (Donato Battista, Esq., County Counsel, attorneys)

Record Closed: February 7, 2017 Decided: March 27, 2017

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Jose Morales (appellant) appeals from a disciplinary action taken by his employer the County of Hudson, Department of Building & Grounds, Division of Roads & Public Property (County) to suspend him from his position as a Boiler Operator for six months on charges of conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(11). The charges all relate to time sheet irregularities. Appellant denied the charges and claims and filed an appeal on June 2, 2015.

The appeal was transmitted to the Office of Administrative Law (OAL), on November 25, 2015, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -

15 and N.J.S.A. 52:14F-1 to -13. It was assigned to the Honorable Irene Jones, A.L.J. on December 7, 2015. A hearing notice was sent scheduling the matter for April 18, 2016. On that date, the County failed to appear and asserted that it had never received any pre-hearing or hearing notice. It was re-assigned to me on July 8, 2016, following the retirement of Judge Jones. With the consultation of counsel, the hearing was scheduled for December 1, 2016. When it did not conclude on that date, another plenary hearing was convened on February 7, 2017, on which date the record closed.

FACTUAL DISCUSSION

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Kim Riscart-Cardella was the first witness to be presented by the respondent on this matter. Cardella has been the Unit Chief with the Department of Buildings and Grounds since January 2006. She oversees the buildings and parking lots including the facilities themselves and the personnel within. Chief Engineer Thomas Manfredi reports to her and there are various other intermediate supervisors between Manfredi and appellant. Appellant works in the Powerhouse as a Boiler Operator.

Cardella testified that she sought removal of appellant on disciplinary charges because he had allegedly stolen county services through manipulation of his time sheets. The final disciplinary action was reduced to six months because of certain mitigating factors, including, but not limited to, his apology, an admission, and some family custody issues. Cardella then provided more background to this disciplinary action.

Cardella stated that appellant and Gary Dooley worked the overnight shift at the Powerhouse. Because they each received two different days off, they only both worked that shift three days of the week. In March of 2015, she became suspicious that the operators were covering for each other's shifts and skipping out on some of those shifts. On March 4, 2015, Cardella reviewed the payroll sign-in/sign-out sheet and found that

appellant had already signed out for that day. She then instructed Manfredi to drop in on the night shift to see who was working. He did so on April 9, 2015, and found Dooley working notwithstanding that he should have been out serving a suspension on that date. He also found that appellant was not there even though he was the operator who should have been on duty. On several other dates, she, Manfredi, or day-shift operators reported that Dooley and appellant were switching shifts or not following the schedule. Cardella identified log book entries wherein appellant was improperly signing it on certain days when he was not scheduled to work, and same with Dooley.

On cross-examination, Cardella admitted that the log book entries were consistent with the appellant's interpretation of what day of the week to denominate the overnight shift. She also admitted that there was no evidence that appellant actually worked fewer than five days per week, although she seemed convinced that Dooley somehow worked four days and had three days off or was serving a suspension one day per week during this period. There was also no evidence that the county needed to cover extra shifts because of appellant skipping shifts without authorization, or that the Powerhouse was unattended for any overnight shifts. Cardella was sure that appellant had not provided any court order on his parental rights prior to the departmental disciplinary hearing.

Orestes Acosta is a supervisor for the Powerhouse for the second shift (3:00 pm. to 11:00 p.m.). He has been with the County for four years. There is no supervisor on duty for the overnight shift. Acosta's office is in the Administration Building. On March 5, 2015, he advised Cardella that Dooley was working the shift that had been assigned to appellant.

Julio Cartegena has been a day shift boiler operator for the County for approximately eight years. He takes over from the shifts covered by Dooley and appellant. He admitted that the daily boiler read-out sheets were started at 11:00 p.m. by the overnight operators and then continued for that particular day by the first and second shift operators. Cartegena recalled that on March 4, 2015, he saw both Dooley and appellant in their vehicles when his shift started.

Thomas Manfredi also testified for respondent. He has been employed by the County for twenty-six (26) years and presently serves as the Chief Engineer. His office is in the Administration Building but he also has oversight over the Annex, the Powerhouse and the Courthouses. He issues the schedule for the Powerhouse operators but he is seldom there on site. Timesheets are on the honor system and there is no reliance on an electronic punch clock. Manfredi testified that he had had a discussion with Dooley and appellant about the differing interpretations of the overnight shift "days" in February 2014 (R-17) and again in January 2015 (R-10b). He had done this because he also had heard rumors that these two employees were covering different shifts than they were assigned.

On cross-examination and then in rebuttal, Manfredi denied that appellant had ever advised him about his parental obligations or shown him a court order regarding such. Nevertheless, Manfredi mentioned such a family court order in his own memorandum to Cardella when describing appellant's refusal to follow the schedule as dictated by himself.

Rodolfo Quintanilla testified on behalf of the appellant. He is now retired but he had been a boiler operator for several years with total county employment spanning fourteen years. Quintanilla mostly was assigned to the second shift but sometimes covered for the overnight shift. He testified as to where the schedules were posted and that the boiler read-out sheets always started a new day at 11:00 p.m. of the prior evening. Quintanilla did not recognize the hand-written annotated schedule used by Manfredi to explain his overnight shift interpretation. On cross-examination, he explained that he worked the overnight shift a few times per month when he would be assigned to cover the shift for someone who was out. He always worked that shift alone.

Appellant testified in his own defense. He has been employed with the county since approximately 1998 when he started at the correctional facility. He was a Boiler Operator and then a Stationary Engineer at the Administrative Building. By 2004, appellant was working the third or overnight shift, which was selected by seniority rank. He needed to work Saturday through Wednesday so he could take his son to school

two days per week following his divorce. He stated that he had Thursday and Friday off for many years without any problem or even any discussion from Manfredi until 2015. Appellant denied ever seeing the 2014 marked-up schedule sheet prepared by Manfredi. While Manfredi did discuss his revised schedule interpretation in January 2015, appellant's union representative advised him to wait until it was posted on formal letterhead and to then grieve the management action. Appellant stated that it was never posted on letterhead, which is why he never filed a formal grievance.

In March 2015, Manfredi gave appellant an oral warning about following his schedule. According to appellant, Manfredi then agreed at that same time that if all the shifts were covered, it would not be a problem. Nevertheless, this disciplinary action was then initiated by his supervisors. Appellant remarked that he had a clear disciplinary record throughout his career and that he never signed in or out until that appropriate time. In other words, he never signed in and out at the same time. He also never signed in for a shift he did not actually work. Appellant utilized various examples from the log books to demonstrate his consistency in his recording of the days of his shifts.

On cross-examination, appellant maintained that he would never be able to get his son to school in Millburn on a Thursday morning if he worked until 7:00 a.m. on Thursday as his "Wednesday" shift. Appellant lives in Newark. Appellant also maintained that he had left a copy of his court order in an envelope with the time sheets at the time that it was issued in 2007. He had no knowledge of where it went once payroll picked up the sheets but after the passage of so much time, he assumed Manfredi understood. To the extent he had additional weekend days with his son, he had family members over at his house to babysit while he worked.

When questioned as to why he had produced a court order at the departmental hearing for the first time, appellant disagreed and stated that he showed a later court order from March 2015 at the departmental hearing only because it was new and the most current. Appellant insisted that Manfredi had orally acknowledged that the schedule could stay as it had been for many years until his son graduated from high school that June. Appellant is the most senior boiler operator assigned to the

Powerhouse.

For evidence to be credible it must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Credibility, or, more specifically, credible testimony must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). I **FIND** that respondent's witnesses were less credible than appellant. Credibility means the testimony as a whole holds or hangs together, and makes sense. After listening carefully to every witness, it was clear to me that this entire case turned on a difference in interpretation as to what to call the day the person on the overnight shift is working.

Appellant and Quintanilla both explained that the practice for many years of the overnight shift was to mark themselves down at the beginning of the shift (11:00 p.m.) as working on the "next" day. Hypothetically, or by way of example, if one was assigned to work 11:00 p.m. to 7:00 a.m. on Monday, appellant and his fellow overnight boiler operators would report on Sunday at 11:00 p.m. and work through until Monday at 7:00 a.m. They would mark the payroll sheets accordingly as Monday. The supervisors considered that to be Sunday's shift. The log book entries by both appellant and Dooley were consistent with their interpretation of the day of the week worked.

The supervisors, who did not themselves ever work that shift, expected the boiler operators assigned on Monday in the hypothetical example to report to work at 11:00 p.m. on Monday and work through until Tuesday at 7:00 a.m. Appellant and his co-workers considered that to be Tuesday's shift. Thus, when the supervisors saw a payroll sheet already signed in for Tuesday at a time when they were of the view that such shift did not commence until 11:00 p.m. on Tuesday, they considered appellant as having signed out ahead of time and therefore, maybe not even working until the end of the shift.

The fact is that every shift was covered and every operator including appellant worked five shifts a week. It is just that Cardella and Manfredi expected to see Dooley sometimes when they saw appellant or vice versa. However, appellant and Dooley

were consistent with each other as were the substitutes from other shifts who occasionally covered. Thus, when appellant stated that he had to have Thursday and Friday off so he could have time to get his son to school for approximately eight years, he stopped work at 7:00 a.m. on Wednesday and returned to the Powerhouse at 11:00 p.m. on Friday. In that way, he had the daytime hours of Thursday and Friday off and was available to drive his son. When Manfredi testified that he believed appellant should have worked through 7:00 a.m. on Thursday and report back at 11:00 p.m. on Saturday, appellant tried to explain that those hours interfered with his parenting time.

There has been no evidence that appellant worked fewer than five shifts per week on a regular basis, unless using authorized leave time. There is no evidence that appellant signed in and out on his payroll sheet except contemporaneously. It only looked that way to Manfredi and Cardella because they were operating with a different "day" in mind. Other factual bases for my finding that appellant and the overnight boiler operators were consistent, and at least historically correct, are the boiler reading charts that "start" at 11:00 p.m. (A-2), and the boiler logs. The payroll sheets were also picked up at the end of the week by 3:00 p.m. so the Friday overnight to Saturday shift started fresh with the next sign-in sheet.

The totality of the evidence in the record does demonstrate that the supervisors had an expectation that the shifts were working different from the reality; and as supervisors, they had the authority to make a change to the long-standing and historic practice. On that point, there was conflicting testimony as to when the difference of interpretations was first discussed. Appellant asked Manfredi for a couple of months before implementing the announced change for two reasons: (1) his parenting time and school drop offs for his son would go away by the end of June and cease to be an impediment or issue because he was then a senior in high school; and (2) appellant was the most senior operator such that no matter what day you called it, he just needed and expected to be off Thursdays and Fridays before 7:00 a.m. While Manfredi presented rebuttal testimony to the effect that appellant never mentioned these personal circumstances, I **FIND** appellant more credible on the likelihood that these conversations and concerns were expressed because appellant was very sensitive to the issue of his parenting time.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). A civil service employee who commits a wrongful act related to her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the County bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490

(E. & A. 1933). This dispute does not turn on a legal interpretation but a factual one.

Based upon the facts set forth above, I **CONCLUDE** that the respondent has not proven by a preponderance of the credible evidence that appellant falsified any records or "stole" time from the County. Furthermore, the evidence supports that there was a well-established pattern and practice of calling the overnight shift by the day of the week during which most of the hours occurred and the shift ended, and not the day it began at one hour until midnight. While it is apparent that respondent required the third shift boiler operators to stop using the time sheets and clock in that manner, it was also shown by the preponderance of the credible evidence that appellant had oral permission to continue as they always had been for just a couple of more months until his son graduated high school. Thereafter, appellant's visitation rights would no longer be impacted by the supervisor's differing view of the third shift "days."

Accordingly, I **CONCLUDE** that respondent has not met its burden of proof on these disciplinary charges and that they must be dismissed.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the County of Hudson, Department of Roads and Property against appellant Jose Morales is hereby **REVERSED**. It is further **ORDERED** that appellant Jose Morales is entitled to back pay and any other benefits that would have otherwise accrue had he not served this six-month suspension.

It is further **ORDERED** that reasonable counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

March 27, 2017

DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:

Date Mailed to Parties: MAR 27 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Rudolfo Quintanilla

Jose Morales

For Respondent:

Kim Riscart-Cardella

Orestes Acosta

Julio Cartogena

Thomas Manfredi

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 [not in evidence]

A-2 Hudson County Blank Reading and Temperature Log

A-3 Hudson County and IUOE Local 68 Memorandum of Agreement, dated November 14, 2013

A-4 Superior Court, Family Part, Consent Order, dated September 24, 2007

A-5 Boiler Room Log Book (excerpts), dated February 6, 2015 etc.

For Respondent:

R-1 Final Notice of Disciplinary Action, dated November 18, 2015

R-2 [not in evidence]

R-3 Preliminary Notice of Disciplinary Action, dated April 29, 2015

R-4 E-Mail Memorandum from Kim Riscart to Denise Dalessandro, dated April 9, 2015

R-5 Statement of Orestes Acosta, dated April 16, 2015

R-6 Statement of Julio Cartegena, dated April 10, 2015

R-7 Statement of Tom Manfredi, dated March 6, 2015

R-8 County of Hudson, Employee Handbook (excerpt), dated July 1, 1998

R-9 Receipt of Handbook by Jose Morales, dated July 15, 1998

R-10 Powerhouse Monthly Schedule

R-11 Payroll Form, Jose Morales, Pay Period dated February 21, 2015

R-12 Boiler Room Log Book (excerpts), dated March 4, 2015

R-13 Boiler Room Log Book (excerpts), dated March 6, 2015

R-14 Boiler Room Log Book (excerpts), dated April 7, 2015

R-15 [not in evidence]

R-16 Payroll Form, Jose Morales, Pay Period dated April 4, 2015

R-17 Powerhouse Monthly Schedule with Hand-Written Annotations, dated February 24, 2014

R-18 Superior Court, Family Part, Order on Visitation, dated May 28, 2010

R-19 Superior Court, Family Part, Order, dated March 6, 2015

6-21-17

STATE OF NEW JERSEY

In the Matter of Erika Otero
City of Paterson,
Police Department

CSC DKT. NO. 2016-543
OAL DKT. NO. CSV 11348-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement, with clarification, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11348-15

AGENCY DKT. NO. 2016-543

IN THE MATTER OF ERIKA OTERO,
CITY OF PATERSON, POLICE DEPARTMENT.

Charles J. Sciarra, Esq., for appellant (Sciarra & Catrambone, attorneys)

Steven S. Glickman, Esq., for respondent (Law Office of Steven S. Glickman, attorney)

Record Closed: May 26, 2017 Decided: May 26, 2017

BEFORE **ELLEN S. BASS,** ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law on July 27, 2015 for determination as a contested case.

The parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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**, who 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.

May 26, 2017
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: May 26, 2017

Date Mailed to Parties: MAY 31 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT, made and executed this ___ th day of March, 2017, by and between the City of Paterson (hereafter referred to as the "City") and Erica Otero (hereafter "Otero"), represents the full and final understanding between the City and Otero regarding all outstanding employment issues between the City and Otero, including her disciplinary appeal, OAL Docket No. CSV 11348-2015N.

1. The City and Otero agree that the disciplinary charges brought against Otero by the City are to be revised as attached.

2. Based on the above, Otero agrees to withdraw her disciplinary appeal, OAL Docket No. CSV 11348-2015N.

3. Based on the above, the City shall file an amended Final Notice of Disciplinary Action, modifying the charges consistent with the attached amended charges.

4A. GENERAL RELEASE

In consideration of the Agreement described above, Otero waives, releases and gives up any claim she, her heirs, executors, administrators, successors and assigns may have against the City and any of its present or past representatives, administrators, supervisors. employees, officers, directors, agents, contractors, etc., and each of their predecessors, successors and assigns, based upon any event arising out of any and all outstanding employment issues to date between the City

and Otero, including her disciplinary appeal, OAL Docket No. CSV 11348-2015N.

For and in consideration of the release, representations, and agreements contained above, the City releases and forever discharges Otero from any and all claims which could have been asserted by the City against Otero arising out of any and all outstanding employment issues to date between the City and Otero, including her disciplinary appeal, OAL Docket No. CSV 11348-2015N.

As an inducement for the City to enter into this Agreement, Otero hereby withdraws any requests for a hearing on any and all outstanding employment issues to date between the City and Otero, including her disciplinary appeal, OAL Docket No. CSV 11348-2015N.

4B. KNOWING AND VOLUNTARY WAIVER

Otero acknowledges that in the execution of this Agreement she is affecting a knowing and voluntary waiver of any claims, liabilities or causes of action against the City and any of its members of the governing body, employees, agents, successors and assigns of the City by reason of any and all outstanding employment issues to date between the City and Otero, including his disciplinary appeal, OAL Docket No. CSV 11348-2015N. Otero further acknowledges that she has discussed the terms of this Agreement with her union and/or legal representatives and that

any questions she may have regarding this matter have been answered to Otero's full satisfaction. Otero also hereby agrees and acknowledges that she has been fully, fairly and adequately represented in this matter.

5. This Memorandum of Agreement is not precedent setting on either party in that the Union and the employee cannot interpret and construe this Memorandum of Agreement or the terms of this settlement as a waiver of the City of Paterson's policy and procedures, or interpret and construe this settlement as a waiver of the parties' contract and applicable labor laws. The parties agree that the terms of this Agreement are specific to the facts and circumstances of this particular action and binding only as to this matter.

6. This Agreement may be modified or amended only by a written instrument duly signed by each of the parties or their respective successors or assigns.

7. This Agreement supersedes all prior agreements and understandings between the parties; it contains the full understanding of the parties with respect to this subject matter; and there are no representations, warranties, agreements or undertakings other than those expressly contained in this Agreement.

8. This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

9. Otero acknowledges that this Agreement does not constitute and shall not be construed as an admission, violation of any law, rule or regulation, breach of any contract or commitment of any wrongdoing whatsoever on the part of the City.

10. Should any of the provisions of this Agreement be declared or determined by a court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first above written.

WITNESS

ERICA OTERO

CITY OF PATERSON

ATTEST

By:

Reviewed as to form:

Steven S. Glickman

TO: **ERICA OTERO**

FROM: **JERRY SPEZIALE, POLICE DIRECTOR**

DATED: **MARCH 18, 2015**

CHARGES AND SPECIFICATIONS

Charges

For her misconduct as outlined in the Specification below, Erica Otero is hereby charged with violating the following provisions of the New Jersey Administrative Code, N.J.A.C., 4A:2-2.3(a) as follows:

(6) Conduct unbecoming a public employee; and
(11) Other Sufficient cause.

Erica Otero's conduct has also violated the statutory standard of behavior required of police officers by N.J.S.A. 40A:14-128, and also as detailed in In re Tuch, 159 NJ Super 219 (App. Div. 1978) and the City of Asbury Park v. Dept. of Civil Service, 17 NJ 419 (1955).

Specifications

On or about September 2, 2014 Erica Otero was in the cell block with prisoner Erlaine Aponte. Erica Otero's handling of prisoner Erlaine Aponte was not in accordance with the City of Paterson Police Department's policies and procedures in that Erica Otero's verbal interaction with prisoner Erlaine Aponte was inappropriate.

Recommended Penalty

Up to termination.

Angiulo, Nicholas

From: Steven S. Glickman <SGlickman@litedepalma.com>
Sent: Monday, June 5, 2017 12:50 PM
To: Angiulo, Nicholas; csciarra@sciarralaw.com
Cc: Messina, JoAnn
Subject: RE: Settlement for Erika Otero - CSV 11348-15

Mr. Anguilo:

You are correct. The specifications have changed but the penalty has not.

Steven S. Glickman

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, June 05, 2017 12:14 PM
To: csciarra@sciarralaw.com; Steven S. Glickman
Cc: Messina, JoAnn
Subject: Settlement for Erika Otero - CSV 11348-15
Importance: High

Mr. Sciarra and Mr. Glickman:

I am the Deputy Director in charge of this agency's hearings unit. We have received the proposed settlement agreement for Erika Otero regarding her appeal of a 30 working day suspension.

Before this matter can be presented to the Civil Service Commission for acknowledgement, clarification is necessary. Specifically, while the settlement attaches a new memorandum indicating that the charges are upheld based on modified specifications, no change in penalty is indicated. I just want to make sure that what this means is that the original 30 working day suspension is remaining as such, just that the specifications have changed.

Please let me know as soon as possible if this is the intention of the parties. If not, please clarify further. An e-mail response is sufficient so long as it is agreed upon by the parties.

Thank you in advance for your cooperation.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

6/21/18

STATE OF NEW JERSEY

In the Matter of Shakerah Parker
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-2278
OAL DKT. NO. CSV 01517-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUNE 21, 2017 BW

The Civil Service Commission, at its meeting of June 21, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 01517-17
AGENCY DKT. NO. 2017-2278

IN THE MATTER OF SHAKERAH PARKER,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENT CENTER.

Robert Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)6

Aimee Blenner, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: May 25, 2017 Decided: June 2, 2017

BEFORE **CATHERINE A. TUOHY,** ALJ:

This matter concerns the appeal of Shakerah Parker from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on February 1, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 2, 2017
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 6/5/17

Date Mailed to Parties: 6/5/17

/mel

Enc.

OAL DKT. NO. CSV 1517-2017

AGENCY DKT. NO.: 2017-2278

SETTLEMENT AGREEMENT

IN THE MATTER OF:

SHAKERAH PARKER

AND

HUNTERDON DEVELOPMENTAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and entered into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **January 9, 2017** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
Administrative Order 4:08, A.4.6	**Removal**	**January 12, 2017**

B. The Appellant **SHAKERAH PARKER** withdraws his/her appeal and request for a hearing, and the Respondent Department of **HUMAN SERVICES** agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
Administrative Order 4:08, A.4.6	**Sustained**	**5 months suspension**

C. The parties have agreed to the following:

For Suspensions, Complete the Following: **N/A**

1. To date, appellant has been suspended for a total of _____days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows:_____.
3. Any other days from the time of last suspension day until return to work shall be treated as follows:_____.

For Removals, Complete the Following:

1. To date, appellant has served a total of **suspension without pay since January 12, 2017** based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the appellant is as follows:_____**NONE**_____

_____

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: **LEAVE OF ABSENCE WITHOUT PAY.**

4. (Strike if not applicable) The appellant agrees to a: **N/A**
   ____resignation in good standing
   ____general resignation

Which shall be effective _____(date). Any dates from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. **DEPARTMENT OF HUMAN SERVICES** (Respondent) shall amend Appellant's personnel records to confirm to the terms of the settlement. All internal records of the Department of **HUMAN SERVICES** will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of **SHAKERAH PARKER** 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute in matters involving other employees.

G. Appellant waives all claims, suits, or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of **HUMAN SERVICES**, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to events, information or disputes giving rise to this action u to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the American with Disabilities Act, the Family Leave Act, Title 11A – the Civil Service Act, the Older Workers Benefits Protection Act, the occupational Safety and Health Act, the Public Employees Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statures, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied.

This wavier includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. **Appellant acknowledges she is given a fixed number of days off each year and understands the importance of reporting to work as scheduled. Appellant understands the seriousness of this disciplinary removal as a result of her chronic and excessive absences. In consideration of Appellant's acknowledgements above, Respondent agrees to give Appellant another chance. Appellant clearly understands that any further incident of chronic or excessive absenteeism (A.4.) shall result in her removal. If Appellant should be removed again and file an appeal, Respondent will not enter into another settlement agreement that would result in her return to work.**

This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/2/17
DATE

Appellant

5-22-17
DATE

On Behalf of Appellant

5/24/17
DATE

Respondent/DHS

5/23/17
DATE

On Behalf of Hunterdon Dev. Ctr.

OAL. DKT. NO. CVS 1517-2017

CERTIFICATION

I, Shatheesh Parker, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION,** my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/12/17
DATE

NAME

6/21/17

STATE OF NEW JERSEY

In the Matter of Isaac Williams
City of Wildwood, Department of Public Works

CSC DKT. NO. 2016-1883
OAL DKT. NO. CSV 00755-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUN 23 2017 BW

The appeal of Isaac Williams, Laborer 1, City of Wildwood, Department of Public Works, removal effective November 17, 2015, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on May 16, 2017. No exceptions were filed.

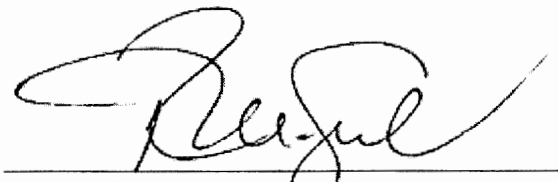
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of June 21, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Isaac Williams.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JUNE 21, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00755-16
AGENCY DKT. NO. 2016-1883

IN THE MATTER OF ISAAC WILLIAMS, CITY OF WILDWOOD, DEPARTMENT OF PUBLIC WORKS AND PUBLIC PROPERTY.

Issac Williams, appellant, pro se

William G. Blaney, Esq., appearing for respondent, (Blaney & Karavan, P.C., attorneys)

Record Closed: April 1, 2017 Decided: May 16, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Appellant, Isaac Williams (Williams or appellant), an employee of respondent, City of Wildwood Department of Public Works and Public Property (City), appeals from the determination of respondent that he be removed for an incident that occurred on February 17, 2015. Respondent argues that he violated: N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; City of Wildwood Workplace Violence Policy; City of Wildwood Employee Policies and Procedures Manual and the Progressive Discipline Policy

"Unauthorized Use of Computers, Internet and Email". The appellant denies the allegations.

PROCEDURAL HISTORY

On September 2, 2015, the City issued a Preliminary Notice of Disciplinary Action suspending appellant without pay indefinitely, beginning February 23, 2015. On November 17, 2015, the City issued a Final Notice of Disciplinary Action sustaining the charges and removing the appellant from his position, effective November 17, 2015. Appellant filed a timely notice of appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on January 8, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on February 2, 2017. Appellant was afforded the opportunity to present an oral summation. The record remained open until March 1, 2017, for the respondent to submit a written summation argument. Also, appellant was afforded the opportunity to present a written summation, if he so chose, by April 1, 2017. On that date, the record closed.

FACTUAL DISCUSSION

Testimony for respondents

Detective John Elwell (Elwell) testified for the respondents that he has been employed by the City of Wildwood for the past ten years as a Police Officer; the last four of which have been as a Detective.

He recalled that on February 17, 2015, he received an assault complaint about an incident that occurred between Williams and Wilmont Jones. Both individuals are Laborers with the City of Wildwood and the specifics were that Williams threatened Jones with a knife while on the job.

On February 20, 2015, Elwell instituted an active investigation and interviewed everyone involved, including Williams and Jones. The investigation was reduced to a report. (R-6 Detective Report). The investigation revealed that another employee told Williams that he was not pulling his fair share of work while shoveling snow. Williams pulled a "pocket knife" out of his pocket and gestured to Jones as if he was going to throw the knife at him several times. Williams acknowledged the incident and agreed that it happened in that manner, but it was done in a playful manner. Williams was charged with aggravated assault, but the charges were summarily dismissed by the County Prosecutor's Office. Elwell did not know why it was dismissed. He also testified that Jones has a significant disability and "you can tell" but do not know what it is. He said he has trouble communicating, verbalizing and also wears a hearing aide.

Herman Seney Jr. (Seney) has been employed by the City of Wildwood Public Works for twenty-two years in Street Maintenance as a Truck Driver.

On February 17, 2015, he went to work because there was a significant snowfall. He was assigned to drive a salt truck with Williams and Jones. At some point, Williams, Jones and another employee were shoveling salt out of the truck. Williams then returned and sat in the truck refusing to do any work. Williams then got out of the truck and said, "You better not say it," to Jones. At that same time, Williams was motioning with a knife in his hand as if he was going to throw the knife at Jones.

Seney also testified that Jones is "slow" and wears hearing aids. Nevertheless, it was obvious that he was "scared." Also, since the incident, Williams has intimidated him as a witness and said, "I'm gonna [sic] get you." On one occasion, Williams kicked the grill of Seney's truck and he "says stuff" to him all the time.

Wilmont Jones (Jones) testified that he has worked at Public Works for a number of years with his brother. He recalled that Williams had a knife in his hand and motioned that he was going to throw a knife at him four to five times. He stated with particularity that he was also "scared" and "I moved back."

During his testimony I observed that Mr. Jones was wearing at least one hearing aid and had some difficulty hearing some of the questions. Also, based on some of his responses, it is my impression that he had difficulty comprehending some of the questions and verbalizing his responses.

Mark D'Amico (D'Amico) had been employed by the City of Wildwood for thirty-one years. He is currently retired from Wildwood City as Superintendent of Public Works. Prior to Public Works, he was employed by Wildwood City as a Police Officer.

He testified that Jones has a disability and has limited communication skills because of that mental disability. Also, he has hearing aids. Both Williams and Jones worked for him as Laborers. He became aware of the incident because Jones and other employees came in his office and told him about it. When they were in his office, it was clear that "Jones was [visibly] upset" by the incident.

He alone drafted the Write-up Notice to Terminate Employee. (R-1). It includes not only the incident involving Wilmont Jones but also use of a cell phone and social media while on city time. He explained that the City of Wildwood Policy Manual states in relevant part that there is to be "no work place violence and no cell phone usage during work." (R-8). As part of the investigation of Williams, there was a search of his open Facebook account. It revealed that on multiple occasions, Williams was accessing Facebook and posting photos while he was at work. (R-12 through R-15). This information was confirmed with Williams' work schedule. (R-35). This was not surprising since Williams has had a significant history of discipline with the City of Wildwood. (R-2).

Testimony for appellant

Isaac Williams had been a Wildwood City Public Works employee for a number of years prior to February 17, 2015. He recalled that on that date, he was called into work due to a snow storm. His work crew was tasked with clearing snow from the public areas around the City of Wildwood. While Williams was seated in the truck, Jones told Williams to get his "black ass out the truck." He admitted that while in the

truck, he pulled a knife out and was gesturing to Jones with the knife with a throwing motion. The knife was initially being used to cut the inserts of his gloves but he never intended any harm toward Jones. He believes that he used good judgment on that day and did nothing wrong. He explained that he never meant to upset Jones and would never hurt him. However, he also believes that other employees put Jones up to this story and are coercing him into getting Williams fired.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of the respondent's witnesses was especially credible and persuasive. Their testimony was clear and concise. It was obvious that they had concerns regarding Williams' actions that included promotion of safety for the individuals working in the Wildwood City Public Works facility and for Jones.

Conversely, Williams' testimony was not credible. Williams' own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. He admitted to gesturing toward Jones with a knife as if he was going to throw it at him. However, more disturbing was that Williams failed to grasp the gravity of his actions. He believes that he used good judgment and did nothing wrong because he was just joking around. Also, Williams' attempt to shift the blame for this incident on other employees was unavailing. The dismissive comment that Jones was being put up to this story was unfounded in fact.

After hearing the testimony and reviewing the evidence, I **FIND,** by a preponderance of credible evidence, that on February 17, 2015, while on the job with the City of Wildwood, Williams pulled out a knife and gestured as if he was going to throw it at another employee, Jones. I **FURTHER FIND,** that Williams used the internet via a cellular telephone while on the job at the City of Wildwood.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

This matter involves a major disciplinary action brought by the

respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; City of Wildwood Workplace Violence Policy; City of Wildwood Employee Policies and Procedures Manual and the Progressive Discipline Policy "Unauthorized Use of Computers, Internet and Email".

Initially, respondent sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a Public Works employee gesturing that he was going to throw a knife at another employee. Also, the same individual was on his cellular telephone during work hours. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of neglect of duty than the image of a Public Works employee gesturing that he was going to throw a knife at another employee. Also, the same individual was on his cellular telephone during work hours. I **CONCLUDE** that appellant's actions constitute neglect of duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with violations of the Other Sufficient Cause; City of Wildwood Workplace Violence Policy; City of Wildwood Employee Policies

and Procedures Manual and the Progressive Discipline Policy "Unauthorized Use of Computers, Internet and Email".

It is noted that the preliminary and final notices of disciplinary action (R-3 and R-4) indicate the sustained charges. Accordingly, I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) will be limited to the regulations, rules and general orders specifically enumerated in the Final Notice of Disciplinary Action. (R-4).

As such, appellant is charged with violating City of Wildwood Workplace Violence Policy. (R-6). The rule provides that:

> The City of Wildwood will not tolerate workplace violence. Violent acts or threats made by an employee against another person or property are cause for immediate dismissal and will be fully prosecuted. This includes any violence or threats made on municipal property, at municipal events or under other circumstances that may negatively affect the Municipality's ability to conduct business.
>
> Prohibited conduct includes, but may not be limited to:
>
> 3. Aggressive, hostile or bullying behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress.
>
> 5. Possession of a weapon while on Municipal property or while on Municipal business, except for those uniformed officers permitted to do so by law. (R-8 pg. 8).

The record reflects in all of the testimony that while on the job for the City of Wildwood, Williams pulled a knife out of his pocket and gestured that he was going to throw it at another employee, Jones. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of the City of Wildwood's Policy on Workplace Violence and the charge is hereby **SUSTAINED**.

Finally, the City of Wildwood Employee Policies and Procedures Manual and the Progressive Discipline Policy address the "Care In Use of Email, Voicemail, Internet and Computer Network Systems". It has a provision that prohibits the recording of "job related incidents or occurrences with any... cellular telephone." (R-8 pg. 26).

R-11 through R-33 are photographs that were placed on Williams' personal Facebook account. The images reflect that Williams photographed incidents and occurrences during his work hours at the City of Wildwood. Also, he posted them to his personal Facebook account during those same times. Appellant did not comply with the City of Wildwood Employee Policies and Procedures Manual involving "Care In Use of Email, Voicemail, Internet and Computer Network Systems". Therefore, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Having met its burden in demonstrating violations of City of Wildwood Workplace Violence Policy and the City of Wildwood Employee Policies and Procedures Manual, "Care In Use of Email, Voicemail, Internet and Computer Network Systems," I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, is hereby **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some

disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that while employed by the City of Wildwood, appellant has been reprimanded and/or received a written warning on eighteen prior occasions and has been suspended on two occasions. Two of the prior incidents were for altercations with other employees. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, the respondent seeks termination of the appellant. Considering the record in the present matter including the appellant's attitude, disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action terminating appellant be **AFFIRMED**.

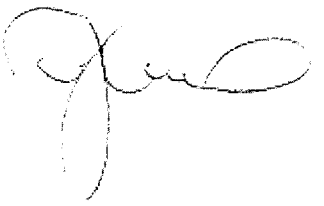
DECISION AND ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause be **SUSTAINED**. I further **ORDER** that the charges of violating the City of Wildwood Workplace Violence Policy and City of Wildwood Employee Policies and Procedures Manual "Care In Use of Email, Voicemail, Internet and Computer Network Systems" be **SUSTAINED**. I **FURTHER ORDER** respondent to terminate appellant from employment with the City of Wildwood.

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.



May 16, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5/16/17

Date Mailed to Parties: 5/17/17

/vj

LIST OF WITNESSES:

For appellant:

Isaac Williams

For respondent:

Detective John Elwell

Herman Seney, Jr.

Wilmont Jones

Mark D'Amico

LIST OF EXHIBITS:

For appellant:

None

For respondent:

R-1 Write-up Notice to Terminate Employee

R-2 Disciplinary Action Log of Williams

R-3 Preliminary Notice of Disciplinary Action

R-4 Final Notice of Disciplinary Action

R-5 Criminal Complaint

R-6 Investigative Report

R-7 Order Dismissing Indictment

R-8 Wildwood City Policy Manual

R-9 Attendance Record

R-10 Directive Receipt

R-11- R-33 Photos and Facebook Postings

R-34 Employee Attendance Record

R-35 Employee Attendance Record

R-36 Employee Attendance Record

R-37 Last Chance Agreement

6-28-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

July 11, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *Timothy Crotto v. Vineland Developmental Center, Department of Human Services* (CSC Docket No. 2017-3522 and OAL Docket No. CSV 7311-17) - **SETTLEMENT**

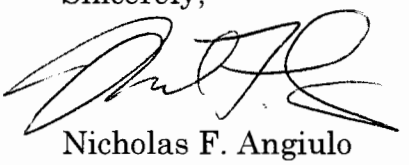
Dear Mr. Scorzetti and Ms. Pinkas:

The appeal of Timothy Crotto, a Residential Services Worker at Vineland Developmental Center, Department of Human Services, of his removal, effective January 13, 2017 on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on June 28, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on June 30, 2016. Accordingly, the time frame for the Commission to make its final decision expires on August 14, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective August 15, 2017.

Sincerely,



Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07311-17

AGENCY DKT. NO. 2017-3522

IN THE MATTER OF TIMOTHY CROTTO,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Michael Scorzetti, Union Representative, IFPTE, Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: June 27, 2017 Decided: June 28, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Timothy Crotto, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case May 22, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 28, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 6/30/17

Date Mailed to Parties: 6/30/17

/nd

OAL DKT. NO. CSV 7311-2017
AGENCY DKT. NO. 20 – 2017 3522

SETTLEMENT AGREEMENT

IN THE MATTER OF

Timothy Cotto

AND

Vineland Developmental Center

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 4/18/17 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. A.O. 4:08 : E-1.3.	Violation of Rule - Removal	1/13/17
2. NJAC 4A:2-2.3(a)6	Conduct unbecoming - Removal	
3. (a)12	Other cause - Removal	
4.		
5.		

B. The Appellant Timothy Cotto withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. A.O. 4:08 : E.1.2 (modified from above)	Sustained	30 days suspension
2. NJAC 4A:2-2.3(a)6+12	Sustained	
3.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 1/13/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Timothy Crotto 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges the Department of Human Services drug policy which prohibits employees from using drugs and understands he is subject to random and reasonable suspicion testing and he is subject to the services of the Employee Advisory Services ~~and the~~ removal on the second infraction of a positive drug test.

Appellant understands behavior leading to his arrest in this matter and a prior arrest in 2010 for drug usage is inappropriate and any continued misbehaviors like this will be cause for termination being sought.

Appellant will be mandated to seek the services of the Employee Advisory Service, which shall be scheduled upon his return to work. He must be compliant to all recommendations.

OAL DKT. NO. CSV 7311-2017

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6/27/17
DATE

Appellant

6/27/17
DATE

Respondent

6/27/17
DATE

ON BEHALF OF Local 195

6/27/17
DATE

Bernadette M. Musiwa, ERC
ON BEHALF OF

OAL DKT. NO. CSV 7311-2017

CERTIFICATION

I, Timothy Cole, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/27/17
DATE

NAME

6-28-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

July 11, 2017

Jason Miller
139 Carver Drive
Wenonah, New Jersey 08090

Nonee Lee Wagner, DAG
Department of Law & Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *Jason Miller v. Department of Transportation* (CSC Docket No. 2017-1150 and OAL Docket No. CSV 15922-16) - **SETTLEMENT**

Dear Mr. Miller and DAG Wagner:

The appeal of Jason Miller, a Highway Operations Technician 1 with the Department of Transportation, of his removal, effective September 15, 2016 on charges, was before Administrative Law Judge Dean J. Buono (ALJ), who issued his initial decision on June 28, 2016 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on June 29, 2016. Accordingly, the time frame for the Commission to make its final decision expires on August 13, 2017.[1] *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

[1] Since the expiration date of August 13, 2017, is a Sunday, the expiration date is actually August 14, 2017 pursuant to *N.J.A.C.* 1:1-1.4.

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective August 15, 2017.

Sincerely,

Nicholas F. ~~Angiulo~~
Deputy Director

Attachment

c: The Honorable Dean J. Buono, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15922-16
AGENCY DKT. NO. 2017-1150

IN THE MATTER OF JASON MILLER,
DEPARTMENT OF TRANSPORTATION.

Jason Miller, petitioner, pro se

Nonee Lee Wagner, Deputy Attorney General, for respondent, Department of Transportation (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: June 23, 2017 Decided: June 28, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 16, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 28, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 6/29/17

Date Mailed to Parties: 6/29/17
/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on June 23, 2017

J-1

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 114
Trenton, New Jersey 08625-0114
Attorney for Plaintiff
State of New Jersey Department
of Transportation

By: Nonee Lee Wagner
Atty ID No. 026612001
Deputy Attorney General
(609) 292-5936

OAL DKT. NO. CSV 15922-2016S
AGENCY REF. NO. 2017-1150
SETTLEMENT AGREEMENT

IN THE MATTER OF

JASON MILLER

AND

**NEW JERSEY DEPARTMENT
OF TRANSPORTATION**

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action, dated September 15, 2016, was for removal pursuant to N.J.A.C. 4A:2-2.3(a)(12).

B. The Appellant Jason Miller withdraws his appeal and request for hearing.

C. The parties have agreed that as of May 12, 2016 Appellant was suspended from the Department of Transportation. The Appellant agrees to a general resignation which shall be effective from May 12, 2016.

D. The New Jersey Department of Transportation, (Respondent), shall amend Appellant's personnel records to conform to the

terms of the settlement. All internal records of the Department of Transportation will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein in paragraph C.2.

F. Appellant agrees not to reapply for employment positions with the New Jersey Department of Transportation.

G. Except for the assessment of Jason Miller's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether know, unknown, vested or contingent, civil, criminal or administrative, except as to worker's compensation claims addressed in paragraph C. 4. Of this agreement, in law or equity against the State of New Jersey, the New Jersey Department of Transportation, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes,

unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation not addressed in paragraph C.4 of this agreement or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

K. The parties agree this can be executed in counterparts.

5-25-17
DATE

Jason Miller, Pro Se, Appellant

6/21/17
DATE

DIANNE BARRETTS, MANAGER
NJDOT EMPLOYEE RELATIONS

6/20/17
DATE

APPROVED AS TO FORM:

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY

By:
NONEE LEE WAGNER
Deputy Attorney General

CERTIFICATION

I, Jason Miller, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that is this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-25-17
DATE

Jason Miller

7-13-17

STATE OF NEW JERSEY

In the Matter of Adeniyi Adediran
Greystone Park Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2017-1175
OAL DKT. NO. CSV 16231-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 16231-16
AGENCY DKT. NO. 2017-1175

IN THE MATTER OF ADENIYI ADEDIRAN,
DEPARTMENT OF HUMAN SERVICES,
GREYSTONE PARK PSYCHIATRIC HOSPITAL.

Nancy Mahony, Esq., for appellant (Law Office of Nancy Mahony, attorney)

Elizabeth A. Davies, Deputy Attorney General, for respondent (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: June 29, 2017 Decided: June 29, 2017

BEFORE **DANIELLE PASQUALE,** ALJ:

This matter concerns the appeal of Adeniyi Adediran from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 25, 2016 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 29, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: June 29, 2017

Date Mailed to Parties: JUN 30 2017

CHIEF ADMINISTRATIVE LAW JUDGE

/rr
Enc.

OAL DKT. NO. CSV 16231-16

SETTLEMENT AGREEMENT

IN THE MATTER OF
ADENIYI ADEDIRAN
AND
GREYSTONE PARK PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated October 6, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-2 Neglect of duty, loafing, idleness, or willful Failure to devote attention to tasks which Could result in anger to person or property.	Removal	August 3, 2016
2. Admin. Order 4:08 E-1 Violation of a rule, regulation, policy Procedure, order, or administrative Decision.	Removal	August 3, 2016
3. Admin. Order 4:08 C-8 Falsification: Intentional misstatement of Material fact in connection with work. Employment, application, attendance or in Any record, report, investigation, or other Proceeding.	Removal	August 3, 2016

4. N.J.A.C. 4A:2-2.3(a)6	Removal	August 3, 2016
Conduct unbecoming a public employee.		
5. N.J.A.C. 4A:2-2.3(a)12	Removal	August 3, 2016
Other sufficient causes.		

B. The parties have agreed to the following:

The Appellant, Adeniyi Adediran withdraws his appeal for a hearing and the Respondent Appointing Authority, Department of Human Services agrees that the following result will occur with regard to each charge:

The Final Notice of Disciplinary Action dated October 6, 2016

Charge	Disposition
1. Admin. Order 4:08 B-2	4 month suspension effective August 3, 2016.
2. Admin. Order 4:08 E-1	4 month suspension effective August 3, 2016.
3. Admin. Order 4:08 C-8	4 month suspension effective August 3, 2016.
4. N.J.A.C. 4A:2-2.3(a)6	4 month suspension effective August 3, 2016.
5. N.J.A.C. 4A:2-2.3(a)12	4 month suspension effective August 3, 2016.

C. The parties have agreed to the following:

The Appellant agrees to one 4 month suspension and shall not receive any back pay as a result of this agreement.

1. To date, appellant has served a total of 4 months without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: No back pay.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: voluntary leave of absence without pay.
4. Appellant will return to the position of Human Services Technician.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability

benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

06/28/2017
DATE

Adeniyi A.
Adeniyi Adediran, Appellant

6/28/17
DATE

Nancy Mahony
Nancy Mahony, Esq.
ON BEHALF OF Appellant

6/28/17
DATE

James L. Frey
ON BEHALF OF Respondent

6/28/17
DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Adeniyi Adediran, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

06/28/2017 — DATE

Adeniyi A. — Adeniyi Adediran

7-13-17

STATE OF NEW JERSEY

In the Matter of Sarah Buckner,
City of East Orange,
Police Department

CSC DKT. NO. 2017-1356
OAL DKT. NO. CSV 16943-16 and
OAL DKT. NO. PTC 16942-16
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: July 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

SARAH BUCKNER,
Petitioner,
v.
ESSEX COUNTY COLLEGE PUBLIC SAFETY ACADEMY,
Respondent.

OAL DKT. NO. PTC 16942-16

OAL DKT. NO. CSV 16943-16

IN THE MATTER OF SARAH BUCKNER, CITY OF EAST ORANGE, POLICE DEPARTMENT

Bette R. Grayson, Esq. for Sarah Buckner (Grayson & Associates, LLC)

Joy B. Tolliver, Esq. for Essex County College Public Safety Academy

Marlin G. Townes III, Esq. Assistant Corporation Counsel

Record Closed: April 13, 2017 Decided: April 18, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

On November 7, 2016 the above referenced matters were transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-

1 to-15 and N.J.S.A. 52:14F 1 to- 13. A telephone prehearing was conducted, during which time the parties agreed on a hearing date. During the pendency of the March 10, 2017 hearing the parties resolved all issues in dispute. A Stipulation indicating the terms of settlement was signed by all parties which is attached and made part hereof.

I have reviewed the record and terms of the Stipulation of Settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION** and the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Police Training 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.

In accordance with the Order of the Consolidation and Predominant Interest dated December 9, 2016, the file will be sent to the Police Training Commission to consider the Stipulation of Settlement in regard to the dismissal from the police training academy. The Police Training Commission will then forward the matter to the Civil Service Commission to consider the Stipulation of Settlement.

April 18, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties:

ljb

COMPLETE AND PERMANENT SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into as of _____, by and between SARAH BUCKNER, (hereinafter "Buckner"), ESSEX COUNTY COLLEGE PUBLIC SAFETY ACADEMY, (hereinafter "the County"), and the CITY OF EAST ORANGE, (hereinafter "East Orange").

WHEREAS, Buckner, was employed by the City of East Orange Police Department and was attending the Essex County College Public Safety Academy, in connection therewith as per this agreement up until September 20, 2016, wherein Buckner was dismissed for failure to successfully complete firearms training; and

WHEREAS, Buckner, the County, and East Orange, desire to resolve all outstanding issues;

NOW THEREFORE, in consideration for the promises and conditions set forth herein, the County, Buckner, and East Orange, agrees as follows:

1. TERMS.

a. Buckner agrees, in the future, not to apply for any employment with East Orange, nor reapply to the Essex County College Public Safety Academy.

b. Buckner shall be permitted to attend, at her own expense, or at the expense of any agency that employs her, Passaic County Police Academy and Bergen County Police Academy.

c. This Agreement is entered into with the understanding that it is **without precedent** and shall not be referred to in any other case or matter between the County or East Orange or any employee of the County or of the City.

2. COMPLETE RELEASE AND CONVENANT NOT TO SUE.

In consideration of the Agreement hereinabove, Buckner, her heirs, assigns and agents (hereinafter referred to collectively as "Buckner") voluntarily enter into this Agreement, and Buckner certifies that she has not been threatened or coerced into signing this Agreement, on the terms which follow:

a). Sarah Buckner hereby releases, waives and discharges Essex County College Public Safety Academy and the City of East Orange, their affiliated departments, and their officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, or action or writ of any kind, nature, character or description that Buckner had, now has, or may in the future have against the Releasees on account of, or arising out of, any matter or thing that has happened, developed or occurred prior to the date of this Agreement in connection with her attending Essex County College Public Safety Academy through her employment with the City of East Orange. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under contract, express or implied, arbitration, common law claim, Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees, costs, and back pay.

b). Sarah Buckner agrees not to file any claim, charge, or complaint of any nature with the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC), New Jersey Public Employment Relations Commission (PERC), Civil Service

Commission, or with any other Federal, State or local court or administrative agency against the County or East Orange or the Releasees, including a claim for workers compensation benefits.

c). If Sarah Buckner violates this Complete Release by filing any claim, charge, or complaint as specifically prohibited above, Buckner agrees to pay all costs and expenses of defending against the suit incurred by Essex County College Public Safety Academy and the City of East Orange and/or the Releasees, including reasonable attorney's fees.

3. CONSULTATION WITH ATTORNEY.

Buckner has consulted with her attorney with respect to this Agreement and has reviewed with her Attorney all of the terms and conditions of this Agreement prior to executing this Agreement. Buckner expressly represents that she is satisfied with the services of her attorneys.

4. COMPLETE AGREEMENT.

This Agreement contains the entire agreement between Buckner, Essex County College Public Safety Academy, and the City of East Orange, and each of them, with respect to the subject matter, and supersedes all prior agreements, understandings, and/or dealings, whether written or otherwise, with respect to the same subject matter. There is no agreement on the part of Essex County College Public Safety Academy or the City of East Orange to do anything other than what is expressly stated in this Agreement. This Agreement shall, in all respects, be interpreted, enforced and governed by the Laws of the State of New Jersey. It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice as an offer to other employees.

5. **ATTESTATION.**

Buckner represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Buckner represents and warrants that she enters into this agreement voluntarily, of her own will, without any pressure or coercion from any person or entity including, but not limited to, the County and East Orange.

ATTESTATION

Sarah Buckner

Witness to Sarah Buckner

ESSEX COUNTY COLLEGE

Bibi Taylor, Chair
Essex County College Board of Trustees

ESSEX COUNTY COLLEGE

A. Zachary Yamba,
Acting President

CITY OF EAST ORANGE

William Senande, City Administrator

CITY OF EAST ORANGE

Sheilah Coley, Public Safety Director

CITY OF EAST ORANGE

Phyllis Bindi, Chief of Police

7-13-17

STATE OF NEW JERSEY

In the Matter of Matthew Calio
Camden County,
Department of Corrections

CSC DKT. NO. 2016-3090
OAL DKT. NO. CSV 04011-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Matthew Calio, County Correction Officer, Camden County, Department of Corrections, 30 calendar day suspension, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on May 30, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

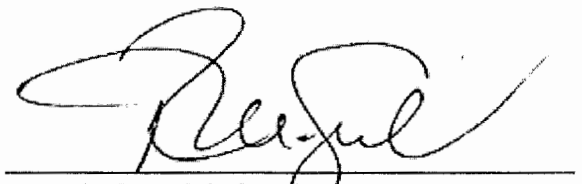
ORDER

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

Re: Matthew Calio

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 04011-16
AGENCY DKT. NO. 2016-3090

IN THE MATTER OF MATTHEW CALIO,
CAMDEN COUNTY DEPARTMENT
OF CORRECTIONS.

William B. Hildebrand, Esq. appearing for appellant, Matthew Calio (Law Offices of William B. Hildebrand, attorneys)

Antonieta P. Rinaldi, Assistant County Counsel, appearing for respondent, Camden County Department of Corrections (Christopher A. Orlando, County Counsel, attorney)

Record Closed: April 13, 2017 Decided: May 30, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Appellant, Matthew Calio (Calio or appellant), an employee of respondent, Camden County Department of Corrections (DOC), appeals from the determination of respondent that he be suspended for thirty days for an incident on August 24, 2015. Respondent argues that he violated: N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C.

4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty and 3.2 Security. The appellant denies the allegations and contends that he acted appropriately.

PROCEDURAL HISTORY

On September 21, 2015, the DOC issued a Preliminary Notice of Disciplinary Action suspending appellant without pay for thirty days. On February 17, 2016, the DOC issued a Final Notice of Disciplinary Action sustaining the charges and suspending the appellant from his position effective February 18, 2016, through March 18, 2016. Appellant filed a timely notice of appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on March 14, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on October 24, 2016. The record remained open until December 1, 2016, for the appellant to renew a Motion to Consolidate with CSV 05868-2016. The motion was received on December 5, 2016, and denied on February 10, 2017. Closing summations were ordered on April 7, 2017, with an extension granted to the parties until April 13, 2017, and the record closed on that date.

FACTUAL DISCUSSION

Testimony

Warden Karen Taylor testified for the respondent that she has been employed by the Camden County Correctional Facility for twenty years and had been appointed Warden on October 23, 2016. At time of this incident she maintained the rank of Captain.

On August 24, 2015, she noticed inmates sitting outside the kitchen and "disrupting activities." She contacted her subordinate officer to address the significant "security concern". She showed a video of the incident wherein Calio remained seated at a hallway desk immediately outside the kitchen. The video also showed an inmate sitting outside of the kitchen door next to Calio's desk, within arm's reach of Calio. (R-3 at 4:48-4:58 inmate on milk crate). She explained that Calio was told a week prior that he was not to allow inmates in the hallway. (R-2). As a result, a complaint was lodged by Lt. Sweeten against Calio. (R-4).

The violations in the complaint include: N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. The warden explained that the allegations of insubordination were because of the safety concern for inmates in a hallway around the kitchen. Calio was told about this concern on August 19, 2015, in the kitchen passbook and chose to ignore it. (R-4). She explained that it was common for inmates to take advantage of officers and that usually leads to a "bad" end result. He was charged with violations of the C.C.C.F.: 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty and 3.2 Security. (R-6).

With respect to violations of the C.C.C.F. General Orders, she explained the duties of a Kitchen Officer and noted that there was a violation of Order Number 8, which provides the need for security and control for civilians. (R-7). She also indicated violations of the C.C.C.F.'s General Order 73: Personal Conduct of Employees. Pointing to regulation numbers four and twelve, she noted that employees will comply with all departmental rules and regulations and all laws of the United States and the State of New Jersey, and that all employees are responsible to know all departmental policies as well as county policies and act in accordance with them, respectively. (R-8).

Finally, the Warden indicated that all sworn personnel will conduct themselves in accordance with the Constitution of the United States, the New Jersey Constitution and all applicable laws and rules enacted or established pursuant to legal authority. Sworn

personnel are also obligated to follow all other departmental and county policies. By not following the General Orders, Calio was in violation of the C.C.C.F.'s General Order number 74. (R-9).

After the disciplinary charges lodged by Lt. Sweeten were explained to Calio, he apologized and said that the "inmate was working" and that he was permitted to be in the hallway. It was at this time, that he was told about another disciplinary issue regarding his pat-down searches of inmates. He explained that he would improve his pat searches.

Warden Owens was disappointed at Calio because he disregarded her order and the safety concern for the facility. The kitchen is a place where a lot of contraband exists (kitchen cutlery and utensils) and there is a high security risk if any of the contraband should make its way into the general population. It was obvious that he failed to comprehend the gravity of his actions/inactions.

On cross-examination, Warden Taylor testified that on the twenty-fourth, she saw inmates in the hallway and told Lt. Sweeten to address her concern and he did. (R-4). He instructed Calio to put the order in the passbook and not to have inmates in the hallway. (R-2). Also, the person on the crate was a runner. His job as it related to the kitchen was to get trays off the elevator and transfer them to the kitchen staff. She indicated that at one point there were "several inmates" in the hallway, not just the runner, which is unacceptable.

Matthew Calio has been a Correction Officer for Camden County for sixteen years. He was hired on March 12, 2001. The facility works on twelve hour shifts.

He introduced a number of character exhibits including: (A-1 Basic Training Certificate), (A-2 Oath of Office), (A-3 Prosecutor's Letters), (A-4 Service Honor), (A-5 Employee of Month), (A-6 Certificate of Appreciation), (A-7 Pay Records (perfect attendance), (A-8 Attendance Awards), (A-9 Performance Evaluations, (A-10 Warden's Award 5/2001), (A-11 Officer of the Year 10/2011), (A-12 Unemployment

Tribunal), (A-13 Pass Book note from August 19, 2015), (A-14 Certificate of Appreciation), (A-15 Volunteer for 911 request).[1]

In August 2015, Calio was assigned to a kitchen "bid" post. A "bid" post is an officer's personal selection of posting but bid by that officer. On August 19, 2015, he made the first entry in the passbook. That was the result of a discussion with Captain Taylor regarding inmates in the hallway outside the kitchen. It was common for inmates be in the hallway, "playing nerf football" but Captain Taylor wanted everyone in the kitchen for security reasons, even the runner who is always in the vestibule doors.

The common practice at the time was to have the runner in the hallway to make the process of unloading the trays from the elevator. However, he believed, the runner was not blocking the door or goofing off and he is still in "disbelief" that it is a breach of security. Calio was adamant that he "did not agree" with Taylor. He thought when he was given the order that it was meant only for people who weren't working. The runner was working. It was simply a "misunderstanding". He said that he apologized for the "misunderstanding" but believed he was complying with the order. Also, he has already been punished by being assigned to "three south", which is an undesirable post.

He believes that he used good judgment on that day and did nothing wrong. He explained that all the corrections officers always performed their duties in the same manner as he had done. He was not insubordinate because he believed "all inmates in kitchen" meant only the inmates who were not working at the time.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div.1961). A credibility determination

[1] At the hearing, Calio's exhibits were marked "R". However, for ease of this Decision, they have been changed to "A" to represent the Appellant.

requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of Warden Taylor was especially credible and persuasive. Her testimony was clear and concise. It was obvious that her concerns regarding inmates in the hallway were to promote the safety of the inmates and individuals working in the facility.

Conversely, Calio's testimony was not credible. Calio's own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. It was disturbing that Calio failed to grasp the gravity of his actions. He believes that he used good judgment and did nothing wrong and explained that the corrections officers always performed their duties in that manner. He was not insubordinate because he believed "all inmates in the kitchen" meant only the ones who were not working. These comments deeply concerned the undersigned because it was apparent that Calio did not comprehend the fact that dangerous contraband (knives, forks, spoons, kitchen utensils) exist in the kitchen and pose a significant threat to all personnel and inmates in the facility if it were to find its way into general population. Calio's takes the position that other corrections officers always performed their duties in the same manner, so it is acceptable.

After hearing the testimony and reviewing the evidence, I **FIND,** by a preponderance of credible evidence, that on August 19, 2015, Calio made an entry in

the passbook that all inmates must be in the kitchen. I **FURTHER FIND,** on August 24, 2015, Warden Taylor noticed inmates sitting outside kitchen and "disrupting activities." I **FURTHER FIND,** that a video showed an inmate sitting outside the kitchen door next to Calio's desk, within arm's reach of Calio.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C.4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104

(App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming); N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty); N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause); Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty and 3.2 Security.

Regarding the charge of insubordination, to the extent that appellant is charged with violation of Rule of Conduct 1.4, which addresses Insubordination and Serious Breach of Security, consideration of such violation will be addressed in concert with the current analysis. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> 'Insubordination' is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, appellant's disregard of a direct order is evidence of insubordination. His argument that it was simply a "misunderstanding" is not lucid nor comprehensible. He was given a direct comprehensible order and chose his own convenient interpretation. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of insubordination. Charges of violations of N.J.A.C. 4A:2-2.3(a)(2) and Rule of Conduct 1.4 are hereby **SUSTAINED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a public employee disregarding a direct order and allowing inmates in a correctional facility to do as they pleased. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of such is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal

standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R. 2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R. 2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of neglect of duty than the image of a public employee in a correctional facility failing to follow a direct order from a superior officer. I **CONCLUDE** that appellant's actions constitute neglect of duty, and the charge is hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with violations of the Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty and 3.2 Security.

It is noted that the Preliminary and Final Notices of Disciplinary Action (R-1) indicate the sustained charges and conclude with the words "et al." Obviously, such amorphous terminology taken literally would constitute insufficient notice to appellant of the charges faced, and would be impossible to prepare to defend. Accordingly, I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) will be limited to the regulations, rules and General Orders specifically enumerated in the Final Notice of Disciplinary Action (R-1). Additionally, Rules of Conduct 1.2, 1.3, and 1.4 have been addressed within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(2), (6) and (7).

As such, appellant is charged with violating Rule of Conduct 1.1, Violations in General, which is a charge of "Failure to comply with regulations, orders, directives or practices of the department, whether verbal or written by the Warden or his designee." (R-6). The rule provides that:

> Any employee who violates any rule, regulation, procedure, order or directive, either by an act of commission or omission, whether stated in this manual or elsewhere, or who violates the standard operating procedure as dictated by departmental practice, is subject to disciplinary action in accordance with the New Jersey Department of Personnel (Civil Service) rules and regulations. Disciplinary actions shall be based on the nature of the rule, regulation, procedure, order, or directive violated, the severity and circumstances of the infraction and the individual's record of conduct.

Violation of this rule would seem to be implicated by the appointing authority's allegations of violations of General Orders 73, and 74 as well as Post Order 8.

Post Order 8 (R-7) addresses the duties of a kitchen officer. Section 4 of this order states that "Provides security and control for civilians."

The record reflects in the testimony and video that a lack of control of the inmate seated in the hallway. Appellant did not fulfill the requirements of General Order 8. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of Post Order 8 and the charge is hereby **SUSTAINED**.

General Order 73 (R-8) addresses "Personal Conduct of Employees." Captain Taylor testified that appellant violated sections 4 and 12, of this order.

Section 4 states that "Employees will comply with all departmental rules and regulations and all laws of the United States and the State of New Jersey." The record reflects that appellant did not comply with the General Order he was accused of violating. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Section 12 states that, "Employees are responsible to know all departmental policies as well as county policies and act in accordance with them." Irrespective of whether the appellant was aware or unaware of the specific requirement of Post Order 8, ultimately it is his responsibility to know. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Based on the foregoing, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of General Order 73.

General Order 74 (R-9) addresses "Professional Code of Conduct." Testimony revealed that appellant violated sections one of this order.

Section 1 states that, "Sworn personnel will conduct themselves in accordance with the Constitution of the United States, the New Jersey Constitution and all applicable laws and rules enacted or established pursuant to legal authority. Sworn personnel are also obligated to follow all other departmental and county policies." The evidence in the record demonstrates that appellant not only violated Post Order 8 but also N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming); N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty) and therefore this supports a finding of a violation of this section. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Based on the foregoing, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of General Order 74.

Having met its burden in demonstrating violations of General Orders 73 and 74, as well as Post Order 8, I **CONCLUDE** that the appointing authority has demonstrated a violation of Rule of Conduct 1.1 Alleged violations of Rules of Conduct 1.2 and 1.4 having already been addressed, I **FURTHER CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, is hereby **SUSTAINED**.

Finally, the respondent sustained charges of 2.10 Inattentiveness to Duty and 3.2 Security.

2.10 Inattentiveness to Duty is defined as "Personnel shall not engage in any activities or personal business which could cause them to neglect or be inattentive to duty." (R-6). I find nothing in the record to support a claim that would substantiate this charge, therefore I **CONCLUDE** that the charge of a violation of 2.10 Inattentiveness to Duty, is hereby **DISMISSED**.

3.2 Security is defined as "[p]ersonnel shall exercise a scrupulous regard for security in their dealings with inmates and with regard to the Correctional Facility in general. Any act of commission or omission tending to undermine security shall constitute a breach of security." (R-6). I find the record to support a claim that would clearly substantiate this charge. The fact that appellant continues to fail to see the security concern in an inmate seated at such a proximate location to the security desk is troublesome. Therefore, I **CONCLUDE** that the charge of a violation of 3.2 Security, is hereby **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has been reprimanded on two occasions for Neglect of Duty and suspended on two occasions for Conduct Unbecoming. The first

suspension was for Three days and the second for Fifteen days. Despite this fairly unremarkable disciplinary record, it is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, the respondent seeks a Thirty-Day suspension. Considering the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action suspending appellant for Thirty Days without pay was justified.

DECISION AND ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming); N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty); N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) be **SUSTAINED**. I further **ORDER** that the charges of violating Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination and 3.2 Security also be **SUSTAINED**. The charge of 2.10 Inattentiveness to Duty is hereby **DISMISSED**. I **FURTHER ORDER** respondent's imposition of a Thirty-Day suspension without pay is **AFFIRMED**.

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.

May 30, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 5/30/17

Date Mailed to Parties: 5/30/17

/vj

LIST OF WITNESSES:

For Appellant:

Matthew Calio

For Respondent:

Warden Karen Taylor

LIST OF EXHIBITS:

For Appellant:

A-1 Basic Training Completion Certificate
A-2 Oath of Office
A-3 Prosecutor Letters
A-4 Service Honor (five years)
A-5 Memorandum: Employee of the Month, dated August 20, 2009
A-6 Certificate of Appreciation (ten years)
A-7 Excerpts from Pay Records
A-8 Perfect Attendance Awards
A-9 Performance Evaluations 2014
A-10 Warden's Award
A-11 Officer of the Year Award
A-12 Unemployment Appeals Examiner's Decision
A-13 Kitchen Pass-on-Notes
A-14 Certificate of Appreciation
A-15 Memorandum: Volunteer

For Respondent:

R-1 Preliminary Notice of Disciplinary Action (31A), dated September 21, 2015 and Final Notice of Disciplinary Action (31B), dated February 17, 2016

R-2 Notes form Kitchen Pass-On-Book by Calio, dated August 19, 2015

R-3 Video

R-4 Supervisor's Complaint Report Authored by Lt. Harry Sweeten, dated August 24, 2015

R-5 General Incident Report (Rebuttal) by Calio, dated August 25, 2015

R-6 Camden County Department of Corrections Rules of Conduct

R-7 Camden County Department of Corrections Post Order Number 008 Kitchen Officer

R-8 Camden County Department of Corrections General Order Number 73 Personal Conduct of Employees

R-9 Camden County Department of Corrections General Order Number 74 Professional Code of Conduct

R-10 Calio Chronology of Discipline

7-13-17

STATE OF NEW JERSEY

In the Matter of Matthew Calio
Camden County,
Department of Corrections

CSC DKT. NO. 2016-3565
OAL DKT. NO. CSV 05868-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Matthew Calio, County Correction Officer, Camden County, Department of Corrections, 150 calendar day suspension, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on May 30, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, increasing the 150 calendar day suspension to a 180 calendar day suspension, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision. The Commission notes this increase in penalty is warranted based on the appellant's egregious misconduct, his failure to appreciate the seriousness of his actions as well as his previous disciplinary history.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified and increases the 150 calendar day suspension to a 180 day calendar day suspension. The Commission therefore dismisses the appeal of Matthew Calio.

Re: Matthew Calio

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05868-16
AGENCY DKT. NO. 2016-3565

IN THE MATTER OF MATTHEW CALIO,
CAMDEN COUNTY DEPARTMENT
OF CORRECTIONS.

William B. Hildebrand, Esq. appearing for appellant, Matthew Calio (Law Offices of William B. Hildebrand, attorneys)

Antonieta P. Rinaldi, Assistant County Counsel, appearing for respondent Camden County Department of Corrections (Christopher A. Orlando, County Counsel)

Record Closed: April 13, 2016 Decided: May 30, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Appellant, Matthew Calio (Calio or appellant), an employee of respondent, Camden County Department of Corrections (DOC), appeals from the determination of respondent that he be suspended for One Hundred Fifty (150) days for an incident on August 25, 2015. Respondent argues that he violated: N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7)

Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; General Order 73; General Order 74; General Order 79 and Post Order 8. The appellant denies the allegations and contends that he acted appropriately.

PROCEDURAL HISTORY

On October 1, 2015, the DOC issued a Preliminary Notice of Disciplinary Action suspending appellant without pay for 150 days. On March 25, 2016, the DOC issued a Final Notice of Disciplinary Action sustaining the charges and suspending the appellant from his position effective March 25, 2016, through August 21, 2016. Appellant filed a timely notice of appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on April 15, 2016. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on October 24, 2016. The record remained open until December 1, 2016, for the appellant to renew a Motion to Consolidate with CSV 04011-2016. The motion was received on December 5, 2016, and denied after oral argument. Closing summations were ordered for April 13, 2017, and the record closed.

FACTUAL DISCUSSION

Testimony

Sergeant Robert Parker (Parker) testified for the respondents and has been employed by the Camden County Department of Corrections for seventeen and one-half years. He is currently the Training Commander and on average performs twenty-five to thirty-five pat searches per day. He explained that the purpose of a pat search is to limit contraband entering and moving through the facility.

He demonstrated a pat search on another correction officer. The process can best be described as a thorough searching and touching of the body and extremities including under the arms and between the legs, to determine if any items are attempting to be concealed.

Warden Karen Taylor (Taylor) also testified for the respondent. She has been employed by the Camden County Correctional Facility for twenty years and had been appointed Warden on October 23, 2016. At time of this incident she maintained the rank of Captain.

On September 2, 2015, Captain Blackwell noticed Officer Calio was poorly searching inmates and said she would handle it. However, Warden Taylor reviewed the institutional video of the incident which was dated, September 2, 2015. Calio was observed from 7:08 a.m.-11:58 a.m. She articulated that it showed poor searches or no searches at all on inmates coming in or out of the kitchen area. (R-2). In fact, there was more than forty no searches, more than forty improper searches and only six acceptable pat searches.

The video was played and paused at several instances throughout the Warden's testimony:

7:15 a.m. air patdown (airpat); touches back and slides down outside of the hips)
7:25 a.m. "air pat" but did not check juice containers
7:27 a.m. "air pat" six inmates
7:32 a.m. no search at all

The Warden stated that what is "most shocking" is that Calio doesn't even get up from his chair. "Looking at the video five hours was enough". She was "very shocked" at what she saw. She was clear that Calio "was not being harassed" by her. In fact, she was simply looking out for the safety of the facility. "I'll make him do his job." "Failure to do your job will not be tolerated." The significant discipline requested was because Calio had been counseled about his poor search techniques on August 25,

2015, and apologized for it. Then, on September 2, his poor performance continued, evidencing that Calio simply "refused to do what he was told".

On cross-examination, the Warden conceded that inspection of juice containers and food trays is not specifically articulated in (R-9). However, it is mentioned in (R-12). Also, she does not know if any contraband got passed Calio. But, the only reason she does not know is because Calio did not do his job effectively to uncover any items. "Laziness is the case of improper searches and discipline has corrected it over the past year."

Matthew Calio has been a Correction Officer for Camden County for sixteen years. He was hired on March 12, 2001. The facility works on twelve hour shifts.

He introduced several character exhibits including: (A-1) Basic Training Certificate, (A-2) Oath of Office, (R-3) Prosecutor's Letters, (A-4) Service Honor, (A-5) Employee of Month, (A-6) Certificate of Appreciation, (A-7) Pay Records (perfect attendance), (A-8) Attendance Awards, (A-9) Performance Evaluations, (A-10) Warden's Award 5/2001, (A-11) Officer of the Year 10/2011, (A-12) Unemployment Tribunal, (A-13) Pass Book note from August 19, 2015, (A-14) Certificate of Appreciation, (A-15) Volunteer for 911 request.[1]

In August and September 2015, Calio was assigned to his kitchen "bid" post. Bid post are for officers to choose the post and bid on it. He completes 250 pat down searches per day and several thousand pat down searches per month. He never had a problem with contraband getting in the facility.

"Pat searches are a dangerous activity." "When you bend down to search it puts you in a very difficult and compromising position." He conceded that if you do not properly search individuals that is also dangerous. He recalled being confronted by Taylor in August about the quality of his pat down searches. His response to her was "Ma'am, I apologize. I'll do my best." After that he stated that he tried to do his best.

[1] Appellant submitted Exhibits labelled with "R". For ease of reading, the Exhibits are being referred to as "A" for appellant.

As a defense, Calio claims that there is no remedial training in pat down searches. He claims that he needs a refresher course. There are other aspects of law enforcement that require continued training, but not for searches. However, he admitted to violating Post Order Number 8 (R-9) which requires "searches of all inmates arriving/departing from the kitchen." He claimed that he didn't search everyone because that is "what the guys do". In fact, he reiterated that he did not make full searches of inmates "for his own safety" but "it gets done the way they want it now."

He believes that he used good judgment on that day and did nothing wrong; explaining that all the correction officers performed their duties the same way. He "didn't conduct proper pat searches for his own safety" and he lacked proper continued training.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of Taylor was especially credible and persuasive. Her

testimony was clear and concise. It was obvious that her concerns regarding inmate searches were to promote the safety of the inmates and individuals working in the facility.

Conversely, Calio's testimony was not credible. Calio's own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. He admitted to not searching inmates but more disturbing is that Calio failed to grasp the gravity of his actions. He believes that he used good judgment and did nothing wrong. He explained that all the correction officers always performed their searches of inmates in the same manner as he had done. He "didn't conduct proper pat searches for his own safety" and his lack of access to training. Calio's attempt to shift the blame for this incident on his employer is unavailing. The dismissive comment that "it gets done the way they want it now" deeply concerns the undersigned.

After hearing the testimony and reviewing the evidence, I **FIND,** by a preponderance of credible evidence, that on August 25, 2015, Calio was counseled that the searches he was making on inmates were not proper. I **FURTHER FIND,** on September 2, 2015, Calio was observed failing to search inmates and making improper searches.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil-service employee who commits a

wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; General Order 73; General Order 74; General Order 79 and Post Order 8.

Initially, Calio has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties. Calio testified that he failed to search inmates entering and leaving the kitchen. Also, the record reflects in the testimony and video Calio performing "airpats" on some inmates and on many occasions, there was no search of some inmates. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of Incompetency, Inefficiency,

Failure to Perform Duties. Charges of violation of N.J.A.C. 4A:2-2.3(a)(1) are hereby **SUSTAINED**.

Regarding the charge of Insubordination, to the extent that appellant is charged with violation of Rule of Conduct 1.4, which addresses Insubordination and serious breach of security, consideration of such violation will be addressed in concert with the current analysis. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> 'Insubordination' is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, appellant was counseled by Taylor in August about the quality of his pat down searches. His response to her was "Ma'am, I apologize. I'll do my best." After that, his testimony was that "he tried to do his best." Yet, he also testified that he "didn't conduct proper pat searches for his own safety" and his lack of access to training. His disregard of a direct order is evidence of insubordination. His argument to the contrary is not lucid nor comprehensible. Accordingly, I **CONCLUDE** that

the appointing authority has met its burden in demonstrating support to sustain a charge of Insubordination. Charges of violations of N.J.A.C. 4A:2-2.3(a)(2) and Rule of Conduct 1.4 are hereby **SUSTAINED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a Correction Officer not searching or performing an "airpat" on an inmate in a prison. Also, the same officer disregarding a direct order and allowing inmates in a correctional facility to walk freely through the institution without searches. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty"

signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of neglect of duty than the image of a correction officer in a correctional facility failing to search inmates. I **CONCLUDE** that appellant's actions constitute neglect of duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with violations of the Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; General Order 73; General Order 74; General Order 79 and Post Order 8.

It is noted that the Preliminary and Final Notices of Disciplinary Action (R-1) indicate the sustained charges and conclude with the words "et al." Obviously, such amorphous terminology taken literally would constitute insufficient notice to appellant of the charges faced, and would be impossible to prepare to defend. Accordingly, I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) will be limited to the regulations, rules and general orders specifically enumerated in the Final Notice of Disciplinary Action (R-1). Additionally, Rules of Conduct 1.2, 1.3, and 1.4 have been addressed within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(2), (6) and (7).

As such, appellant is charged with violating Rule of Conduct 1.1, Violations in General, which is a charge of "Failure to Comply with Regulations, Orders, Directives or Practices of the Department, whether verbal or written by the Warden or his designee." (R-6). The rule provides that:

> Any employee who violates any rule, regulation, procedure, order or directive, either by an act of commission or omission, whether stated in this manual or elsewhere, or who violates the standard operating procedure as dictated by departmental practice, is subject to disciplinary action in accordance with the New Jersey Department of Personnel (Civil Service) rules and regulations. Disciplinary actions shall be based on the nature of the rule, regulation, procedure, order, or directive violated, the severity and circumstances of the infraction and the individual's record of conduct.

Violation of this rule would seem to be implicated by the appointing authority's allegations of violations of General Orders 73, 74, 79 and Post Order 8.

Post Order 8 (R-9) addresses the duties of a kitchen officer. Section 4 of this order states that "Provides security and control for civilians."

The record reflects in the testimony and video that some of the inmates were searched and others were not. Also, in many case the "airpat" search was performed. Appellant did not fulfill the requirements of Post Order 8. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of Post Order 8 and the charge is hereby **SUSTAINED**.

General Order 73 (R-10) addresses "Personal Conduct of Employees." Captain Taylor testified that appellant violated Sections 4 and 12, of this order.

Section 4 states that "Employees will comply with all departmental rules and regulations and all laws of the United States and the State of New Jersey." The record reflects that appellant did not comply with the General Order he was accused of violating. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Section 12 states that, "Employees are responsible to know all departmental policies as well as county policies and act in accordance with them." Irrespective of whether the appellant was aware or unaware of the specific requirement of Post Order 8, ultimately it is his responsibility to know. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Based on the foregoing, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of General Order 73.

General Order 74 (R-11) addresses "Professional Code of Conduct." Testimony revealed that appellant violated Section 1 of this order.

Section 1 states that, "Sworn personnel will conduct themselves in accordance with the Constitution of the United States, the New Jersey Constitution and all applicable laws and rules enacted or established pursuant to legal authority. Sworn personnel are also obligated to follow all other departmental and county policies." The evidence in the record demonstrates that appellant not only violated Post Order 8 but also N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming); N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty) and therefore this supports a finding of a violation of this section. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Based on the foregoing, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of General Order 74.

General Order 79 (R-12) addresses "Search of Inmates (Pat Searches)." Taylor testified that appellant violated this order in its entirety.

"A "PAT SEARCH" is a search of an inmate's person and his/her clothing while the inmate is clothed...." It articulates the procedure and mechanics for conducting such a search. The record reflects that appellant by his own admission did not comply with the General Order 79. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Having met its burden in demonstrating violations of General Orders 8, 73, 74 and 79, I **CONCLUDE** that the appointing authority has demonstrated a violation of Rule of Conduct 1.1 Alleged violations of Rules of Conduct 1.2 and 1.4 having already been addressed, I **FURTHER CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, is hereby **SUSTAINED**.

Finally, the respondent sustained charges of 2.10 Inattentiveness to Duty and 3.2 Security.

2.10 Inattentiveness to Duty is defined as "Personnel shall not engage in any activities or personal business which could cause them to neglect or be inattentive to duty." (R-8). I find nothing in the record to support a claim that would substantiate this charge, therefore I **CONCLUDE** that the charge of a violation of 2.10 Inattentiveness to Duty, is hereby **DISMISSED**.

3.2 Security is defined as "[p]ersonnel shall exercise a scrupulous regard for security in their dealings with inmates and with regard to the Correctional Facility in general. Any act of commission or omission tending to undermine security shall constitute a breach of security." (R-8). I find the record to support a claim that would clearly substantiate this charge. The fact that appellant fails to acknowledge the security concern in improperly searching or failing to search an inmate is troublesome. Therefore, I **CONCLUDE** that the charge of a violation of 3.2 Security, is hereby **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate,

regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has been reprimanded on two occasions for Neglect of Duty and suspended on two occasions for Conduct Unbecoming. The first suspension was for Three days and the second for Fifteen days. Despite this unremarkable disciplinary record, it is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of

> competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, the respondent seeks a One-Hundred-Fifty-Day suspension. Considering the record in the present matter including the appellant's cavalier attitude, disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action suspending appellant for One Hundred-Fifty days without pay be modified to One-Hundred-Eighty days.

DECISION AND ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause be **SUSTAINED**. I further **ORDER** that the charges of violating Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 3.2 Security; General Order 73; General Order 74; General Order 79 and Post Order 8 also be **SUSTAINED**. The charge of 2.10 Inattentiveness to Duty is hereby **DISMISSED**. I **FURTHER ORDER** respondent's imposition of a One-Hundred-Fifty-Day suspension without pay is **MODIFIED** to One-Hundred-Eighty days.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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.

May 30, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: May 30, 2017

Date Mailed to Parties: May 30, 2017

/vj

LIST OF WITNESSES:

For Appellant:

Matthew Calio

For Respondent:

Sergeant Robert Parker

Warden Karen Taylor

LIST OF EXHIBITS:

For Appellant:

A-1 Basic Training Completion Certificate
A-2 Oath of Office
A-3 Prosecutor Letters
A-4 Servicer Honor (Five Years)
A-5 Memorandum: Employee of the Month, August 20, 2009
A-6 Certificate of Appreciation (Ten Years)
A-7 Excerpts from Pay Records
A-8 Perfect Attendance Awards
A-9 Performance Evaluations (2014)
A-10 Warden's Award
A-11 Officer of the Year Award
A-12 Kitchen Officer Post Order Number 8
A-13 Blank
A-14 Certificate of Appreciation
A-15 Memorandum: Volunteer

For Respondent:

R-1 Preliminary Notice of Disciplinary Action (31A), dated October 1, 2015

Final Notice of Disciplinary Action (31B), dated March 25, 2016

R-2 Video and Timeline

R-3 Supervisor's Complaint Report Authored by Taylor, dated September 9, 2015

R-4 Rebuttal by Calio, dated September 12, 2015

General Incident Report (Rebuttal) by Calio, dated September 13, 2015

R-5 Policy and Procedure Sign-In-Sheet for 2011

R-6 Academy Tests Taken by Calio

a) Master Test for Agency Training dated march 16,2001

b) Role of a Correctional Officer, dated April 11, 2001

c) Search of a Person Test, dated April 14, 2001

R-7 Curriculum from Calio's Correctional Academy Titled (10.6 Search of Persons)

R-8 Camden County Department of Corrections Rules of Conduct

R-9 Camden County Department of Corrections Post Order Number 8 Kitchen Officer

R-10 Camden County Department of corrections General Order Number 73 Personal Conduct of Employees

R-11 Camden County Department of Corrections General Order Number 74 Professional Code of Conduct

R-12 Camden County Department of Corrections General Order Number 79 Search of Inmates (Pat Searches)

R-13 Calio Chronology of Discipline

7-13-17

STATE OF NEW JERSEY

In the Matter of Claudio Camacho
Mercer County,
Department of Transportation
and Infrastructure

CSC DKT. NO. 2017-3393
OAL DKT. NO. CSV 06107-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 06107-17

AGENCY DKT. NO. 2017-3393

CLAUDIO CAMACHO, MERCER COUNTY TRANSPORTATION AND INFRASTRUCTURE.

Debra Parks, AFSCME, appearing pursuant to N.J.A.C. 1:1-5.4(a)6, for Claudio Camacho, appellant

Kristina E. Chubenko, Esq., Assistant County Counsel, for Mercer County, Transportation and Infrastructure, respondent (Arthur R. Sypek, Jr., County Counsel, attorney)

Record Closed: June 13, 2017 Decided: June 14, 2017

BEFORE **CARL V. BUCK, III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on May 2, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Claudio Camacho from the action of the respondent, Mercer County, Transportation and Infrastructure. On June 13, 2017, the parties filed a fully executed Settlement Agreement and General Release. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 14, 2017
DATE

CARL V. BUCK, III ALJ

Date Received at Agency: 6/15/17

Date Mailed to Parties: 6/15/17

/lam

APPENDIX

EXHIBITS

Joint:

J-1 Settlement Agreement and General Release

For Petitioner:

None

For Respondent:

None

J-1

ARTHUR R. SYPEK, JR., MERCER COUNTY COUNSEL
BY: KRISTINA E. CHUBENKO, ASSISTANT COUNTY COUNSEL
McDADE ADMINISTRATION BUILDING, ROOM 201
640 SOUTH BROAD STREET
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068
609-989-6511

IN THE MATTER OF CLAUDIO CAMACHO	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Settled prior to Administrative Law Hearing	CSV 06107-2017S

This Settlement Agreement and General Release ("Agreement") is agreed to by the County of Mercer ("County") and Claudio Camacho ("Employee") (collectively "parties") upon the following terms and conditions:

WHEREAS, Employee is employed as an Equipment Operator in the County's Department of Transportation & Infrastructure/Highway Division; and

WHEREAS, a Preliminary Notice of Disciplinary Action dated March 7, 2017 was issued to Employee; and

WHEREAS, a Final Notice of Disciplinary Action dated March 21, 2017 was issued removing Employee from his employment; and

WHEREAS, Employee filed a timely appeal of the FNDA with the Civil Service Commission bearing agency reference number 2017-3393; and

WHEREAS, the matter was transferred to the Office of Administrative Law bearing docket number CSV 06107-2017S for a de novo hearing; and

WHEREAS, the parties would like to resolve the matter amicably due to the uncertainties and cost of litigation; and

WHEREAS, Employee has agreed to resign, upon and subject to the terms and conditions contained herein, which shall be considered a general resignation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. Employee understands and agrees that his employment with the County ended effective March 21, ~~1027~~ 2017 and will be recorded as a general resignation. Employee understands and agrees that the County is not obligated to employ him, and that he will not seek reemployment or reinstatement or accept reemployment with the County or any of its subdivisions, subsidiaries or affiliates, at any time in the future.

2. Employee agrees to withdraw with prejudice the appeal with pending at the Civil Service Commission bearing agency reference number 2017-3393 and Office of Administrative Law Docket Number CSV 06107-2017S.

3. Employee agrees that the County accepting his resignation in lieu of seeking removal constitutes consideration for his waiver of claims contained in this Agreement. Employee will be given the opportunity to obtain medical coverage through the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. § 1166(a)(4) ("COBRA") for a period of up to eighteen (18) months starting from the date of his employment end date at Employee's own expense.

4. Except as set forth in Paragraph 3, Employee hereby relieves and discharges the County of and from any obligation to pay or provide any salary, expense, reimbursement or other sum, or any benefit plan of any nature. Employee agrees that the benefits set forth in Paragraph 3 shall be the only obligation the County has, had or might ever have regarding Employee pursuant to or in connection with Employee's employment with the County,

excepting any obligation pertaining to a pending workers compensation claim. The parties further agree that the benefit set forth in Paragraph 3 herein shall constitute full and fair consideration for the waiver and release of claims pursuant to Paragraph 6 hereof.

5. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by employee, but instead constitutes the good faith settlement of a disputed claim and the parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

6. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County amending the charges in this matter and agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of this agreement that he has now to any relief of any kind from the County, whether or not he now knows about those rights, arising out of his

employment with County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relation Act; New Jersey Family Leave Act, Older Workers Benefit Protection Act of 1990, 29 U.S.C. §621 et seq., and any other claims for unlawful employment practices with regard to this matter. It is emphasized that Employee is waiving all possible claims against the County with regard to this disciplinary matter.

7. Employee represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that he is voluntarily entering into this Agreement and that the County has not made any representations concerning the terms of effects of this Agreement other than those contained herein.

8. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

9. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s)/term(s) or provision(s) shall not be

affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

10. The foregoing constitutes a full and final disposition of this matter.

11. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

12. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

13. This Agreement is the result of negotiations with Employee and Employee's union representative(s) with whom Employee had an opportunity to consult prior to signing same and is satisfied with the representation.

14. Employee specifically acknowledges that he understands that this Agreement is a legally binding document, and that by signing this Agreement he is prevented from filing, commencing or maintaining any action, complaint, charge, or other proceeding against the County, except as expressly permitted by the terms of this Agreement. Employee further agrees that any fact, evidence, event or transaction currently unknown to Employee but which hereafter may become known shall not affect in any way or manner the final and unconditional nature of this Agreement. Employee acknowledges that he understands that he has the right to consult with an attorney of his choice to review this Agreement and that he is encouraged by the County to do so. Employee further acknowledges that he understands that he has twenty-one (21) days to consider and accept this Agreement from the date it was first given to Employee, although she may accept it at any time within those twenty-one (21) days. Employee further acknowledges that he understands that he has seven (7) days after signing the Agreement to revoke it by

delivering to Kristina Chubenko, Assistant County Counsel, County of Mercer, McDade Administration Building, 640 S. Broad Street, Trenton, New Jersey 08650, written notification of such revocation within the seven (7) day period. If Employee does not revoke the Agreement, the Agreement will become effective and irrevocable on the eighth (8^{th}) day after he signs it (the "Effective Date").

If Employee elects to exercise his right of revocation, this Agreement and the promises contained in it, will automatically be deemed null and void.

15. This settlement fully and finally disposes of all issues in controversy. It is reached by way of compromise.

16. This Agreement shall neither set a precedent nor constitute a past practice.

17. This Agreement shall not be considered binding and/or final until approved by and executed by the County Administrator and/or his designee. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null

********* Signatures appear on following page ************

IN WITNESS WHEREOF, and intending to be legally bound hereby, I have hereunto set my hand. **WITH MY SIGNATURE HEREUNDER, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT AND UNDERSTAND ALL OF ITS TERMS INCLUDING THE FULL AND FINAL RELEASE OF CLAIMS SET FORTH ABOVE. I FURTHER ACKNOWLEDGE THAT I HAVE VOLUNTARILY ENTERED INTO THIS AGREEMENT, THAT I HAVE NOT RELIED UPON ANY REPRESENTATION OR STATEMENT, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO HAVE THIS AGREEMENT REVIEWED BY MY ATTORNEY/UNION REPRESENTATIVE.**

Dated: 6/9/17

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Dated: 6/8/17

CLAUDIO CAMACHO, EMPLOYEE

Dated: 6/8/17

DEBBIE PARKS, AFSCME COUNCIL

7-13-17

STATE OF NEW JERSEY

In the Matter of Felix Colon,
City of Passaic, Department of Public Works

CSC DKT. NO. 2017-1239
OAL DKT. NO. CSV 16513-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 **BW**

The appeal of Felix Colon, Laborer 1, City of Passaic, Department of Public Works, 90 working day suspension, on charges, was heard by Administrative Law Judge Ellen S. Bass, who rendered her initial decision on June 7, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision modifying the 90 working day suspension to a 15 working day suspension, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 90 working day suspension to a 15 working day suspension.

Since the penalty has been modified, the appellant is entitled to 75 working days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty

was modified by the Commission, charges were sustained and major discipline was imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

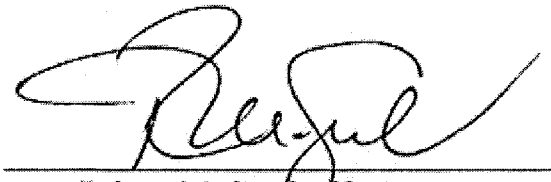
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 90 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 75 days of back pay, benefits, and seniority. 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 shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Unit H
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16513-16
AGENCY DKT. NO. 2017-1239

IN THE MATTER OF FELIX COLON, CITY OF PASSAIC, DEPARTMENT OF PUBLIC WORKS.

Curtiss Jameson, Esq., for appellant, Felix Colon (Jameson, Esq., attorneys)

Steven Siegler, Esq., for respondent, City of Passaic (Eric Bernstein and Assoc., attorneys)

Record Closed: June 2, 2017 Decided: June 7, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The City of Passaic, Department of Public Works, (Passaic) seeks to impose a ninety-day unpaid suspension on the respondent, Felix Colon (Colon), who is employed by Passaic as a laborer. It contends that he has abused his leave time for several years, and charges him with chronic absenteeism, incompetency, inefficiency, neglect of duty, conduct unbecoming, inability to perform his duties, and other sufficient cause. N.J.A.C. 4A: 2-2.3. Colon replies that his absences were all legitimate, and that, to the extent the charges are sustained, the penalty imposed is unreasonable and excessive.

PROCEDURAL HISTORY

Passaic issued a Preliminary Notice of Disciplinary Action (PNDA) on August 9, 2016. A departmental hearing was conducted on or about October 6, 2016, and a Final Notice of Disciplinary Action (FNDA) was issued on October 7, 2016. Colon appealed to the Civil Service Commission on October 18, 2016, and the matter was transmitted to the Office of Administrative Law (OAL) on October 28, 2016. A hearing was conducted at the OAL on May 11, 2017. Post-hearing submissions were filed on June 2, 2017, at which time the record closed.

FINDINGS OF FACT

The pertinent facts were uncontroverted and I **FIND**:

Colon has been employed by Passaic as a laborer since January 2011. He has had only one prior disciplinary infraction during his employment, and was suspended for one day in 2013. That infraction concerned a matter other than absenteeism, the conduct presently at issue.

The Passaic Employee Handbook lists infractions that could result in discipline. Included are "unscheduled absence, or chronic, patterned or excessive absence," and "chronic or patterned tardiness." Director of Personnel Viviana Lamm indicated that a pattern of absence can include repeated use of partial sick days, and can result in a disciplinary response even if the absences are excused. Per his union contract, Colon receives 15 sick days per year, and 12 vacation days per year. If he is out sick for five days or more, his contract requires that he produce a doctor's note. In Passaic, sick days may be used only for personal illness, and not to conduct personal business, or simply because an employee prefers a day off.

Lamm reviewed Colon's attendance history from 2013 through 2015, as follows:

1. During 2013, Colon took 15.75 sick days and 20.25 vacation days.[1] He also took three administrative leave days. Some of the sick and vacation leave was taken as partial days. An analysis of how many work days were impacted by leave time reveals that Colon took sick time (either a full day or a partial day) on 24 days, and vacation time on 22 days throughout the year. No doctor's notes were supplied by Colon.

2. During 2014, Colon took 13.75 sick days, and 11 vacation days. He also took three administrative leave days. But again, a review of the number of actual days impacted by leave time reveals that Colon took some form of sick leave on 24 days. In December, there is a distinct Monday/Friday pattern of sick day use. No doctor's notes were supplied by Colon.

3. During 2015, Colon used 16.5 sick days, and 11.25 vacation days. Because he used his time to take partial days, 27 work days were impacted by his sick leave usage, and 13 work days were impacted by his vacation time. Colon supplied a doctor's note indicating he would be out of work due to anxiety from December 7 through December 11, 2015.

In late 2015, concerns arose about Colon's health. He apparently advised the then Director of the Department of Public Works that he was seeing a psychiatrist, and that he was taking psychiatric medication. Since Colon operated heavy equipment, his employer became concerned about his fitness for duty. Colon was sent for a medical examination at Barnabas Health on February 9, 2016; it was recommended that his medication be reviewed as it did have a sedative effect. On February 11, 2016, Colon's psychiatrist, Dr. Kim, related via letter that he had adjusted the administration of the medication to address this concern. Colon again was examined at Barnabas Health on February 11, 2016, and was declared fit for duty.

[1] He had carried over some vacation days from the prior year.

Colon worked until July 20, 2016. During 2016, he used 15.75 sick days. He exhausted his allotment of paid sick time, and his vacation time, and went on an unpaid status. He did submit two doctor's notes that verified that he was ill. One from Dr. Kim, dated June 27, 2016, indicated that Colon could not work for medical reasons from June 28, 2016 until July 9, 2016. A second letter from Dr. Kim stated that Colon should be excused from June 28, 2016 until August 9, 2016. But that letter was delivered to Passaic on July 19, 2016, and inexplicably is dated August 9, 2016.

Lamm explained that so long as Colon's illness was verified via a doctor's note, Passaic would not suspend him or terminate his employment; hence he was placed on an unpaid leave during the period from July 20, until August 9, 2016. But she explained that it was imperative that Colon complete an FMLA (Federal Medical Leave Act) packet, per Passaic protocol. Despite numerous attempts to secure Colon's cooperation, to include seeking the intervention of his attorney, the packet was never completed.

Accordingly, on the day his doctor indicated that Colon was fit to return for duty a PNDA was issued, and he was suspended until September 6, 2016, for a total of 20 days. The discipline ultimately imposed by Passaic, and as affirmed at the local hearing, was a ninety-day suspension; the remaining time was served from October 11, 2016, through January 17, 2017.

Counsel for Colon shared for the record that his client does have a pending worker's compensation claim, in which he alleges that his absences were due to workplace induced stress and anxiety.

CONCLUSIONS OF LAW

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which

it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

Here, Passaic has charged Colon with chronic absenteeism, incompetency, inefficiency, neglect of duty, conduct unbecoming, inability to perform his duties, and other sufficient cause. N.J.A.C. 4A: 2-2.3. "Neglect of duty" has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title. Ortiz v. City of Newark, CSV 12056-04, Initial Decision (February 8, 2006), modified, Merit System Board (April 6, 2006), <http://njlaw.rutgers.edu/collections/oal/> (citing Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564). "Neglect of duty" includes official misconduct as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001) <http://njlaw.rutgers.edu/collections/oal/>. "Inefficiency" has been defined as the failure of an employee to adhere to proper procedures. See Okosa v. Union County Human Servs., CSV 5279-99, Initial Decision (July 20, 2000), modified, Merit System Board (September 15, 2000), <http://njlaw.rutgers.edu/collections/oal/l>.

In judging whether an employee's absenteeism is chronic or excessive, relevant factors include, among others, the number of absences, the time span between the absences, and the negative impact on the work place. See Harris v. Woodbine Developmental Ctr., CSV 4885-02, Initial Decision (February 11, 2003), adopted, Comm'r (March 27, 2003), <http://njlaw.rutgers.edu/collections/oal/>; Hendrix v. City of Asbury, CSV 10042-99, Initial Decision (April 10, 2001), adopted, Comm'r (June 8, 2001), <http://njlaw.rutgers.edu/collections/oal/>; Morgan v. Union Cnty. Runnells

Specialized Hosp., 97 N.J.A.R.2d (CSV) 295; Bellamy v. Twp. of Aberdeen, Dep't of Pub. Works, 96 N.J.A.R.2d (CSV) 770. It is further recognized that "numerous occurrences" of habitual tardiness or similar chronic conduct "over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." West New York, supra, 38 N.J. at 522. And "excessive absenteeism is not necessarily limited to instances of bad faith or lack of justification on the part of the employee who was frequently away from [his or] her job." Terrell v. Newark Hous. Auth., 92 N.J.A.R.2d (CSV) 750, 752; see also Bellamy, supra, 96 N.J.A.R.2d at 772.

I **CONCLUDE** that the County has met its burden of proving charges of neglect of duty, inefficiency and excessive absenteeism against Colon.[2] His pattern of constantly taking sick time, and doing so for partial days, was a disruption to the workplace. His conduct demonstrated a disregard for his obligations to his employer. Although toward the end of several years of such conduct Colon began to support his absences with doctor's notes, the case law makes it clear that considering the pattern of sick time abuse reflected on this record, his absences from the workplace were excessive. It would have been impossible for Colon, with attendance of this sort, not to have neglected his duties. Colon's failure to cooperate with FMLA procedures compels me to sustain the charge of inefficiency.

PENALTY

In this de novo review of the County's disciplinary action I am required to reevaluate the penalty on appeal. N.J.S.A. 11A:2-19; Henry, supra, 81 N.J. 571; Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or a fine of no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job

[2] The charges of conduct unbecoming and incompetency arise from the same facts, and are subsumed in the charges of neglect and inefficiency and excessive absenteeism.

security and protecting them from arbitrary employment decisions. Progressive discipline is not "a fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 531 (2007). The question to be answered is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness'" Ibid.

I **CONCLUDE** that the penalty imposed here was excessive, and was shocking to my sense of fairness. Passaic has never before sought to discipline Colon for his poor attendance. He has been employed by Passaic for over six years; has only one minor incident on his disciplinary record; and has never been the subject of major disciplinary action. I **CONCLUDE** that the appropriate penalty is a fifteen-day suspension.

ORDER

It is **ORDERED** that the charges against Colon are **AFFIRMED**. It is further **ORDERED** that the penalty of a ninety-day suspension be **REDUCED** to a fifteen-day suspension. The amount of back pay shall be mitigated in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

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, P.O. 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.

June 7, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

JUN 8 2017

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

None

For Respondent:

Viviana Lamm

EXHIBITS

For Appellant:

A-1 Letter dated August 17, 2016
A-2 Letter dated August 31, 2016
A-3 Hearing Officer's Report
A-4 Memorandum dated January 22, 2016
A-5 Additional copy of R-20
A-6 Annotated copy of R-25
A-7 Letter dated August 19, 2016, with attachments
A-8 Docketing, Worker's Compensation

For Respondent:

R-1 PNDA
R-2 Employee Handbook
R-3 Collective Bargaining Agreement
R-4 CAMPS transaction history
R-5 Time records
R-6 Attendance records, 2013

R-7 Summary
R-8 Time Records
R-9 Attendance records, 2014
R-10 Summary
R-11 Time Card Report
R-12 Attendance records, 2015
R-13 Summary
R-14 Time Card Report
R-15 Attendance records, 2016
R-16 Summary
R-17 Email
R-18 Prescription blank
R-19 not admitted
R-20 Work status form
R-21 Doctor's note
R-22 Work status form
R-23 not admitted
R-24 Doctor's note
R-25 Doctor's note
R-26 Notice of minor disciplinary action

STATE OF NEW JERSEY

In the Matter of Hubert Davis
Essex County,
Department of Health and Rehabilitation

CSC DKT. NO. 2017-2818
OAL DKT. NO. CSV 04241-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 04241-17
AGENCY DKT. No. 2017-2818

HUBERT DAVIS,
Appellant,
v.

ESSEX COUNTY DEPARTMENT OF HEALTH AND REHABILITATION,
Respondent.

Mr. Duwaine Walker, Union Representative, **CWA Local 1040,** for appellant pursuant to N.J.A.C. 1:1-5.4(a)6

Robin Magrath, Esq., Director of Labor Relations, for respondent (Courtney M. Gaccione, Essex County Counsel, attorney)

Record Closed: June 8, 2017 Decided: June 12, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) and filed on March 28, 2017, for determination as a contested case. A conference call was held on April 19, 2017 wherein the parties advised the undersigned that the within removal matter had been under settlement negotiations. However, since

the time it was negotiated, Appellant Davis has been unresponsive. A hearing date was then scheduled for June 8, 2017. On April 20, 2017 the undersigned forwarded a letter to all parties requesting a status report in this matter. On May 23, 2017 the Court received a

letter addressed to Mr. Davis from his union representative asking him to contact them to advise as to whether he will accept or rejection the Settlement offer. On June 8, 2017, attorneys for respondents submitted a letter to the undersigned enclosing the fully executed Settlement Agreement and Release in the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 12, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 19 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

OFFICE OF THE COUNTY COUNSEL

Hall of Records, Room 535, Newark, New Jersey 07102
973.621.5003 — 973.621.4599 (Fax)
www.essexcountynj.org

Joseph N. DiVincenzo, Jr.
Essex County Executive

Courtney M. Gaccione
Essex County Counsel

June 8, 2017

(Via Facsimile 973-648-6124 & regular mail)
Honorable John Scollo, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Hubert Davis v. Essex County Dept. of Health & Rehabilitation
OAL Docket No. CSV-04241-2017N
Agency Ref. No. 2017-2818

Dear Judge Scollo:

Enclosed please find the original Stipulation of Settlement and General Release in connection with the above entitled matter for processing by your office

Respectfully,

Robin Magrath

Robin Magrath
Director of Labor Relations
973-621-2558

RM:ks
enc.
cc: Dwaine Walker, CWA Local 1040 Representative w/enc.
Frank Del Gaudio, Director, Dept. of Health & Rehabilitation w/enc.

Exhibit - 1
June 8, 2017

COURTNEY GACCIONE, ESSEX COUNTY COUNSEL
BY: ROBIN MAGRATH, ESQ., DIRECTOR OF LABOR RELATIONS
HALL OF RECORDS-ROOM 535
NEWARK, NEW JERSEY 07102
(973) 621-2558
Attorneys for Essex County Department of Health & Rehabilitation ("County")

HUBERT DAVIS	:OFFICE OF ADMINISTRATIVE LAW :DOCKET NO. CSV-04241-2017N
vs.	: STIPULATION OF SETTLEMENT
ESSEX COUNTY DEPARTMENT OF HEALTH & REHABILITATION	

It is hereby stipulated and agreed to by and between the parties hereto that the above-captioned matters be and same is hereby settled upon the following terms and conditions:

1. The employee acknowledges the charges as outlined in the Preliminary Notice of Disciplinary Action dated December 21, 2016 and the Amended Preliminary Notice of Disciplinary Action dated January 24, 2017.

2. A disciplinary hearing was held on February 2, 2017.

3. The employee was terminated from employment with the County of Essex, effective February 22, 2017.

4. The employee filed an appeal of the termination with the New Jersey Civil Service Commission on or about March 9, 2017.

5. A hearing was scheduled at the Office of Administrative Law on June 8, 2017, but the parties ultimately settled.

6. In lieu of termination, employee hereby resigns from the County of Essex, effective February 22, 2017.

7. The employee agrees to immediately withdraw the appeal of the termination with the New Jersey Civil Service Commission and notify the Office of Administrative Law of same.

8. The employee hereby agrees to waive any claim he may have to back wages and counsel fees. The employee also agrees to waive any right to be reinstated with the County of Essex. The employee shall not seek future employment with the Essex County Hospital Center or any division or department within the County of Essex.

9. The employee acknowledges that he has no accrued time, personal/sick/vacation/compensatory/or any other time, and as a result, is not owed any monetary payment for same from the County of Essex.

10. The County of Essex agrees not to contest unemployment benefits received by the employee, if any. The State of New Jersey shall make the ultimate decision as to unemployment benefits for this employee.

11. The employee and the County of Essex agree that the terms and conditions of this Stipulation of Settlement and General Release and the discussions and negotiations leading up to it shall be kept confidential hereafter to the fullest extent permissible by law and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public unless compelled to do so by judicial process. However, the employee may make disclosures to the members of his immediate family, attorney, union representative and as may be required by his accountant in connection with the discharge of the latter's duties in preparation of tax

returns or financial statements. The employee's or employer's failure to comply with the confidentiality provisions of this program may result in the dissolution of the within Stipulation of Settlement and General Release.

The employee also acknowledges that this settlement being made with a public entity is subject to disclosure, notwithstanding this confidentiality clause, in accordance with the Open Public Meetings Act, N.J.S.A. 10:4-6, et. seq.; Open Public Records Act, N.J.S.A. 47:1A-1, et. seq.; any and all Federal or New Jersey statutes or regulations governing public entity meetings and disclosures including all case law interpreting same.

12. If an action is brought for the employee's or employer's breach of the confidentiality conditions set forth in paragraph 11 hereof, in addition as to such other relief as is appropriate, either party shall be entitled to reasonable attorneys' fees and costs.

13. This Stipulation of Settlement and General Release is not, and shall not in any way be construed, as an admission by the County of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person. The parties have entered into this Stipulation of Settlement and General Release for the sole purpose of avoiding the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and the employee does not purport to be the prevailing party in any threatened or pending

litigation.

14. This Stipulation of Settlement and General Release is not, and shall not in any way be construed, as an admission by this employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employer, but instead constitutes the good faith settlement of a disputed claim and this employee specifically disclaims any liability to employer or any other person or entity.

15. The employee agrees that this Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration for the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims employee has now to any relief of any kind from the County, whether or not employee now knows about those rights, arising out of their employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, violation of Federal Family Medical Leave Act, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory

estoppel; negligence; violation of public policy; sexual harassment; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all possible claims against the County from the beginning of employee's employment with the County to the date this Stipulation of Settlement and General Release is executed by employee.

16. The employee represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with the CWA Local 1040's representative. Further, the employee certifies that he voluntarily entered into this Stipulation of Settlement and General Release and that the County has not made any representations concerning the terms of effects of this Stipulation of Settlement and General Release other than those contained herein.

17. This Stipulation of Settlement and General Release shall neither set a precedent nor constitute a past practice.

18. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Stipulation of Settlement and General Release shall, in all cases, be construed as a whole, according to its fair meaning and not strictly for or against any of the parties.

19. Should any provision of this Stipulation of Settlement and General

Release be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

20. This Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by the County Administrator and the New Jersey Civil Service Commission.

21. The foregoing constitutes a full and final disposition of this matter.

22. The employee shall not institute an Appeal in this matter.

23. The employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

24. This Stipulation of Settlement and General Release may not be modified, altered or changed, except upon the prior express written consent of the parties.

Dated: 6/7/17

ROBIN MAGRATH, ESQ.
DIRECTOR OF LABOR RELATIONS

Dated: 6/8/17

ROBERT D. JACKSON
ESSEX COUNTY ADMINISTRATOR

Dated: 06-07-2017

FRANK DEL GAUDIO
DIRECTOR OF ESSEX COUNTY DEPARTMENT OF HEALTH AND REHABILITATION

Dated: 7-June-2017

DUWAINE WALKER
CWA LOCAL 1040
LABOR REPRESENTATIVE

Dated: 6-7-17

HUBERT DAVIS
EMPLOYEE

7-13-17

STATE OF NEW JERSEY

In the Matter of Denise Deleon
Middlesex County Board of Social Services

CSC DKT. NO. 2016-3862
OAL DKT. NO. CSV 07068-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 07068-16
AGENCY DKT. NO. 2016-3862

IN THE MATTER DENISE DELEON, MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES.

Charlette Matts- Brown, Esq., for appellant Denise DeLeon

Kyle J. Trent, Esq., for respondent Middlesex County Board of Social Services (Appruzzese, McDermott, Mastros & Murphy, attorneys)

Record Closed: June 2, 2017 Decided: June 7, 2017

BEFORE **JOSEPH A. ASCIONE,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on May 10, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Denise DeLeon from the action of the respondent, Middlesex County Board of Social Services. On June 2, 2017, the parties filed a fully executed Settlement Agreement. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 7, 2017
DATE

JOSEPH A. ASCIONE, ALJ

Date Received at Agency: 6/8/17

Date Mailed to Parties: 6/8/17

/lam

LIST OF EXHIBITS

J-1 Settlement Agreement

J-1

DENISE DELEON, Appellant, v. MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES, Respondent.	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. CSV 07068-16 AGENCY REF. NO: 2016-3862

SETTLEMENT AGREEMENT

The above parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

NOW THEREFORE, in consideration of the mutual covenants contained herein, the parties hereby agree to the following terms as full and final settlement of the above-captioned matter:

1. The Board agrees to settle the Final Notice of Disciplinary Action dated April 20, 2016 as follows:

a. The Final Notice of Disciplinary Action will be amended to reflect that Denise DeLeon ("DeLeon") was suspended without pay for three (3) months, covering the period of April 20, 2016 through July 20, 2016;

b. DeLeon's personnel file and records will be amended to reflect that for six (6) months from July 21, 2016 and January 21, 2017, DeLeon was on a leave of absence without pay;

c. DeLeon's personnel file and records will be amended to reflect that for five (5) months from January 21, 2017 through June 21, 2017, DeLeon was on a leave of absence with pay, and the Board agrees to pay DeLeon five (5) months of fully mitigated back pay in the amount of $21, 475, covering the period of January 21, 2017 through June 21, 2017.

The Board agrees to tender the backpay payment no later than the second payroll period of August 2017.

d. The parties acknowledge that from June 18 through December 10, 2016, DeLeon collected unemployment insurance benefits. The parties agree that the above-referenced backpay is fully mitigated, is not a windfall to the employee, and shall be paid for that period of time for which DeLeon did not collect unemployment insurance benefits.

e. DeLeon will return to work on June 22, 2017 and in the title of Human Services Specialist 2, B/L Spanish and English, Range 16, Step 7; and

f. DeLeon understands and agrees that, in light of her three-month suspension and eleven-month leave of absence, her next annual work evaluation will not be conducted until on or about June 22, 2018 and her next eligibility for increment will be concomitant with this annual evaluation date.

2. DeLeon, on her own behalf and on behalf of her heirs, executors, administrators, successors and assigns agrees to withdraw the instant appeal with prejudice.

3. DeLeon waives any and all rights to file a grievance and any other form of complaint concerning the disciplinary action imposed against her in the Final Notice of Disciplinary Action dated April 20, 2016. DeLeon shall not institute any further appeal or any other action with respect to this matter.

4. DeLeon shall not request any other relief with respect to this matter, other than that provided for by this Settlement Agreement. With respect to this matter and the incidents giving rise to the above-referenced discipline, Employee voluntarily and in consideration for the above hereby releases the Board, its employees, officials, agents and assigns from all claims, benefits, demands, damages, and causes of action that she may have had against the Board, its employees, officials, agents and assigns from the date of her initial employment with the Board

until the date of this agreement, including but not limited to, all claims, benefits, demands, damages arising under Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000e, et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. § 1981, et. seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, and 1986 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq.; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; 29 U.S.C. § 1001, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Rehabilitation Act of 1973, the False Claims Act, 31 U.S.C. § 3729, et seq.; the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., the False Claims Act, 31 U.S.C. §3729, et seq., and any other Federal, State or local laws, regulations, collective negotiations agreement, or ordinance; or claims of quasi-contract, tort, negligence, intentional act, civil conspiracy, harassment, fraud, defamation, intentional and/or negligent infliction of emotional distress; or any common law claim; or any claim for punitive damages, and any other duty or obligation of any kind or description to the fullest extent permissible by law. DeLeon represents that as of the date she executes this Agreement, she has not filed any charge, complaint, claim, or action with any court, organization, governmental entity, or administrative agency, or directed or authorized such charge, complaint, claim, or action to be filed on her behalf against the Board, except the appeal referred to in paragraph 5 of this Agreement and any claim, if any, for worker's compensation benefits. DeLeon does not hereby waive (1) her right to enforce the terms of this Agreement; (2) the right to file any unwaivable charge or complaint (although DeLeon does waive and release any right to recover damages in connection with any such charge or complaint relating to anything which has happened up to the date she signs this Agreement); and (3) rights or claims that cannot lawfully be released.

5. In accepting this Settlement, DeLeon acknowledges that she is waiving her right to proceed to a hearing on her appeal to the New Jersey Civil Service Commission pending at the Office of Administrative Law under Docket No. CSV 07068-2016S. DeLeon understands that this Agreement is contingent upon the approval of the Civil Service Commission and further understands that, once approved by the Civil Service Commission, the aforementioned appeal will be deemed resolved and the matter closed.

6. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

7. If any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum, such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties.

8. This Agreement shall inure to the benefit of, and may be enforced by, the parties hereto and all of their respective heirs, legal representatives, successors and assigns.

9. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement. The parties further agree that this Agreement shall not be filed with any court except in an action to enforce or challenge its terms.

10. Denise DeLeon acknowledges that she has had ample time to consult with Counsel and her Union Communications Workers of America, throughout the negotiations that

preceded her execution of this Agreement; that she has been represented by Counsel and her Union during the entirety of this matter; that she has carefully read and fully understands all of the provisions of this Agreement, including the Release; that she is voluntarily executing this Agreement without coercion or duress; that she has had adequate time to review this Agreement and the release contained in this Agreement; and that she understands and acknowledges that she is waiving any right to proceed to a hearing at the Office of Administrative Law by signing this Agreement.

11. This Settlement may be executed in multiple originals, each of which shall be considered an original instrument, but all of which shall constitute one (1) agreement, and shall bind the parties hereto and their successors, heirs, assigns, and legal representatives.

12. This settlement between the Board and DeLeon shall not be deemed a precedent or be considered a past practice and shall have no effect on future cases, be it through arbitration or otherwise, and that the contents of this Agreement shall be non-evidential in any future matter involving the Board and CWA Local 1082 and/or one of its bargaining unit members, except as a basis for progressive discipline in any future disciplinary matter between the Board and DeLeon.

Dated: 5/30/17

Denise DeLeon

Dated: 5-31-17

BY:

Middlesex County Board of Social Services

7-13-17

STATE OF NEW JERSEY

In the Matter of Julissa Del Gaudio
Bergen County, Board of Social Service

CSC DKT. NO. 2016-4522
OAL DKT. NO. CSV 09823-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Julissa Del Gaudio, Human Services Aide, Bergen County, Board of Social Services, release at the end of the working test period, effective June 3, 2016, was heard by Administrative Law Judge Leslie Z. Celentano, who rendered her initial decision on June 6, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of Julissa Del Gaudio.

Re: Julissa Del Gaudio

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09823-16

IN THE MATTER OF JULISSA DELGAUDIO, BERGEN COUNTY, BOARD OF SOCIAL SERVICES.

Julissa DelGaudio, petitioner, pro se

Yaacov Brisman, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: May 1, 2017 Decided: June 6, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter appellant, Julissa DelGaudio, appeals her release by the Bergen County Board of Social Services (the Board) at the end of her working test period, effective June 3, 2016. On July 1, 2016, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL) in accordance with N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing was scheduled for February 6, 2017, and was held on that date. At the conclusion of the hearing, appellant asserted that she was not aware that she had the ability to bring witnesses with her. This matter had been scheduled on July 13, 2016, to commence on February 6, 2017, and nothing had been

heard from petitioner in the ensuing seven months. Nevertheless, over the strenuous objections of respondent, the appellant was provided with one week to advise whether she intended to call witnesses, and in that event to provide their names. Two weeks later appellant advised that she wished to call three witnesses, and once again over the strenuous objection of respondent, a date to continue the hearing was scheduled.

On May 1, 2017, respondent appeared with potential rebuttal witnesses and the appellant also appeared, advising that no additional witnesses would be testifying. As such the record was closed on that date.

TESTIMONY

Robert Calocino

Mr. Calocino is the Acting Director of the Bergen County Board of Social Services and has been the Chief Personnel Officer since 2012. Prior to that he served as the Senior Personnel Technician. He is familiar with hiring practices and the training and evaluation processes for determining whether someone would be permanently hired.

Mr. Calocino advised appellant by letter dated October 9, 2015, (R-1) that she had been offered the position as a temporary part-time Human Services Aide. During the first month, there is training for the SNAP program (food stamps; review of regulations; the code; and the interview process). During the first thirty days, temporary part-time employees are given several tests based upon objective criteria. Employees are advised how they are doing via a training progress report.

Appellant's thirty-day training progress report (R-2) dated November 30, 2015, indicated that she had scored a 74% on the food stamp program eligibility test where the average score had been 84%, indicating she scored below average. She scored a 72% on the financial eligibility test and the average for the class was 82%, indicating a level of difficulty understanding the financial eligibility requirements. Finally, for the FAMIS and DOVE inquiry test, she scores a 92%, indicating a satisfactory understanding of how to access those systems and interpret the information. The average for the class was 96%.

There was concern at the time that appellant had scored below average in all of her tests, and it was suggested that she utilize the handouts to better understand the program.

Thereafter, on January 14, 2016, a memo was sent to appellant from the training supervisor (R-3) complimenting appellant's professional manner and initiative, as well as her ability to work independently and be organized. It was reported, however, that she needed to review her work more carefully to avoid the number of errors and to ask more questions. Mr. Calocino indicated that appellant's issues were holding up the process. He indicated she could have asked for help from her training supervisor; she had also never said that her training was insufficient. He indicated that at this juncture, some of the other aides from her group were moved into the unit to start working the position under supervision.

Thereafter, on February 29, 2016, appellant was offered the part-time Human Services Aide position and advised that there was a ninety-day working test period starting on that date. (R-4.) However, appellant's status remained as temporary as Board approval had not yet been secured. (R-5.)

Following Board approval, appellant was advised her ninety-day working test period began as of March 7, 2016. (R-6.) At this juncture, she was considered to be a regular employee with a ninety-day working test period.

The first evaluation appellant received, covering the thirty days between March 8, 2016, and April 7, 2016, reveals that the quality of appellant's work was scored as a 1 out of a possible 6. She had an error rate of 30.6% and the average of the trainees was 17.6%. The quantity of her work was deemed to be a 3.5 out of a possible 6. She completed 108 intake and recertification interviews, which was higher than the average of 103.7. However she had a higher error rate. Her job knowledge and skill was scored a 1 out of a possible 6.

Taking all of her scores combined, she earned a 23 out of a possible 50 indicating that she meets the job requirements, but only barely. At a subsequent conference with appellant to discuss the evaluation, her supervisor indicated that her error rate needed to improve because she simply made too many errors. No comments were offered by appellant at that time under the employee comment section.

Mr. Calocino testified that the training department is always available to help employees and that a supervisor and specialist in the unit are available to answer questions.

Appellants next review, a sixty-day evaluation, covered the period of April 8, 2016, to May 7, 2016. The quality of her work was now rated a zero out of a possible 6 with an error rate of 30.5% at a time when the average for the trainees was 13.3%. This was deemed to be an unacceptable error rate. The quantity of her work was once again determined to be a 3.5 out of a possible 6. Appellant completed 118 interviews when the trainee average was 108.8. Her job knowledge and skill at this time was rated a .5 out of 6, down from a 1 out of 6 at her last review. Several other scores were lower, and during the working test period they should be increasing as she had been on the job, had the training and was getting more experience. This was a cause for concern for respondent and the reviewer noted in the comments that appellant has had no improvement in her error rate, and continued to make careless errors. (R-8.) Her total was now 19.5 out of a possible 50 indicating she was not meeting the job requirements. At an evaluation conference on May 13, 2016, with her supervisor she was advised that she needed to improve the quality of her work before her next evaluation or she was at risk of failing the ninety-day evaluation period. Once again the evaluation reflects no employee comments.

Appellant's ninety-day evaluation dated June 3, 2016, and covering the period of May 8, 2016, through June 2, 2016, reflected a .5 out of 6 score on the quality of her work. This is an extremely poor score and appellant's error rate was 19.6% at the time when the average was 12.2%. The quantity of her work still rated at 3.5 out of 6 and the job knowledge and skill was a 1 out of 6, still extremely poor. Other scores showed no change including those for professional conduct, self-motivation, communication and team work and flexibility, which actually went down as of this last evaluation. (R-9.) Her final score

was 19.5 out of a possible 50 for her ninety-day evaluation, indicating that she still was unable to meet the job requirements. Her inability to demonstrate that she was able to complete the quality of work necessary led to appellant's termination. (R-10.)

Julissa DelGaudio

Appellant testified that there were thirteen trainees in her class and she felt that she did the job properly. She indicated there were other issues and that although she knows her "scores weren't that high" she felt she had better scores than others. She indicated she had to train under stress and that the professionalism was not there at the agency. She stated that no one sat next to her to evaluate her and that her error rate was much better at the end despite what the evaluations indicate.

On May 1, 2017, when petitioner was to return with witnesses, she provided a written narrative to be included with her testimony which was admitted without objection. (P-1.)

ANALYSIS

In this matter, Ms. DelGaudio has appealed her release at the end of her working test period, effective June 3, 2016. A candidate for permanent-employee status must successfully complete a working test period so that an appointing authority may determine whether the employee can satisfactorily perform the duties of that title. N.J.S.A. 11A:4-15. "A working test period is part of the examination process which shall be served in the title to which the certification was issued and appointment made." Ibid. It supplements the examination process "by providing a means for testing an employee's fitness through observed job performance under actual working conditions." In re Stringer, CSV 4341-09, Initial Decision (March 16, 2011) (citing Dodd v. Van Riper 135 N.J.L. 167, 171-72 (E. & A. 1947)), adopted, CSC (June 15, 2011), <http://njlaw.rutgers.edu/collections/oal/>. The purpose of the working test period is not to provide the employee further training to qualify him for the position, but rather "to further test a probationer's qualifications." Briggs v. N.J. Dep't of Civil Serv., 64 N.J. Super. 351, 355 (App. Div. 1960). During the working test period, the appointing authority evaluates the employee's "work performance and

conduct . . . in order to determine whether he merits permanent status," while the employee "is entitled to a fair opportunity to demonstrate his ability to fulfill the requirements of the position." Vegotsky v. Office of Admin. Law, 92 N.J.A.R.2d (CSV) 162, 167.

At the end of the working test period, an appointing authority may terminate the employee or return that employee to his or her former permanent title if the employee's job performance was unsatisfactory. See N.J.S.A. 11A:2-6(a)(4); N.J.S.A. 11A:4-15(c); N.J.A.C. 4A:2-4.1; N.J.A.C. 4A:4-5.4(a). "The only requirement necessary to justify release at the end of the working test period is that the opinion of the Appointing Authority be formed in good faith." Mabson v. City of Monmouth, CSV 2164-05, Initial Decision (Jan. 26, 2006) (citing Devine v. Plainfield, 31 N.J. Super. 300, 302-03 (App. Div. 1954)), adopted, MSB (March 9, 2006), <http://njlaw.rutgers.edu/collections/oal/>. In an appeal concerning the release of an employee at the end of a working test period, the burden of proof is on the employee to show that the appointing authority acted in bad faith when it determined that the employee was incapable of satisfactorily performing the duties of the position. N.J.A.C. 4A:2-4.3(b); Briggs, supra, 64 N.J. Super. at 356; Devine, supra, 31 N.J. Super. at 303. Bad faith contemplates dishonesty and a state of mind affirmatively operating with a furtive motive, self-interest or ill will. See O'Connor v. Health Servs. Ctr. of Camden Cnty., 91 N.J.A.R.2d (CSV) 23, 25.

In this context, good faith means that "the appointing authority has actually observed the probationer's performance and found it to be unsatisfactory," and "[a] fair evaluation period is further evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky v. Twp. of Freehold Dep't of Code Enforcement, 92 N.J.A.R.2d (CSV) 155, 157.

Based upon the foregoing, I **FIND** that appellant has presented no argument regarding any purported bad faith by the respondent. In fact, the preponderance of the evidence established that the appointing authority exercised good faith by evaluating appellant at required intervals over the course of her working test period, and by giving her specific feedback on the deficiencies in her job performance. The record is devoid of any evidence of ill will or dishonest motive by the appointing authority; to the contrary, the

undisputed evidence demonstrated that appellant's performance ratings declined during the course of her working test period and she offered no evidence to rebut the veracity of the appointing authority's evidence of her deficiencies.

It is further evident that while Ms. DelGaudio received extensive training, she had significant and wide-ranging problems during her working test period, all of which are amply manifest in the most recent progress reports issued in this matter.

I am therefore satisfied that the respondent acted in good faith in the manner in which it assessed appellant's capabilities during the working test period, and that it made a valid determination regarding her ongoing unsatisfactory performance. Despite the Board having given appellant notice in a timely fashion regarding her interim failures during the working test period, she nonetheless failed to measure up and meet minimum standards of acceptable performance thereafter.

CONCLUSION AND ORDER

Based upon all of the foregoing, I **CONCLUDE** that the Board has correctly determined that the release of Julissa DelGaudio at the end of her working test period was appropriate under the circumstances and that it was done in good faith.

It is therefore **ORDERED** that the release of Julissa DelGaudio, at the end of her working test period, effective June 3, 2016, is **AFFIRMED**.

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, P.O. 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.

June 6, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: June 6, 2017

JUN 7 2017

Date Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

dr

APPENDIX

Witnesses

For Appellant:

Julissa DelGaudio

For Respondent:

Robert Calocino

Exhibits

For Appellant:

P-1 Appellant's Written Narrative

For Respondent:

R-1 Letter from Robert Calocino to Julissa DelGaudio dated October 9, 2015

R-2 30 Day Training Progress Report

R-3 Memorandum dated January 14, 2016

R-4 Letter from Robert Calocino to Julissa DelGaudio dated February 29, 2016

R-5 Memorandum dated February 29, 2016

R-6 Letter from Robert Calocino to Julissa DelGaudio dated March 7, 2016

R-7 Employee Performance Review dated April 19, 2016

R-8 Employee Performance Review dated May 13, 2016

R-9 Employee Performance Review dated June 3, 2016

R-10 Memorandum dated June 3, 2016

7-13-17

STATE OF NEW JERSEY

In the Matter of R. Bernard Garner
Motor Vehicle Commission

CSC DKT. NO. 2013-2673
OAL DKT. NO. CSV 05849-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: **BW**

The appeal of R. Bernard Garner, Technician Trainee, Motor Vehicle Commission, release at the end of the working test period, effective March 24, 2013, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders, who rendered her initial decision on June 1, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of R. Bernard Garner.

Re: R. Bernard Garner

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05849-13
AGENCY DKT. NO. 2013-2673

IN THE MATTER OF R. BERNARD GARNER,
MOTOR VEHICLE COMMISSION.

R. Bernard Garner, appellant, pro se

Marc J. Malfara, Hearing Officer, for respondent Motor Vehicle Commission, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: May 6, 2014 Decided: June 1, 2017

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

Appellant R. Bernard Garner (Garner) appeals his dismissal from the position of Technician Trainee with the Motor Vehicle Commission (MVC) due to an unsatisfactory rating at the end of a six-month Working Test Period (WTP).

PROCEDURAL HISTORY

On March 13, 2013, the Motor Vehicle Commission advised appellant that he failed to successfully complete his WTP and was terminated as of the close of business on March

24, 2013. On March 18, 2014, appellant filed a notice of appeal concerning the termination with the Civil Service Commission. The MVC transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 29, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Administrative Law Judge John Schuster III held a hearing on May 6, 2014, and closed the record on that date. Twenty-seven extensions were granted to Judge Schuster to allow him to complete the decision, but despite multiple inquiries as to what was needed to allow him to finish all outstanding decisions, Judge Schuster retired on April 1, 2017, without writing the initial decision. An additional extension was granted to allow time to contact the parties pursuant to N.J.A.C. 1:1-14.13, to determine if the parties could settle or wished to relitigate it upon transfer to a new judge. The answer having been in the negative, the undersigned was assigned the case. An additional extension was granted to allow time to listen to the hearing record, read the exhibits, and write the decision.

FACTUAL DISCUSSION AND FINDINGS

Some facts are not disputed. Garner started in June 2012, as a "944 employee," which is an at-will employee limited to 944 annual hours. In that capacity, he solely worked at the information desk. Then, on September 24, 2012, because his supervisor in the prior position was happy with his work and Garner had requested the move, Garner began a working test period in the position of part-time MVC Tech, limited to twenty-four hours per week. In his new position, his duties included working at the reception desk, and serving customers at the individual windows for driver licenses, registrations, renewals, and title documents. The WTP for the position is four months, such that the normal time for a decision on his employment would have ended on January 24, 2013. The MVC had the option to extend the WTP an additional two months with documentation, which it exercised.

Appellant received a two-month evaluation report on November 19, 2012, where he was told by his direct supervisor, Brian DeLuca, and Deborah Vannatten, the facility supervisor, that he would be trained in titles and licenses in the next two months. Garner was also told if he had a problem, he should ask for assistance. The second evaluation report,

dated and signed on January 15, 2013, (R-40) was marked unsatisfactory. The manager at the Lakewood Motor Vehicle Commission agency at which Garner worked, made a determination to extend the probationary period in part due to the extensive operational disruptions caused by Superstorm Sandy, which struck on October 29, 2012. The third and final evaluation report, dated and signed on March 13, 2013, (R-2), also marked unsatisfactory, was the final evaluation preceding his termination.

The evaluation reports identified the rationale for Garner's unsatisfactory ratings. The four-month evaluation stated that Garner continued to make mistakes, including incorrect owners, missing signatures, incorrect make of car, missing lien holder and processing questionable work without consulting a supervisor. (R-40.) The six-month evaluation stated that Garner's performance remained unsatisfactory, his errors were due to his negligence in reviewing forms presented to him, and he made thirty-one errors in the twelve days prior to the report. The errors included missing information on applications, incorrect signatures, work processed for the incorrect owner and improperly answered questions. The evaluation added that Garner took an extended amount of time to process transactions. (R-2.)

The dispute is over whether Garner's performance was unsatisfactory and whether he had an opportunity to understand and learn from his errors, or whether the agency showed bad faith in its treatment of him.

Deluca, Garner's direct supervisor, testified on behalf of the MVC. On the date of the hearing, DeLuca had served for over three years as the agency manager, with duties including managing the twenty-eight employees at the Lakewood facility.

DeLuca testified that employees at the MVC were encouraged to ask questions of senior technicians or supervisors, and that Garner did in fact ask questions during his employment. DeLuca had many discussions with Garner regarding his performance including the two-, four- and six-month evaluations. During the WTP, Garner was shown the print-out of the errors that he made, and was informed that his performance must improve. DeLuca indicated that employees were expected to login to their work stations and be ready to serve customers at the beginning of their shifts; however, the MVC

provided a grace period of approximately five-minutes. The four-month evaluation stated that Garner was averaging fifteen to twenty minutes to sign onto the computer and process his first transaction and took 30 minutes to sign onto the computer on both November 19 and 21, 2012. (R-40.)

On cross-examination, DeLuca testified that the MVC based the required login time when the employee took possession of the work station, and that it could take an additional thirty seconds to one minute more to log into a camera work station.

Deborah Vannatten, Supervisor 1 at the Lakewood MVC facility since August 2012, was the only supervisor at the facility. Vannatten described Garner's duties, and the hands-on supervision he was provided.

Vannatten testified that there was a discussion with Garner concerning the performance reviews during the WTP, including the errors detailed in the evaluations. During a discussion concerning Garner's six-month review, Vannatten and DeLuca sat down with the appellant, and reviewed all errors with the corresponding dates, as well as photocopies of every document. Garner provided no objections during the performance review. On cross-examination, Vannatten identified the types of transactions referenced in the performance reviews.

Garner testified on his own behalf. At the time he was notified of his termination, DeLuca stated that Garner was always on time; never stretched breaks; was always good to the customers; and worked well with his colleagues. However, Garner testified, DeLuca also said that Garner needed more training to "get the hang of the job."

Garner stated that DeLuca continually told him that he may be terminated, and Garner spoke to Human Resources about DeLuca.

Garner relied upon the December 2012 Performance Assessment Review Model (PAR) on his job performance (A-1) to rebut the unsatisfactory WTP evaluation reports. The report contained a detailed job description for an MVC technician, and the interim evaluation of Garner's performance containing a numbered score for individual tasks

required in the position. The interim evaluation score was nineteen, which fell into the successful category of nineteen to twenty-nine points. The PAR was signed by Garner, DeLuca, and Vannatten.

In Garner's cross-examination of DeLuca, he asked multiple questions concerning the amount of time it took Garner to sign into his work station and service clients. Garner noted that he began many of his shifts at 2:00 p.m., and in many instances needed to wait for an MVC employee to complete a transaction with a customer. Therefore, in those instances, he was unable to login at the beginning of his shifts. Garner also testified that logging into a camera terminal could be difficult, and would take longer to complete his login.

Having heard the testimony of the witnesses and reviewed the documentary evidence I make the following findings of **FACT**:

1. Appellant received copies of all written evaluation reports.

2. Appellant was made aware of the multiple errors he made in the course of his duties during the WTP that were relevant to the unsatisfactory ratings contained in the evaluations.

3. Vannatten and DeLuca personally counseled appellant on the nature of the errors, and attempted to train appellant to remedy his performance.

4. Appellant received sufficient training from Vannatten, DeLuca, and other experienced MVC employees.

5. Appellant was given an additional two-month review process when his termination would have been justified following a four-month evaluation.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee's rights and duties are governed by the Civil Service Act, which has been described as an important inducement to attract qualified personnel to public

service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See, Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972). In ensuring the merit and fitness of public service employees, a candidate for permanent employee status must successfully complete a probationary or working test period. See, N.J.S.A. 11A:4-15; N.J.S.A. 11A:1-2; State-Operated Sch. Dist. of City of Newark v. Gaines, 309 N.J. Super. 327, 332 (App. Div. 1998), certif. denied, 156 N.J. 381 (1998).

The primary objective of the working test period is 'to supplement the examining process by providing a means for testing an employee's fitness through observed job performance under actual working conditions." Dodd v. Van Riper, 135 N.J.L. 167, 171 (E. & A. 1947). The working test period is not to provide the employee with further training to qualify him for the position and "the employee must demonstrate that he is competent to discharge the duties of the position." Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 355-56 (App. Div. 1960).

In an appeal from an employee's termination at the conclusion of a working test period, the employee shoulders the burden of proving that the appointing authority's "action was in bad faith." N.J.A.C. 4A:2-4.3(b). If bad faith is found, the employee is entitled to a new full or shortened working test period and, if appropriate, other remedies. N.J.A.C. 4A:2-4.3(c). The basic test is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position. See, Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 356 (App. Div. 1960); Devine v. Plainfield, 31 N.J. Super. 300, 303-04 (App. Div. 1954); Lingrell v. New Jersey Civil Serv. Comm'n, 131 N.J.L. 461 462 (1944). In general, good faith has been defined as meaning "honesty of purpose and integrity of conduct with respect to a given subject." Smith v. Whitman, 39 N.J. 397, 405 (1963). As stated in Schopf v. New Jersey Department of Labor, 96 N.J.A.R. 2d (CSV) 853, 857:

> No set rule may be formulated when attempting to determine whether an employee's termination at the end of the working test period was based on opinions of the appointing authority formed in good or bad faith. If the opinion is formed based upon actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the

> employee will be able to satisfactorily and efficiently perform those duties if the appointment becomes permanent, it must be considered to have been made in good faith. If, on the other hand, the decision to terminate is not based upon actual observations of performance, or if it is made based upon dishonest motives, is based on bias, prejudice or self-interest, or is made with ill will toward the employee or because of some furtive design, it must be set aside. The use of the good faith standard also implies that if the employer's decision to terminate is made in good faith, the fact that the Merit System Board may not have decided the question in the same way is of no import. It is only required that the opinion be based on actual observations and that those observations form a rational basis for the opinion.

The preponderance of the evidence established that the appointing authority exercised good faith by evaluating Garner at required intervals over the course of his working test period, by giving him specific feedback on the deficiencies in his job performance, and focusing on numerous errors as well as excessive length of time to sign into his work station and begin servicing customers. Garner did not dispute the specific deficiencies and errors described in his performance evaluations, nor present any evidence that his performance was satisfactory. Appellant did offer an explanation relating to the amount of time required to sign into his work station and serve clients. However, DeLuca's testimony that an employee was given a grace period, which did not begin until the employee took possession of the work station, combined with the instances documented in the performance evaluations, make his argument unpersuasive. Garner's only defense was his 2012 PAR, in which he received an interim evaluation score of nineteen, which fell into the successful category of nineteen to twenty-nine points, and was on the cusp of a successful and unsuccessful score. However, appellant Garner presented no documentary evidence or testimony that his subsequent performance improved enough to merit retaining him in the position.

Therefore, I **CONCLUDE** that the record is insufficient to establish bad faith by the appointing authority. To the contrary, the undisputed evidence demonstrated that Garner's performance ratings were unsatisfactory during the course of his WTP and he offered no evidence to rebut the veracity of the appointing authority's evidence of his deficiencies. The evidence plainly shows that his continued errors validated his unsatisfactory evaluation. Therefore, **I CONCLUDE** that the appointing authority's decision to terminate Garner at the end of his working test period should be affirmed.

ORDER

Based on the foregoing, I **ORDER** that the appointing authority's decision terminating Appellant R. Bernard Garner at the end of his working test period is **AFFIRMED**.

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.

June 1, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: June 1, 2017

Date Mailed to Parties: June 1, 2017

WITNESSES

For Appellant:

R. Bernard Garner

For Respondent:

Brian DeLuca

Deborah Vannatten

EXHIBITS

For Appellant:

A-1 State of New Jersey, Performance Assessment Review, PAR Model, Motor Vehicle Commission, Agency Services-Employee, Rater: Deborah Vannatten/ Supervisor 1, Motor Vehicle Agency/Lakewood, Rating Period June 1, 2012 through May 31, 2013

For Respondent:

R-1 Termination Letter, dated March 13, 2013

R-2 Six-Month Evaluation, MVC Report on Progress of Probationer, dated February 13, 2013

R-3 Six-Month Evaluation, Conclusion, MVC Report on Progress of Probationer

R-4 Performance Review, February 20 through March 12, 2013

R-5 Termination Print-Out, dated February 20, 2013

R-40 Four-Month Evaluation, MVC Report on Progress of Probationer, dated November 14, 2012

7-13-17

STATE OF NEW JERSEY

In the Matter of Roland Harris
City of Paterson
Department of Public Works

CSC DKT. NO. 2016-975
OAL DKT. NO. CSV 03555-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Roland Harris, Laborer 1, City of Paterson, Department of Public Works, removal effective July 28, 2015, was heard by Administrative Law Leslie Z. Celentano, who rendered her initial decision on June 13, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission dismisses the appeal of Roland Harris with prejudice.

Re: Roland Harris

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. CSV 03555-16
AGENCY DKT. NO. 2016-975

IN THE MATTER OF ROLAND HARRIS, CITY OF PATERSON, DEPARTMENT OF PUBLIC WORKS.

Roland Harris, petitioner, pro se

Charles Festa, III, Esq., for respondent (Dominick Stampone, Corporation Counsel)

Record Closed: June 12, 2017 Decided: June 13, 2017

BEFORE **LESLIE Z. CELENTANO,** ALJ:

Petitioner appealed his removal by respondent effective July 28, 2015, based upon charges of conduct unbecoming a public employee; neglect of duty; misuse of public property, including motor vehicles; and other sufficient cause, in violation of N.J.A.C. 2:2-3(a). The matter was transmitted to the Office of Administrative Law (OAL) on March 4, 2016.

The matter was scheduled for hearing on May 17, 2016, however was adjourned on the hearing date at the request of petitioner who indicated he was not ready to

proceed, and wished to hire an attorney to represent him. Altough the respondent had appeared with witnesses, ready to proceed, the petitioner's request at the hearing for an adjournment was granted. The matter was rescheduled for June 12, 2017 and notices were sent to all parties on October 5, 2016. On June 12, 2017, respondent again appeared at 9:00 a.m., with all witnesses, ready to proceed. Petitioner did not appear, nor did anyone on his behalf, and there was no communication of any kind whatsoever from petitioner.

Accordingly, based upon all of the foregoing, I **FIND** that this matter should be and is hereby **DISMISSED WITH PREJUDICE**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

June 13, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: June 14, 2017

Date Mailed to Parties: June 20, 2017
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

7-13-17

STATE OF NEW JERSEY

In the Matter of John Howard
Cumberland County,
Department of Corrections

CSC DKT. NO. 2017-2882
OAL DKT. NO. CSR 04037-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: CSR 04037-17

AGENCY DKT. NO. N/A

IN THE MATTER OF JOHN HOWARD,
CUMBERLAND COUNTY.

Arthur J. Murray, Esq., for appellant, John Howard (Alterman & Associates, LLC, attorneys),

Theodore E. Baker, County Counsel for respondent, Cumberland County

Record Closed: June 2, 2017 Decided: June 6, 2017

BEFORE **JEFFREY R. WILSON,** ALJ:

This matter concerns the appeal of John Howard, from the action of the respondent/appointing authority. The appeal was filed with the Office of Administrative Law (OAL) on March 23, 2017, pursuant to N.J.S.A. 40A:14-202(d).

The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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. 40A:14-204.

6.6.17
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: 6/13/17

Date Mailed to Parties: 6/13/17

JRW/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on June 2, 2017

ALTERMAN & ASSOCIATES, LLC

8 South Maple Avenue
Marlton, New Jersey 08053
(856)334-5737 - Phone
(856)334-5731 - Fax

Stuart J. Alterman – NJ
*Jeffrey S. Ziegelheim – NJ *Of Counsel*
Arthur J. Murray – NJ

Deborah Maddox – Administrator/Paralegal
Cristin Morris – Pension Coordinator
Maria Borrotto – Legal Assistant

May 30, 2017

Honorable Jeffrey R. Wilson
Office of Administrative Law
1601 Atlantic Avenue, Ste. 601
Atlantic City, NJ 08401

RE: C/O John Howard; PNDA Dated 11/17/2015 and FNDA Dated 02/27/2017
Our File No. 3540

Dear Judge Wilson:

Attached is a copy of the fully executed Settlement Agreement as it relates to the above referenced matter.

In light of the above, Petitioner Howard withdraws the Appeal she has filed in this matter.

Respectfully submitted,
ALTERMAN & ASSOCIATES, LLC

Arthur J. Murray, Esquire
amurray@alterman-law.com

AJM/mb/enc.
cc: Theodore Baker, Esquire w/o attachments

SETTLEMENT AGREEMENT
And
LIMITED DURATION LAST CHANCE DISCIPLINARY AGREEMENT

THIS SETTLEMENT AGREEMENT and LIMITED DURATION LAST CHANCE DISCIPLINARY AGREEMENT (hereinafter sometimes referred to as the "Agreement") is entered into by and between CUMBERLAND COUNTY CORRECTIONS OFFICER JOHN HOWARD, a member of PBA Local 231, (hereinafter "HOWARD") and the COUNTY OF CUMBERLAND, DEPARTMENT OF CORRECTIONS (hereinafter "CC DOC"); and

WHEREAS, HOWARD filed an appeal against CC DOC in the Office of Administrative Law, entitled JOHN HOWARD v. CUMBERLAND COUNTY, bearing OAL Docket Number CSR 04037-17 stemming from a Final Notice of Disciplinary Action dated February 27, 2017 concerning an incident occurring on November 15, 2015 with a corresponding guilty plea and sentencing on February 17, 2017; and

WHEREAS, the parties having been scheduled for *de novo* hearing on May 17, 2017; and

WHEREAS, HOWARD and CC DOC entered into global settlement negotiations with the input of the Honorable Jeffrey Wilson, A.L.J,; and

WHEREAS, HOWARD and CC DOC have now settled all controversies (itemized in the preceding paragraphs) between them; and

WHEREAS, all parties acknowledge that the merits of the controversies were in dispute and were never fully adjudicated, but all have reasons to desire amicable resolution of the collective matters; and

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. **The Terms of Settlement:**

   a. HOWARD shall with due speed withdraw his appeal against CC DOC in the Office of Administrative Law entitled JOHN HOWARD v. CUMBERLAND COUNTY DEPARTMENT OF CORRECTIONS, bearing OAL Docket Number CSR 04037-17 stemming from a Final Notice of Disciplinary Action dated February 27, 2017 concerning an incident occurring on November 15, 2015 with a corresponding guilty plea and sentencing on February 17, 2017.

b. CC DOC shall issue an Amended Final Notices of Disciplinary Action all Dated February 27, 2017, which shall reflect a change in the "disciplinary action" taken from "Removal" to "Suspension for 180 Days"; all of which has already been served. Service of the Amended Final Notices of Disciplinary Action shall be valid by mailing copies of same by regular mail to Arthur J. Murray, Esquire, attorney for HOWARD.

c. HOWARD shall return to work with CC DOC effective May 22, 2017 (depending on shift assignment) as an employee in good standing and shall have no pending discipline against him as of that date. Howard agrees to attend any training ordered by the CC DOC given his extended time out of work.

d. HOWARD hereby irrevocably waives all back pay to which he might otherwise be entitled from November 17, 2015 through the date of this Settlement Agreement. The waiver of said back pay is not a waiver of any seniority except for the 180 suspension days referenced in Paragraph 1(b).

e. HOWARD hereby forfeits his right to file an appeal in the Office of Administrative Law as it relates to the Amended Final Notice of Disciplinary Action issued pursuant to Paragraph 1(b) of this Settlement Agreement and Limited Duration Last Chance Disciplinary Agreement.

f. HOWARD understands that he shall be subject to a Limited Duration Last Chance Disciplinary Agreement as part of this Settlement Agreement with the following parameters:

    I. This Limited Duration Last Chance Disciplinary Agreement shall start on May 22, 2017 and shall lapse completely on September 15, 2018. Upon expiration of this Limited Duration Last Chance Disciplinary Agreement, it can no longer be utilized by CC DOC in any subsequent disciplinary action initiated against HOWARD or in which HOWARD is a witness.

    II. If at any time during the timeframe of May 22, 2017 through January 31, 2018, CC DOC files a Preliminary Notice of Disciplinary Action against HOWARD and the specifications of said Preliminary Notice of Disciplinary Action consist of any violation which has a corresponding penalty of one suspension day or greater, HOWARD understands that the "discipline sought" by CC DOC shall consist of "Removal". If at any time during the timeframe of February 1, 2018

through September 15, 2018, CC DOC files a Preliminary Notice of Disciplinary Action against HOWARD and the specifications of said Preliminary Notice of Disciplinary Action consist of any violation which has a corresponding penalty of three suspension days or greater, HOWARD understands that the "discipline sought" by CC DOC shall consist of "Removal".

III. If the charges referenced in Paragraph f (II) are sustained following a Departmental Hearing, following a *de novo* hearing before the Office of Administrative Law and following any appeals thereto, HOWARD understands that the "discipline taken" by CC DOC shall consist of "Removal" and HOWARD shall be prevented from arguing for any other penalty or appealing the penalty sought, but HOWARD shall be entitled to defend the charges on their merits at any hearing or in any appeal.

2. **Dismissal of Action**. HOWARD understands and agrees that his attorneys and/or counsel for the CC DOC will file with the appropriate Stipulation of Dismissal with prejudice and/or Withdrawal of Appeal with prejudice with regard to effectuating the terms of this Settlement Agreement and Limited Duration Last Chance Disciplinary Agreement.

3. **Attorneys' Fees and Costs**: HOWARD agrees that HOWARD will bear his own costs and attorneys' fees through his coverage with PBA Local 231.

4. **Entire Agreement**: This Agreement contains the sole and entire agreement between the parties hereto and is intended to memorialize the settlement of discipline pending against HOWARD and all appeals of discipline filed by HOWARD pending as of the date of the Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

5. **Severability**: The parties agree that if any court declares any portion of this Agreement unenforceable, the remaining portions shall be fully enforceable.

6. **Applicable Law**: This Settlement Agreement and Limited Duration Last Chance Disciplinary Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret their Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey in the County of Cumberland.

7. **Effective Date**: This Agreement will become effective on the date on which all parties to the Agreement have executed it.

8. None Use: This Settlement Agreement and Limited Duration Last Chance Disciplinary Agreement is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein or to enforce its terms.

9. BY SIGNING THEIR SETTLEMENT AGREEMENT AND LIMITED DURATION LAST CHANCE DISCIPLINARY AGREEMENT, HOWARD ACKNOWLEDGES:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;

C. HE AGREES WITH EVERYTHING IN IT;

D. HIS ATTORNEY NEGOTIATED THIS SETTLEMENT AGREEMENT AND LIMITED DURATION LAST CHANCE DISCIPLINARY AGREEMENT WITH HIS KNOWLEDGE AND CONSENT;

E. HE HAS BEEN ADVISED TO CONSULT WITH HIS ATTORNEY AND PBA UNION PRESIDENT PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND LIMITED DURATION LAST CHANCE DISCIPLINARY AGREEMENT, AND HAS IN FACT DONE SO; AND

F. HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND LIMITED DURATION LAST CHANCE DISCIPLINARY AGREEMENT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

Dated: 05/22/17

JOHN HOWARD

We agree to the form and content of this Settlement Agreement & Limited Duration Last Chance Disciplinary Agreement.

Theodore E. Baker, Esquire (County Counsel, Cumberland County)

Dated: 5/23/17

Theodore E. Baker, Esquire

Warden

Dated: 05-24-2017

Richard Smith

PBA Local 231 President Victor Bermudez

Dated: 5/23/17

Victor Bermudez

Prepared by:

Arthur J. Murray, Esquire
Attorney for JOHN HOWARD

Angiulo, Nicholas

From: Arthur J. Murray <AMurray@ALTERMAN-LAW.COM>
Sent: Monday, June 19, 2017 6:16 PM
To: Theodore Baker; Angiulo, Nicholas
Subject: RE: John Howard v. Cumberland County - Settlement

We concur. But it should be noted as an "approved" Leave of Absence without Pay.

-Art

From: Theodore Baker [mailto:theodoreba@co.cumberland.nj.us]
Sent: Monday, June 19, 2017 1:42 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; Arthur J. Murray <AMurray@ALTERMAN-LAW.COM>
Subject: RE: John Howard v. Cumberland County - Settlement

We suggest that the balance of time be recorded as LOA without pay.

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, June 19, 2017 12:34 PM
To: amurray@alterman-law.com; Theodore Baker
Subject: John Howard v. Cumberland County - Settlement
Importance: High

Mr. Murray and Mr. Baker:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding John Howard from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Howard agrees to a 180 day (six month) suspension, which has already been served. However, the record reflects that he was immediately suspended on November 17, 2015. Assuming the agreed upon 180 day suspension ends on May 17, 2016, we need to know how the time period from that date until Mr. Howard's reinstatement should be recorded. For example, is that time period to be recorded as a leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An email reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

7-13-17

STATE OF NEW JERSEY

In the Matter of Enrique Marrero
Township of North Bergen,
Department of Pubic Safety

CSC DKT. NO. 2016-4040
OAL DKT. NO. CSV 08063-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08063-16
AGENCY DKT. No. 2016-4040

ENRIQUE MARRERO,
Appellant,

v.

TOWNSHIP OF NORTH BERGEN, DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Patrick P. Toscano, Jr., Esq., for Appellant (Toscano Law Firm, LLC, attorneys)

Mark A. Tabakin, Esq. for Respondent (Weiner Lesniak, attorneys)

Record Closed: June 8, 2017 Decided: June 12, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

On May 25, 2016, the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) where it was filed on May 31, 2016, for determination as a contested case. A telephone prehearing conference was held on June 21, 2016 and a hearing date of November 7, 2016 was scheduled. The November 7, 2016 hearing date was converted to a settlement conference date. Subsequently, the parties reached a settlement, which was signed by December 7, 2016.

Due to miscommunications, the finalized, signed settlement agreement was not transmitted to the tribunal by respondent's counsel. Meanwhile, respondent's file was archived. Subsequently, it was retrieved from storage and sent to the Tribunal.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 12, 2017
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

SETTLEMENT AGREEMENT and GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into between the **Township of North Bergen** (the "Township") and **Enrique Marrero** ("**Marrero**"), collectively, "the Parties".

WHEREAS, Marrero is employed by the Township as a police sergeant; and

WHEREAS, with regard to an incident that occurred on November 1, 2015, by way of a Final Notice of Disciplinary Action dated April 29, 2016, Marrero was suspended, without pay, for a period of thirty (30) days for the following charges:

(a) Violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, inefficiency or failure to perform duties;

(b) Violation of N.J.A.C. 4A:2-2.3(a)(2) Insubordination;

(c) Violation of N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming a public employee;

(d) Violation of N.J.A.C. 4A:2-2.3(a)(7) Neglect of duty; and,

(e) Violation of N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause; and

WHEREAS, Marrero filed an appeal of his discipline and suspension with the Office of Administrative Law (OAL Docket No. CSV 08063-16); and

WHEREAS, on November 7, 2016, the Office of Administrative Law was scheduled to conduct a plenary hearing in the matter, but instead, the Parties agreed to voluntarily enter into this Agreement; and

WHEREAS, the Parties deem it to be in their best interests to memorialize the terms and conditions of their agreement placed on the record before the Honorable John Scollo, A.L.J., with respect to the parties' rights, duties and obligations regarding Marrero's discipline and suspensions stemming from the November 1, 2015 disciplinary matter; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The **"Township"**, as used herein, shall at all times mean the Township of North Bergen, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, elected officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. **"Marrero"**, as used herein, shall mean Enrique Marrero, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. With regard to the November 1, 2015 disciplinary matter, Marrero agrees and voluntarily elects to forever dismiss, with prejudice, all claims and appeals relating to his discipline and suspension in connection with the matter docketed as OAL Docket No. CSV 08063-16.

4. With regard to the November 1, 2015 disciplinary matter, the Township agrees to issue an Amended Final Notice of Disciplinary Action, attached hereto as "Exhibit A", to reflect a sustained charge of violation of N.J.A.C. 4A:2-2.3(a)(12) Other sufficient cause, with the penalty of a fifteen (15) day suspension, without pay.

5. The Parties agree that Marrero shall serve the fifteen (15) day suspension, without pay, by forfeiting his accumulated but unused vacation days. In the event that Marrero's

unused, accumulated vacation days for 2016 are less than the fifteen (15) days he is to be suspended, the balance shall be taken from his vacation days for 2017.

6. The Parties acknowledge and agree that the terms set forth in this Agreement is a full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by either party against the other for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorney's fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of the matter docketed as OAL Docket No. CSV 08063-16, and the underlying facts and circumstances that gave rise to that docketed matter.

7. Marrero understands and agrees that this Agreement does not constitute an admission by the Township of any wrongful action or violation of any federal or state statute, regulation, policy or procedure, or common law right so that neither this writing nor the fact of settlement constitutes an admission of liability or wrongdoing or breach of duty. It is understood and agreed by Marrero that the Township does not admit any liability, nor has it made any agreement to make any payment or take any action not reflected in this Agreement. The Township specifically denies any wrongful action or conduct.

8. As an inducement for the parties to enter into this Agreement, each party does hereby remise, release and forever discharge all other parties from any and all debts, obligations, suits, actions, causes of action, claims or demands, in law or in equity, which any one party now has or hereafter may assert against the others arising out of the matter docketed

as OAL Docket No. CSV 08063-16, as well as the underlying facts and circumstances that gave rise to that docketed matter, including, but not limited to, all claims, liabilities, costs and attorneys' fees under: (1) the New Jersey civil service laws and regulations; (2) the Civil Rights Acts of 1964, as amended (42 U.S.C. 2000(e) et seq.); (3) the Americans with Disabilities Act; (4) the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.); (5) any collective negotiations agreement; (6) Township ordinances, rules and regulations; (7) the Constitution of the United States; (8) the Constitution of New Jersey; (9) wage and hour laws, federal and state; (10) any and all paid and/or unpaid medical and/or personal and/or family leave laws and regulations, federal and state including, but not limited to, FMLA and NJ FLA; (11) any other federal or state statute or common law (including, but not limited to the ADEA, WARN Act); (12) the New Jersey Tort Claims Act N.J.S.A. Title 59; (13) the Fourth and Fourteenth Amendments to the United States Constitution; and/or (14) other causes of action whether enumerated herein specifically or not. Marrero does not waive any claims for the Township's breach of this Agreement. Further, Marrero hereby waives any and all relief not explicitly provided for in this Agreement, other than all relief he currently seeks under Civil Action No.: 2:14-cv-03482-KM-MAH , currently venued in the United State District Court, District of New Jersey, Newark

9. The Parties agree that in consideration of the promises set forth in this Agreement that neither party shall file: (a) any appeal or contested case/controversy before the Civil Service Commission seeking any type of relief whatsoever; (b) any grievances or arbitrations relative to the November 1, 2015 disciplinary matter and the Amended Final Notice of Disciplinary Action; and (c) any type of judicial or administrative action of any

type or nature in connection with the November 1, 2015 disciplinary matter and the Amended Final Notice of Disciplinary Action under this Agreement. Marrero agrees not only to release, acquit and forever discharge the Township from any and all claims which arose from Marrero's November 1, 2015 disciplinary matter, but also those which have been or may be made against the Township by any other person or organization on his behalf. Marrero specifically waives any right to become, and promises not to become, a member of any class in any case in which any claim is asserted against the Township, involving any event that has occurred on or before the date of this Agreement and General Release. The Township affirms that, as of the date of execution of this Agreement and General Release, it has no knowledge of any pending class action against it to which Marrero could be a potential class member.

10. The Parties hereby acknowledge and agree that they further expressly waive and assume the risk of any and all claims or damages which exist regarding the November 1, 2015 disciplinary matter the Township and Marrero do not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially affect their decision to enter into this Agreement and General Release.

11. Both Parties acknowledge that this agreement is subject to the approval of the Township. If such approval is not given, this agreement and all of the stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this agreement.

12. Marrero and the Township bear all costs and expenses arising from the actions of their own counsel in connection with this agreement and Agreement and General Release.

13. The terms of this Agreement and the Agreement itself shall be held in the strictest confidence by all parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys, accountants, auditors, tax preparers, and financial advisors; (b) the Township may disclose this Agreement as necessary to fulfill its obligation under the Open Public Records Act, as well as other standard or legally required reporting or disclosure requirements; and (c) the parties may disclose this Agreement insofar as disclosure may be necessary to enforce the terms or as otherwise required by law.

14. Both parties acknowledge and agree that they will not disclose, discuss or post the terms of the Agreement via electronic communication, including, but not limited to, e-mail or text messages; or via the internet or social media websites, including, but not limited to, Facebook, Twitter, blogs, NJ.com, or similar websites or social media outlets.

15. The Parties agree not to disparage or make any negative remarks or statements about the other Parties. For purposes of this, "disparage" shall mean any negative statement, whether written, oral, or via the internet or social media websites.

16. The Parties agree that, if asked about the Agreement by anyone, including any member of the media, they will respond only: "That the matter concerns a personnel matter for which no comment can be made as it is confidential."

17. The Parties acknowledge and agree that if they violate any of the terms of this Agreement, including but not limited to breach of the provisions set forth in paragraphs 13 through 16, all of the obligations set forth herein shall cease and the Parties will return to their original positions as if this Agreement never occurred.

18. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

19. The waiver by Marrero and/or the Township of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

20. In any action commenced against any party to enforce the provisions if this Agreement, the moving party, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

21. If any term, provision or condition of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Agreement and General Release.

22. Marrero and the Township agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Agreement.

23. This Agreement contains the entire Agreement between Marrero and the Township with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

24. In entering into this Agreement, Marrero has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted as being reasonable.

25. This Agreement shall be irrevocable, fully binding upon Marrero and his respective heirs, executors, administrators, successors and assigns.

26. This Agreement shall become effective immediately following the execution by Employee and the Township.

Attest:

Thomas Kobin

Dated: 12/7/16

11/29/16

Dated:

Township of North Bergen

BY:

Dated: 12/7/16

Enrique Marrero

BY: _____
Enrique Marrero

Dated:

257

STATE OF NEW JERSEY, COUNTY OF HUDSON

SS.:

I CERTIFY that on this 29 day of NOVEMBER, 2016

Enrique Marrero personally came before me and acknowledged under oath, to my satisfaction, that he is the person

a) named in and personally signed this document; and
b) signed, sealed and delivered this document as his act and deed.

AN ATTORNEY AT LAW OF THE STATE OF NEW JERSEY

7-13-17

STATE OF NEW JERSEY

In the Matter of Fadette McDaniels
New Jersey Veterans Memorial Home,
Menlo Park

CSC DKT. NO. 2017-2688
OAL DKT. NO. CSV 3466-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 3466-17

AGENCY DKT. NO. 2017-2688

IN THE MATTER OF FADETTE MC DANIELS,
NEW JERSEY VETERANS MEMORIAL HOME,
MENLO PARK.

Robert Little, IV, AFSCME Council One, for appellant, appearing pursuant to N.J.A.C. 1:1-5.4(a)6

Susan Sweeney, Esq., for respondent

Record Closed: May 23, 2017 Decided: June 12, 2017

BEFORE **JOSEPH LAVERY,** ALJ t/a:

This matter concerns the appeal of Fadette McDaniels from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on March 13, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 12, 2017
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 6/13/17

Date Mailed to Parties: 6/13/17

mph

OAL DKT. NO. CSV 03466-2017S
AGENCY DKT. NO. 2017-2688

SETTLEMENT AGREEMENT

IN THE MATTER OF

Fadette McDaniels

AND

NJ DMAVA

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 2/14/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)4	10 DAY suspension	
2.	NJAC 4A:2-2.3(a)12		
3.	DD 230.05 (a)4		
4.	DD 220.05 (a)6		
5.	(a)8		

B. The Appellant Fadette McDaniels withdraws his/her appeal and request for a hearing, and the Respondent Department of NJDMAVA agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	NJAC 4A:2-2.3(a)4	5 DAY suspension	
2.	(a)12	(5 DAYS back pay due to appellant)	
	DD 220.05 (a)4 (a)6 (a)8		

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of 10 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 5 DAYS BACK pay due to appellant.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: —.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. ~~[illegible]~~ NJ DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of NJ DMAVA will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Michelle McDaniels's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of NJ DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5-23-17
DATE

Modelte Maldonado
Appellant

5/23/17
DATE

Respondent
NJ DMAVA

5-23-17
DATE

Robert C. Littlehale
ON BEHALF OF APPELLANT

DATE

ON BEHALF OF

OAL DKT. NO. CSV 03464-2017S

CERTIFICATION

I, Fadette McDaniels, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-23-17
DATE

Fadette McDaniels
NAME

7-13-17

STATE OF NEW JERSEY

In the Matter of Yesenia Pucheta
Passaic County Sheriff's Department

CSC DKT. NO. 2015-22
OAL DKT. NO. CSV 08407-14

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 08407-14
AGENCY DKT. NO. 2015-22

IN THE MATTER OF YESENIA PUCHETA,
PASSAIC COUNTY SHERIFF'S DEPARTMENT.

Gina Mendola Longarzo, Esq., for appellant Yesenia Pucheta (Law Offices of Gina Mendola Longarzo, attorneys)

Jose R. Santiago, Assistant County Counsel, for respondent Passaic County (William J. Pascrell, III, County Counsel)

Record Closed: May 30, 2017 Decided: June 1, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Yesenia Pucheta filed an appeal from a Final Notice of Disciplinary Action dated June 19, 2014, issued by respondent Passaic County Sheriff's Department. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 8, 2014, for determination as a contested case. Following the adjournment of several hearing dates at the parties' request, the parties reached an amicable resolution and counsel for appellant submitted

the attached Settlement Agreement and General Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

6/1/17

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 6/5/17

Date Mailed to Parties: JUN 5 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WILLIAM J. PASCRELL, III,
PASSAIC COUNTY COUNSEL
401 GRAND STREET
PATERSON, NJ 07505
(973) 881-4466
Attorneys for Respondent Passaic County Sheriff's Office

YESENIA PUCHETA,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	AOL DOCKET NO: CVS 08407-2014N
	:	
vs.	:	
	:	**SETTLEMENT AGREEMENT**
PASSAIC COUNTY SHERIFF'S	:	**AND GENERAL RELEASE**
OFFICE ,	:	**5th DRAFT**
	:	
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made by and between the Respondent, PASSAIC COUNTY SHERIFF'S OFFICE("Sheriff's Office") and its employee, Petitioner, YESENIA PUCHETA and her husband, TAMER KAZAN.

WHEREAS on July 31, 2012 Petitioner, Yesenia Pucheta, made application to the Passaic County Sheriff's Office for consideration of employment as a Passaic County Sheriff's Officer; (**Exhibit A**) and

WHEREAS all applicants are provided notice, in the application of employment via a form entitled, Employee Status Notification and Disclosure Statement, which specifically provides that an employee does not gain permanent appointment unless all of the conditions for employment are met, (**Exhibit A**), and

WHEREAS The Disclosure Statement provides in pertinent part as follows,

> Career service appointments 4A:4-1.1
> Regular appointments to tiles allocated to the competitive division of the career service are made after taking an examination for the title and appearing on a certification for that tile. Upon successful processing from a certification, a regular appointment is made. An employee does not gain permanent status unless all of the following conditions are met
>
> * A regular appointment is made to the career service from a certification for eligibles
>
> * Successful completion of a working test period (12 months for sworn entry titles, 3 months otherwise)
>
> * AND satisfaction of all title requirements outlined in the job specifications (successful completion of the academy), (**Exhibit A, pg.3**) and

WHEREAS, Petitioner executes an additional Notice in the application that, states that, appointment to the position of County Sheriff's Officer will require completion of an accredited Police Training Academy, during the course of employment, (**Exhibit A, pg.48**)and

WHEREAS, Certification, as provided in N.J.A.C. 13:1-5.1 states as follows:

> (a) A trainee shall be eligible for certification when the school director affirms that:

1. The trainee has achieved the minimum requirements set forth in the basic course applicable to his or her appointment and has demonstrated an acceptable degree of proficiency in the performance objectives contained in the particular basic course;

2. The trainee has participated in no less than 90 percent of the total instructional time assigned to those performance objectives designated by the Commission; and

3. The trainee has successfully completed the training required by the Commission to be conducted by the employing law enforcement agency.

WHEREAS, On September 16, 2013, Petitioner was accepted into and began the Passaic County Police Academy training course, and

WHEREAS, On December 12, 2013 Petitioner was dismissed from the Passaic County Police Academy for allegedly failing to successfully complete the training course; and

WHEREAS, Petitioner had until January 24, 2014 to file an appeal with the Police Training Commission, to contest her dismissal; and

WHEREAS, Petitioner has never filed an appeal of her dismissal from the Passaic County Police Academy with the Police Training Commission, and

WHEREAS On January 17, 2014 a 31A PNDA was served upon Petitioner, seeking her removal from employment at the Passaic County Sheriff's Office and setting forth the following charges;

*4A:2-2.3(a)1 Incompetence, inefficiency or failure to perform duties.

*4A:2-2.3(a)3- Inability to perform duties

*4A:2-2.3(a)11.4 Knowingly and willfully making a false entry, or failing to make a required entry in any Official report or record, (**Exhibit B**)and

WHEREAS, The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq.; and

WHEREAS, A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3; and

WHEREAS The statutory scheme dictates that successful completion of a police training course, at a school approved by the Police Training Commission, is a mandatory prerequisite to a permanent appointment as a Passaic County Sheriff's Officer; and

WHEREAS, N.J.S.A. 52:17B-68 provides that every municipality and county shall require that no person shall be given or accept a permanent appointment unless such person has successfully completed a police training course at an approved school; and

WHEREAS the controlling statute, NJSA 52:17B-68.1 leaves no room for discretion, so that before permanent appointment, there

must be completion of the basic Police Training Commission course, and

WHEREAS Civil Service rules and regulations do not anticipate continued employment, as a sworn law enforcement officer, of those individuals who do not complete the Police Training Commission course; and

WHEREAS, Yesenia Pucheta objected to the pending administrative charges served on her by the Sheriff's Office, in the PNDA 31 and invoked her right to a departmental hearing which was held on March 10, 2014; and

WHEREAS, at the hearing a motion was made by Petitioner and Counsel to adjourn without proceeding, at which point the parties agreed that Petitioner's status of Suspended with Pay would be changed to Suspended Without Pay effective immediately; and

WHEREAS on June 19, 2014, a 31-B FNDA was issued, terminating Petitioner under NJSA 4A:2-2.3(a)1, Inability to Perform Duties and 4A:2-2.3(a)3, Failure to Perform Duties; and

WHEREAS The Passaic County Sheriff's Office and Yesenia Pucheta (cumulatively the "Parties") are now Parties to a matter currently before the Office of Administrative Law (OAL Docket No. CVS 08407-2014N) regarding the Sheriff's Office's imposition of disciplinary action against Yesenia Pucheta with an effective date of June 19, 2014; and

WHEREAS, on September 17, 2014 Petitioner, along with her Husband Tamer Kazan, being represented by the same counsel, Gina Mendola Longarzo, LLC, filed a Notice of Tort Claim on behalf of Petitioner and her husband, Tamer Kazan, setting forth various claims and allegations as set forth in the attached (**Exhibit C**); and

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with a hearing; and

WHEREAS, the proposed settlement is in the best interest of the Parties;

NOW THEREFORE, intending to be legally bound hereby, The Passaic County Sheriff's Office, Yesenia Pucheta and Tamer Kazan have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them:

A. Yesenia Pucheta will resign from her employment with the Sheriff's Office as of the date upon which she went on a no pay status. The end of Yesenia Pucheta's employment will be treated as a voluntary resignation from her employment in good standing. Concurrent with the execution of this Agreement, Yesenia Pucheta shall submit a valid and binding letter of resignation in good standing from her employment with the County, attached hereto as Exhibit D.

B. The Sheriff's Office agrees to provide any prospective employers with a neutral reference of Yesenia Pucheta, to include the dates of her employment and position held within the Sheriff's Office. In the event the County is contacted by any person or entity seeking a professional, personal or character reference related to Pucheta and/or her employment at the County as a Sheriff's Officer, all parties agree that the County shall advise such person or entity that it is the policy of the County to solely provide information verifying employment, dates and title and will verify that Pucheta resigned in good standing.

C. Yesenia Pucheta and her Husband, Tamer Kazan waive any and all claims as set forth under the Notice of Tort Claim filed on September 17, 2014 as referenced herein, against all parties, named therein, known or unknown, and as more fully set forth herein. While Tamer Kazan is not a party to this action and appeal before the Office Of Administrative Law, all parties, including Tamer Kazan, acknowledge that this Settlement Agreement and Release, shall specifically act as a Release of his claims, as set forth under that Notice of Claim, previously referenced herein, for any and all claims and causes of actions associated with, arising from and/or in any way connected to the claims which have been or which could have been asserted, in connections with

the termination of employment of Petitioner, Yesenia Pucheta and the Passaic County Sheriff's Office. And both Petitioner Yesenia Pucheta and her Husband Tamer Kazan, recognize that they are receiving valuable consideration under the terms, conditions and execution of this agreement, so as to make this Settlement Agreement and Release, binding upon Tamer Kazan, Yesenia Pucheta and the Sheriff's Office, pursuant to all of the terms and conditions as set forth herein and as such has become a party to this Settlement and Release.

D. In consideration of paragraphs A-C, and all of the terms and conditions as set forth herein, the Passaic County Sheriff's Office Agrees to pay an attorney's fee in trust to the Law Offices of Gina Mendola Longarzo, LLC, in the amount of $20,000.00 within forty five days of the acceptance of this Settlement Agreement and Release, by Civil Service as a final determination.

E. The Parties have also agreed to the following:

1. There will be no back pay to be paid by the Sheriff's Office to Yesenia Pucheta.
2. Yesenia Pucheta agrees not to apply for work at the Passaic County Sheriff's Office for a period of nine years from the date of the execution of this agreement by all parties. However, the Passaic County Sheriff's Office has the discretion to void/rescind this

provision and accept an application for employment from Yesenia Pucheta prior to the expiration of the six year period.

F. The Passaic County Sheriff's Office agrees to dismiss all disciplinary charges against Pucheta with prejudice and the Final Notice of Disciplinary Action, dated June 19, 2014, will be amended to reflect that she resigned in good standing from her employment with the Sheriff's Office and the form attached hereto as (**Exhibit D**) and will be filed with the Civil Service Commission; The Sheriff's Office shall amend Yesenia Pucheta's personnel records to conform to the terms of the Agreement. All of the Sheriff's Office internal records will be kept intact. Nothing herein shall preclude the Sheriff's Office from releasing information on this matter to anyone who has a release executed by Yesenia Pucheta or as consistent with the law. Any information regarding the resolution of the underlying charges will be provided to the Public Employees Retirement system pursuant to N.J.S.A. 43:1-2.2 as amended effective April 14, 2007.

G. Yesenia Pucheta waives all other claims against the Passaic County Sheriff's Office and all others as set forth above with regard to the instant charges, including any award of back pay or other monetary relief, other than counsel fees.

H. Nothing in this Agreement shall be deemed to be an admission of liability on behalf of either party. This Agreement shall not constitute a precedent in matters involving other employees.

I. Yesenia Pucheta and her Husband waive all claims, suits or action, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against Passaic County, Passaic County Board of Chosen Freeholders, The Sheriff's Office, all employees, agents or assigns, including but not limited to those which have been or could have been made or prosecuted as a result of the Notice of Tort Claim filed on September 17, 2014, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits law,

the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

J. The Parties and Tamer Kazen agree that if any portion of this Agreement is deemed illegal, unenforceable, or ineffective in a legal forum, such portions shall be deemed severable such that all other portions of this Agreement shall remain valid and binding upon all parties and shall be fully enforceable. No Party, including Tamer Kazan shall act or seek to have this Settlement Agreement and Release declared illegal or unenforceable in any legal forum, specifically as to its terms and conditions, including the waiver of rights as set forth herein.

K. In the event that any party to this Settlement and Release, brings an action to enforce the terms of this Agreement or as a result of a breach of the Agreement by the opposite party, in addition to any remedies available at law or in equity, the non-breaching party shall be entitled to an award of reasonable attorneys' fees and costs incurred in

connection with that enforcement or breach action in the event that any such breach is found by a court of competent jurisdiction.

L. This Agreement is executed voluntarily and without any duress or undue influence on the part or behalf of any and all parties signing hereto, with the full intent of releasing all claims. They acknowledge that:

1. They have carefully read this Agreement and it has been explained to them in full;
2. They have been represented in the preparation, negotiation and execution of this Agreement by legal counsel of their own choice or that they have voluntarily declined to seek such counsel;
3. They fully understand the terms and consequences of this Agreement and of the releases it contains;
4. They are fully aware of the legal and final binding effect of this Agreement;
5. They freely and voluntarily enter into this Agreement without duress or coercion;
6. The Parties are completely satisfied that this Agreement is fair, reasonable, and acceptable; and
7. The parties are satisfied with their respective counsel if any and believe their counsel has effectively represented their independent interests.

M. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them, under the terms and conditions of this Agreement. Each Party warrants and represents that there are no actions filed or pending in state or federal court, liens or claims of lien or assignments in law or equity or otherwise of, or against, any of the claims or causes of action released herein.

N. Each executing Party represents that it has had the opportunity to consult with an attorney, and has carefully read and understands the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representation or statement made by the other Party hereto, which are not specifically set forth in this Agreement.

O. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise except by an instrument in writing of concurrent or subsequent date, signed by a duly authorized officer or representative of each of the parties hereto. The Parties agree that they waive the rule of construction against the drafter of this Agreement.

P. The laws of the State of New Jersey shall govern this Agreement. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning

this Agreement, but this agreement shall be binding upon any and all jurisdictional courts and dispute resolution forums of this state.

Q. The Agreement is effective after it has been signed by all of the Parties set forth below and approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the **CIVIL SERVICE COMMISSION** in its totality shall not interfere with the rights of either party to continue to pursue the matter further.

R. This Agreement may not be executed in counterparts, and each counterpart shall have the same force and effect as an original and constitute an effective, binding agreement on the part of each of the undersigned.

S. This Agreement represents the complete and full understanding between the Parties, thereof and is signed as their own free act.

T. The recitations set forth above in the Whereas clauses, are incorporated herein as substantive provisions and are not mere recitals.

BY SIGNING BELOW, THE UNDERSIGNED FURTHER INDICATE AND ACKNOWLEDGE THAT THIS IS A LEGALLY BINDING DOCUMENT AND that THEY ARE FREELY AND VOLUNTARILY GIVING UP CERTAIN RIGHTS TO FILE LEGAL CLAIMS AND TO RELEASE PRIVATE AND CONFIDENTIAL INFORMATION AND INTEND TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT WITHOUT EXCEPTION.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the respective dates set forth below.

5-5-17
Date

Yesenia Pucheta

5/5/17
Date

Tamer Kazan

5/5/17
Date

Gina Mendola Longarzo, LLC
Attorney for Appellant

5/16/17
Date

Sheriff's Office
Representative of Passaic County

5/22/17
Date

Office of the County Counsel
Attorney for Respondent

CERTIFICATION

I, Yesenia Pucheta, being the moving party in this matter, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Agreement voluntarily.

I also understanding that if this Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-5-17
DATE

Y Pucheta
YESENIA PUCHETA

7-13-17

STATE OF NEW JERSEY

In the Matter of Rebecca Recine
Hamilton Township,
Department of Public Safety

CSC DKT. NO. 2016-2244
OAL DKT. NO. CSV 471-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 **BW**

The appeal of Rebecca Recine, Public Safety Telecommunicator, Hamilton Township, Department of Public Safety, removal effective December 15, 2015, on charges, was heard by Administrative Law Judge Solomon A. Metzger, who rendered his initial decision on June 7, 2017 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Public Safety*, 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 her permanent position.

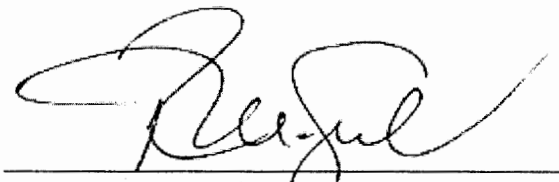
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Rebecca Recine. The Commission further orders that appellant be granted back pay, benefits, and seniority for the period of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

The Commission further orders that counsel fees be awarded to the attorney for 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 and 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
JULY 13, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF REBECCA RECINE, HAMILTON TOWNSHIP DEPARTMENT OF PUBLIC SAFETY.

OAL DKT. NO. CSV 471-16
AGENCY DKT. NO 2016-2244

Frank M. Crivelli, Esq., for appellant Rebecca Recine (Crivelli & Barbati, LLC, attorneys)

Lindsay Burbage, Esq., for respondent Department of Public Safety

Record Closed: May 12, 2017 Decided: June 7, 2017

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a Final Notice of Disciplinary Action terminating appellant's employment with the Hamilton Township Department of Public Safety under the Civil Service Act, N.J.S.A. 11A:2-1 et seq. Appellant sought review and the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to-15. A hearing was conducted on August 16 and August 23, 2016.[1]

Certain facts are undisputed. Appellant was hired as a Public Safety Tele-communicator, more commonly known as a dispatcher, in September 2010. This is a

[1] The matter was heard before John Schuster III, ALJ, who retired before rendering an initial decision. I have been temporarily assigned to review the record and complete the OAL's work in the matter. Counsel have consented to this procedure.

civilian position. Her duties included taking emergency calls, quickly eliciting needed information, and directing the problem to appropriate units for intervention. On March 31, 2015, and April 3, 2015, she failed to report for work and officers were sent to find her. Appellant was tested on suspicion of drug use and was suspended on April 9, 2015. Appellant was terminated from her position effective December 15, 2015.

Though multiple charges were filed, the parties agreed that the hearing would focus on appellant's fitness for duty as a dispatcher.

Dr. Howard Adelman was presented by the appointing authority as an expert in Psychology. On September 25, 2015, he undertook psychological testing using the Personality Assessment Inventory (PAI) geared toward law enforcement. Dr. Adelman testified that this is a highly reliable test that has been in use for many years. He also interviewed appellant and integrated this information with the test results. The process took approximately five hours. Dr. Adelman thought that appellant answered his questions openly and without any effort to evade. He concluded that she was anxious, depressed, ruminative, and strongly reactive. She could be explosive when frustrated. She might prove unreliable at work and had poor inter-personal skills. Appellant used medications, both prescribed and otherwise, that engendered somatic symptoms such as fatigue and lack of clarity. Together, these conditions would impede her performance as a dispatcher and Dr. Adelman found her unfit for that particular duty. He did not inquire into appellant's work history, as his assessments were intended to be predictive of future complications.

Dr. Daniel S. Cowan is a board-certified psychiatrist called by appellant. Dr. Cowan examined appellant on June 23, 2016. He found that she suffered from a generalized anxiety disorder and has had episodes of depression. She also suffers from attention deficit disorder. Appellant reported taking medications on and off for these conditions, but was not on medication when he saw her. While working as a dispatcher she was taking Xanax for anxiety and Adderall for attention issues. Dr. Cowan offered that many people take these medications and have no problem working.

Dr. Cowan also reviewed Dr. Adelman's report and found it unclear. It appeared Dr. Adelman relied in part on a personality test designed for law enforcement personnel. These are predictive tests generally used for interview purposes, or if someone is not performing well. They help determine whether a certain personality type is suited to a given organization or position. Dr. Cowan does not use formal written testing, as this is the province of psychologists. He felt; however, that in this instance it would be more informative to inquire into appellant's work history. In his seventy-five-minute session with appellant she denied alcohol or drug abuse and denied being angry, aggressive, or having difficult relationships. She reported that she had worked for five years as a dispatcher without much incident. Dr. Cowan felt that this was better evidence of fitness than a personality test.

Appellant testified that her record as a dispatcher was generally free of incident, other than the two events that led to her fitness for duty exam and a prior lateness in 2011. As to the incidents she related that she had been ill, not impaired and that her error was not calling in sick. More generally she was not hostile, impatient, depressed or fatigued and felt that she handled her duties professionally. This is the substance of the record.

The burden of proof rests with the appointing authority to show that appellant is unfit for her title, N.J.S.A. 11A:2-21. This was not accomplished. I have accorded greater prominence to appellant's work history than to the predictive testing. Over the course of five years as a dispatcher the incidents were few. No peer or supervisor appeared to endorse the image of her as angry, argumentative, brooding, or depressed. There is no evidence that appellant ever failed to properly receive or route a call, or that there were complaints from the public about her manner. As to the events of March 31 and April 3, 201,5 we have only appellant's testimony that she was ill and did not call out for her shifts. While it is possible to exclude a candidate based on psychological testing, this is no small matter, see, In re Vey, 124 N.J. 534 (1991). I do not entirely discount Dr. Adelman's assessment; Dr. Cowan recognized as well that appellant had issues requiring medications. However, Dr. Adelman opined that work history is insignificant in the face of testing and he thereby marginalized a common

measure of evaluation. The traits he ascribed to appellant would weigh more heavily were they better correlated with known conduct.

Based on the foregoing, it is ordered that appellant be restored to her position as a dispatcher, with back pay, benefits and counsel fees, in accordance with the regulations.

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.

June 7, 2017
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency: 6/7/17

Date Mailed to Parties: 6/7/17

mph

WITNESSES:

For appellant:

Rebecca Recine

Dr. Daniel S. Cowan

For respondent:

Dr. Howard Adelman

7-13-17

STATE OF NEW JERSEY

In the Matter of Felix Rivera
City of Millville, Police Department

CSC DKT. NO. 2016-1610
OAL DKT. NO. CSR 09076-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Felix Rivera, Police Officer, City of Millville, Police Department, removal effective May 28, 2016, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on May 26, 2017. No exceptions were filed.

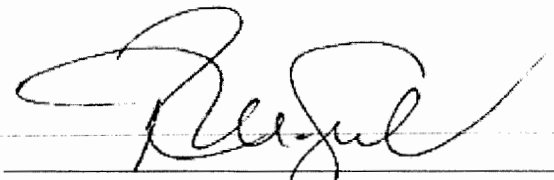
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Felix Rivera.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 09076-16
AGENCY DKT. NO. N/A

IN THE MATTER OF FELIX RIVERA,
CITY OF MILLVILLE, POLICE DEPARTMENT.

Michael L. Testa, Esq., for appellant, Felix Rivera (Testa, Heck, Testa & White, attorneys)

Stephen D. Barse, Esq., for respondent, City of Millville Police Department (Gruccio, Pepper, DeSanto & Ruth, attorneys)

Record Closed: April 11, 2017 Decided: May 26, 2017

BEFORE **JOHN S. KENNEDY,** ALJ:

STATEMENT OF THE CASE

City of Millville Police Officer, Felix Rivera, (appellant) appeals the decision of the City of Millville Police Department (respondent, City,) to remove him from employment. A Preliminary Notice of Disciplinary Action, (PNDA) dated June 19, 2015, seeks the removal of appellant based on the following charges: N.J.A.C. 4A:2-2.3(a)1—Incompetency, Inefficiency, or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)6— Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)7— Neglect of Duty; N.J.A.C. 4A:2-2.3(a)12— Other Sufficient Cause; Millville Police Department (MPD) Rules & Regulations 3.3.2

Oath of Office; 3.3.6 High Ethical Standards; 4.1.1 Performance of Duty; 4.1.3 Obedience to Law & Rules; 4.1.8 Compromising Criminal Cases; MPD General Orders III A1(a) General Conduct; III A2(a) Conduct Unbecoming; and III A3(c) Accountability, Responsibility and Discipline. After a departmental hearing, charges against appellant were sustained and incorporated into a Final Notice of Disciplinary Action (FNDA) 31-C (J-1) with a proposed penalty of removal from employment. The FDNA also sustained charges against appellant for violating MPD Rules & Regulations 4.3.3 Inaccurate/ False Report; 4.12.6 Truthfulness and General Orders 4-78 Evidence.

PROCEDURAL HISTORY

Appellant appealed his removal to the Office of Administrative Law (OAL), where it was received on June 17, 2016. Appellant waived the 180-day period for completion of the case on September 26, 2016. The hearing in this matter was held on January 17, 2017, February 3, 2017 and February 6, 2017. The parties agreed to file their briefs with the court on April 10, 2017, and the record closed on April 11, 2017.

FACTUAL DISCUSSION

The respondent alleges that in June 2015, the City filed disciplinary charges against appellant seeking his removal from employment for violations of Civil Service Regulations, Rules and Regulations and General Orders of the City's Police Department. Appellant was one of several city police officers who were disciplined as a result of what respondent summarizes as a failure to perform the job responsibilities that was discovered initially by an investigation by the Cumberland County Prosecutor's Office ("CCPO"). The City's Internal Affairs (IA) department conducted its own investigation and ultimately issued the charges that resulted in the termination of appellant.

The investigation of the various officers was initiated by a complaint filed by another Millville police officer alleging that certain Millville police officers were not conducting criminal investigations properly and was closing cases before investigations

were completed. Upon learning of the lawsuit, Millville Police Captain, Matteo Rabbi, investigated the allegations and then referred the matter to the CCPO, concerned that criminal activity may have taken place. Ultimately, after an investigation that lasted in excess of one year, the CCPO referred the matter back to the City to be handled administratively. CCPO Special Agent, Ron Cuff, led that investigation. During his investigation, Agent Cuff initially investigated thirty-one cases that had been identified by one officer as not having been properly investigated and were improperly closed out. Agent Cuff decided that he should examine all cases handled by the MPD Detective Bureau (DB) during the two-year period of 2012 and 2013. Appellant served in the DB during that time period and Agent Cuff reviewed all of the cases assigned to him during that time period. Agent Cuff prepared spread sheets listing cases assigned to each officer and issuing findings about the investigations conducted.

Upon receipt of the CCPO declination letter in May 2015, Sergeant Brian Starcher (Starcher) conducted an IA investigation for the City. Starcher testified that the CCPO declination letter identified seven or eight officers who should be subject to administrative investigation and that his investigation included reviewing all cases handled by the DB during the period of 2012 - 2013. Starcher utilized the spreadsheets prepared by Agent Cuff to identify the cases he investigated for each officer. After considering the evidence gathered during the investigation, the City issued and served appellant with the June 15, 2015, PNDA.

Appellant asserts that the PNDA fails to set forth any facts supporting the allegations of an inaccurate or false report. The attachment to the PNDA merely sets forth the various sections alleged to have been violated by appellant without any specific factual basis. The attachment merely sets forth four case numbers and the City Rules and Regulations alleged to have been violated by appellant regarding inaccurate/false reports and truthfulness. Those case numbers are 12-06241 (R-8), 13-06797 (R-19), 13-07684 (R-20), and 13-23873 (R-22). Appellant asserts that the remaining charges regarding inaccurate, false or untruthful reports should be dismissed for the failure on the part of the employing agency to set forth the allegations with specificity.

TESTIMONY

Detective Brian Starcher testified on behalf of the City. Starcher testified that he relied on the spreadsheet prepared by Agent Cuff while conducting his investigation, but also conducted his own investigation and reached his own conclusions and made his own recommendations. Starcher authenticated and played the recording of his IA interview of appellant, which he conducted on May 26, 2015. (R-3.) That interview formed the basis of the charges filed against appellant. Appellant was provided with an opportunity to review the reports in each of the cases assigned to him and was questioned about deficiencies in his investigation of each case. Appellant stated in his IA interview that he was fully aware that a detective's job is to investigate cases with the goal of solving crimes. (R-3; 6:25.)[1] He added that if there are witnesses, it is his job to follow-up and interview them. Appellant stated that he had the ability to go into the system and assign cases to himself. (R-3; 7:50-9:00.) He could and occasionally did go into LawSoft and assign cases to himself. (R-3; 9:30.) Appellant's statement revealed that at one point, Sergeant Redden asked the detectives to close inactive cases out so that the department could get an accurate count regarding the number of cases being assigned to each individual detective. He stated that investigations are never really closed until someone has been charged, stating that they may run out of leads but they are never really closed. (R-3; 10:50.) When Starcher asked about the many cases that were closed during the week of June 24, 2013, appellant indicated that it was probably the same period of time that Sergeant Redden asked the detectives to close out inactive cases. He explained that there may be times when he may not want to let a person know that he or she is under investigation (R-3; 12:45) but that at some point he should try to interview the accused. (R-3; 13:45.) When questioned regarding meetings with supervisors, appellant indicated that they were few and far between and that regular meetings rarely happened due to the heavy caseload. According to Starcher, these meetings are important to direct and guide detectives in their investigations, and to help manage detectives' caseloads. New guidelines on how cases are assigned have been developed as a result of this investigation. Previously,

[1] This reference is to the approximate time during appellant's IA interview when each statement was made, not to the time during the OAL hearing.

there was no set procedure to notify a detective when he was assigned a new case. Sometimes it was just done orally or with a sticky note left on their desk. Now, there is a formal written procedure to notify detectives of new assignments.

On cross-examination, Starcher testified that there were four or five working detectives during the time period covered by this case and that the majority, if not all, said they were overworked. The job of the superior officers was to review reports, not to redo investigations. Starcher also testified that Sergeant. Redden told detectives to close cases that could not be solved and for which there was no more work to be done. Initial reports are typically prepared by patrol officers although occasionally a detective will complete an Initial Investigation Report. Starcher explained that reports should contain all information generated during the investigation, including unsuccessful attempts to contact victims, those accused, and witnesses should be documented, including names, dates, addresses, phone numbers, etc. Starcher pointed out that in many of appellant's reports there was no follow-up investigation. The inclusion of this information is important for anyone else working on the case and for evidential purposes.

Starcher was questioned on cross-examination about an e-mail he sent to the City Business Administrator, Susan Robostello, on January 15, 2016, after he was notified that he was being transferred to the DB from IA. (P-2.) When challenged that his e-mail indicates that he did not have the training to investigate detectives because he had not had training for several years, Starcher explained that he was primarily seeking updates on case law. In his new position in the DB Starcher has found that he does not need to meet with detectives when he assigns cases but he chooses to do so to help him learn. If he rejects a report he explains his reasons to the officer whose report was rejected. He does not have regular meetings with detectives but will have one-on-one meetings.

Of the ninety-four cases assigned to appellant during the 2012-2013 time period, the City alleges that he erred in nineteen of those cases. Each of those cases will be addressed individually:

Case No. 12-01302 (R-4)

This case involved an alleged theft that occurred on January 12, 2012. The investigating officer was Richard Kott, Badge No. 104. Officer Kott's report indicates that Detectives Guy and Rivera arrived at the scene and processed it. Appellant recalls that he processed the scene and did some fingerprinting but he did not document his actions. (R-3; 20:15.) He stated that he should have documented what he processed. (R-3; 21:40.) After initially processing the scene, appellant never went back to speak to any of the victims. The victim of the theft indicated that a J.P.C. assisted his mother with cleaning up a lot of clutter that had been built up over the years in the residence. Officer Kott's report indicates that he was unable to locate J.P.C.

A Supplemental Report by appellant on March 29, 2012, revealed that no information was developed in reference to J.P.C. stealing the items from the residence, and the case would now be closed. He indicated that if any new information was developed the case would be reopened at that time. Appellant admitted in the course of his interview that in hindsight he should have interviewed J.P.C.

Case No. 12-02415 (R-5)

This case involved an initial report of a burglary at the Wal-Mart store. It was investigated by Officer John Redden, III, Badge No. 102, on January 23, 2012. Appellant also processed the scene for potential fingerprints. The Loss Prevention Officer provided Officer Redden with a copy of surveillance video. Attached to the video was a photo of the suspect's vehicle. Appellant's Supplemental Report, dated January 31, 2012, indicates that he did in fact process the scene.

His report indicates that he recovered a set of eighteen-inch bolt cutters to be fingerprinted at a later date. The bolt cutters and video were taken by appellant but never put in evidence by him, nor was the existence of this evidence documented by appellant. Appellant said he would consider the video and bolt cutters evidence but

there was no documentation placing them in evidence and he has no idea where those items are. (R-3; 30:00.) He added that he did not know why the report did not show the evidence and that there was no reason for him not to put the video and bolt cutters in evidence. He was unable to get any prints from the bolt cutters. Appellant's report indicates that he was unable to identify any suspects and was waiting for a Wal-Mart's representative to provide him with a detailed list of stolen items. Supplemental Report B written by appellant indicates the case would be closed as of March 29, 2012, as no suspects had been identified and no new leads developed. No one from the Wal-Mart store ever provided a list to the appellant regarding the stolen items. Appellant made no other attempts to identify a suspect.

Case No. 12-05014 (R-6)

This case involved a burglary alleged to have occurred on February 18, 2012, at XXX Vine Road. Officer Joseph LaBonne, Badge No. 154, was the investigating officer and was unable to locate any fingerprints at the scene. Appellant indicated during the course of his interview that he did not recall the case at all. He further stated that, at that time, he was "kind of new" to the DB.

Appellant prepared a report on March 29, 2012. His report indicated that there was no information or suspects developed in the case. He did not check the neighborhood or speak to neighbors or the victims. Appellant did not go to the scene of the alleged burglary. Appellant stated that as a practice he did not always document when he processed a scene if it did not turn up any evidence or leads. (R-3; 37:05.) Appellant admitted he should have done more to solve this case.

Case No. 12-05949 (R-7)

This case was investigated by Officer Antonio Delfinado, Badge No. 127. This case involved a burglary at XXXX Louis Drive. Officer Delfinado's report indicates that

appellant processed the scene and the evidence report in this case verifies this and appellant placed fingerprint examination envelopes into evidence.

Appellant's Supplemental Report A indicates that he spoke to a neighbor about two suspicious looking males the neighbor had seen in the area. However, the neighbor could only provide a vague description of the suspects. Appellant's Supplemental Report B indicates that several stolen items were recovered in another matter, Case No. 12-07102, and that the alleged victim went to the station and reviewed a booklet of the stolen items recovered in Case No. 12-07102. The alleged victim was unable to identify any of the items as belonging to him. An arrest was made in connection with Case No. 12-07102 and appellant believed it was the same suspect who committed both burglaries. The alleged victim at that time was unable to identify any of the recovered items as belonging to him. Appellant said that he identified a suspect in this case but he never interviewed the suspect because the suspect was not willing to talk. He did not document this in any of his reports and conceded that he should have. The incident occurred on February 27, 2012, and appellant closed the case on April 11, 2012. Starcher testified that appellant should have talked to neighbors, checked the neighborhood for cameras, attempted to interview suspects and checked with pawn shops or second hand stores to locate the stolen property.

Case No. 12-06241 (R-8)

This case involved burglary and theft of approximately $6,000. The incident occurred on March 1, 2012, and appellant closed the case on April 11, 2012. Appellant's report in this case states that he spoke with the victim and asked her to come in to identify suspect. He claimed during his IA interview that the victims would not identify suspects but he did not document this. (R-3; 48:25.) The victim in this case alleged the appellant never contacted her. Appellant stated that this is false (R-3; 49:10) but he did not document his efforts to contact the victim. He acknowledged during his IA that he should have documented that the victim refused to come in to the station. (R-3; 51:50.)

Appellant prepared a Supplemental Investigation Report (R-8; 12-06241) in which he claimed that on March 9, 2012, a large amount of stolen items were recovered in another case. The report indicated that he contacted the victim but she never came to the station. As of April 11, 2012, appellant had "not been able to contact her" and the case was closed. The report does not state that the victim refused to identify suspects (as he claimed during his IA interview) or that she refused to come in when he contacted her (as he claimed during his IA interview). Appellant stated in his report that he had no other leads and was closing the case but the Investigation Report issued by the initial responding officer identified J.L.'s ex-boyfriend by name as a possible suspect. Appellant made no mention of any efforts to locate or contact this individual. Appellant also stated in his report that he believed that the suspects from another case were involved in this burglary but he does not say why and he did not document who they were.

The victim in this case, J.L., testified before this tribunal that the value of the stolen items was significantly higher than what she initially told Officer Delfinado. Rather than the $6,000 value she initially reported, she now believes the jewelry was worth $45,000. She also said that $300 in cash was missing, but she did not think to check for the cash when the house was burglarized. J.L. called for the investigating officer several times, but he was not available when she called. She denied that anyone from the police department ever called her.

Case No. 12-07074 (R-9)

This case involved burglary and theft of approximately $10,000 worth of copper wire on March 9, 2012. Appellant remembered this case. There was no documentation that he checked the recycling facilities in the area but he contends that he did. Appellant identified suspects at the beginning of his investigation but there is no indication that he attempted to interview any suspects.

Starcher testified that appellant should have looked further into the other cases he referenced in his report. Starcher also testified that dates of contacts should always

be included in reports along with the method of contact. It was not clear who appellant interviewed during field interviews and that his report should have listed each person's name and address as well as the date and time of the interviews.

Appellant set up two MPD owned cameras near the entrance to the fence of the Verizon property which captured two white males and one white female walking toward the Verizon property. On April 25, 2012, appellant indicates that as of that date the subjects had not been identified but there is no evidence that he made any attempt to identify them.

Case No. 12-19675 (R-10)

This case involved aggravated assault, unlawful possession of weapons, and possession of a weapon for unlawful purpose. Appellant denied any recollection of this case and said he did not know the victim. (R-3; 101:40.) He did not remember doing a report for this incident and the only evidence he submitted was an interview on DVD. (R-3; 102:00.) The last page of the Evidence Report indicates FR2-FR4 was placed into the Evidence Locker by appellant. That Evidence Report indicates that there was an interview of the victim B.W. by appellant. He candidly admitted during the course of his IA interview that he did not remember why he had not actually prepared a supplemental report.

Case No. 12-20237 (R-11)

This case involved aggravated assault and unlawful possession of a weapon. The victim was shot multiple times. Appellant recalled this case but never identified a suspect although someone gave him the names of some suspects. (R-3; 1:08:00.) There is no written record of what additional steps were taken. Appellant stopped working on this case nine days after the incident with no evidence that the investigation continued.

Appellant did prepare a report, Supplement B. His report indicates that he took nine photographs of the area and copied them onto a CD-R and entered them into evidence. He goes on in his report to indicate the interviews that took place with the neighbors and indicates that on Monday, July 9, 2012, he spoke to D.S., the victim's brother, who told him he did not know who had shot his brother.

Case No. 12-20319 (R-12)

This case involved a burglary of $11,900. worth of jewelry. Appellant remembered being assigned this case but did not document the efforts he made to solve this case.

Starcher testified that appellant had leads in Officer Bojaciuk's report that he could have pursued but that he never contacted, which included two persons of interest or persons to speak with as possible suspects. He added that appellant also could have spoken with neighbors and canvassed the neighborhood for video cameras. Appellant never documented whether he checked with pawn shops.

On cross-examination Starcher maintained that even though appellant arrested a person for receiving stolen property he should have tried to identify the person who actually conducted the burglary.

Case No. 12-23625 (R-13)

This case involved aggravated assault and domestic violence wherein the victim was a pregnant female. Appellant's report indicates that the unborn baby died. Agent Cuff's report confirms that there was no record that appellant attempted to contact the CCPO. Appellant claimed that the victim was uncooperative and closed the case.

Starcher testified that any time there is a death it must be reported to the CCPO. Appellant, according to Starcher, could have spoken to the suspect in an effort to investigate this case and even if the victims did not want police involvement appellant should have contacted the CCPO.

Case No. 12-28256 (R-14)

This case involved the theft of property from Verizon at XX Reese Road. There were nine other cases wherein appellant also investigated thefts from Verizon. On September 7, 2012, he responded to American Recycling where he observed several large rolls of cable. A representative from American Recycling provided appellant with two photos of J.A. from the weigh station from American Iron which showed the wiring being sold to them. He confirmed with Verizon that the property belonged to them and had a value of approximately $300.00.

His report indicates that on October 7, 2012, he was able to locate and interview J.A. There was no indication in the reports if anyone was arrested for the underlying theft, although appellant charged J.A. with receiving stolen property and she identified by name the person who gave her the stolen property.

Case No. 13-00859 (R-15)

This case commenced on January 9, 2013, when Officer Michael Phillips, Badge No. 147, was dispatched to XXX Lance Court for a reported burglary in progress. Officer Phillips' report indicates that the homeowner was not able to provide neither any description of the accused nor any additional information about the van she saw outside the residence. His report indicates that Detectives Rivera, Guy and Miller arrived at the scene as per Sergeant Duffield's request. The homeowner advised the detectives that she was missing $400 in United States currency from her pocketbook. Appellant said that he did not remember this case being assigned to him so he did not prepare any reports. He did remember going out to meet with the victims. Agent Cuff's spreadsheet confirmed that this case was assigned to appellant and that victim said that he attempted to contact appellant but that he never heard from him. Appellant placed in evidence e-mails exchanged between him and the victim. (P-1.) In one response, appellant writes "We are still working on several burglaries (including yours) in which a group of people were involved with. It will take some time to decipher if your house was

included in the burglaries committed [sic] by these individuals. We will contact you once we have more information."

Case No. 13-00889 (R-16)

This case was investigated by Officer Douglas Wilson, Badge No. 135, on January 9, 2013, regarding shots being fired. An individual was shot in the foot. Officer Wilson indicates that Officer Mooney was dispatched to the Regional Medical Center (RMC) to speak to the alleged victim. Officer Mooney's report, Supplement A, indicates that she did go to RMC to speak to the victim. The victim stated the accused was a black male wearing all dark clothing. He was tall and thin. He stated that he really did not get a good look at the accused.

Appellant prepared Supplement D. In addition to receiving five photographs of the victim's right foot, which were placed into evidence, appellant also went to Cooper Hospital to obtain a recorded statement from the victim. Appellant's report indicates that the victim spoke of other subjects involved in the incident. He identifies the subject as S1 and S2. S2 is identified in the report as being the subject who shot the victim. No leads regarding the suspects were provided to appellant.

Appellant remembered going to the scene and that there were several people with whom he should have spoken but did not. (R-3; 1:42:50.) He did not document any of these facts for the benefit of anyone else who might work on the case. Oddly, he admitted that he closed out the case about a month after it was opened but that he did not know why he did. (R-3; 1:43:55.)

Starcher testified that five reports were filed in this case, with numerous names mentioned in multiple reports who appellant could have tried to interview. He also could have checked with neighbors and canvass the neighborhood for cameras. He added that there was no investigation of this case after February 19, 2013, even though the incident occurred on January 9, 2013, slightly more than a month earlier.

(Case No. 13-03501 (R-17)

This case involved burglary, criminal trespass, and criminal mischief, with guns and money taken, and possibly a TV. Appellant did not recall anything about this case but he closed the case on May 21, 2013, slightly more than three months after the incident. He has no idea why the case was closed but no leads were developed.

Case No. 13-04887 (R-18)

This case involved an aggravated assault, possession of weapons for unlawful purpose, and unlawful possession of weapons that occurred on February 16, 2013, with a gunshot having entered an assisted living facility and lodged in a wall. Three police officers, in addition to appellant, prepared reports containing their initial efforts to gather information and solve this case. Appellant issued a report stating that he had not "developed any leads on this case" but did not document any efforts he made to identify leads and closing the case on May 21, 2013. Appellant did not recall working on this case during his IA interview.

Case No. 13-06797 (R-19)

This case involved robbery, aggravated assault, and theft. The victim in this case was transported to RMC with several broken bones in his face. Appellant prepared a Supplemental Report in this case but did not remember preparing it in his IA. He specifically remembered going to the victim's house to speak with the victim at his home on March 7, 2013, to ask him to look at a photo array however the victim was still in the hospital at that time, having been transferred from a local hospital to Cooper University Hospital Medical Center and was not released until four days later on March 11, 2013. Appellant's report indicates that as of June 24, 2013, when he closed the case as he had not heard from the victim even though he "made several attempts to contact him with negative results."

Case No. 13-07684 (R-20)

This case involved robbery, aggravated assault, and shots fired. Appellant recalled this case and indicated that he tried to contact one witness but he had moved to Philadelphia. He claimed he spoke with witnesses but did not document any attempts to solve the case. Page 3 of Officer Scott's report states that a surveillance video was turned over to appellant but there was no evidence log or chain of custody submitted by appellant indicating that the video was placed in evidence. Appellant indicated that there were no leads however Starcher testified that there was evidence that appellant should have reviewed. Appellant closed the case on June 24, 2013, stating that he had not developed any leads. This was the same week that the detectives were told to close inactive cases so that an accurate account could be determined regarding the assignment of cases.

Case No. 13-20755 (R-21)

Officer Michael Parsons, Badge No. 158, reports that on Sunday, June 30, 2013, he was dispatched to Oak View Apartments, Apt. XXX for the report of a gunshot victim. He indicates that one of the victims, E.Y., was very irate and being uncooperative. Officer Parsons's interview of several other persons in the area revealed no relevant or helpful information. Appellant's report, Supplement D, indicates that he made several attempts to contact E.Y. with negative results. He lists the telephone number that he called and indicates there was no answering machine. The other victim had given false contact information to the police and could not be located. Appellant reported that he "was advised the address for him [victim, D.C.] has been vacant for several months" but he did not state who advised him of this or if he attempted to confirm that the address was false. That report was prepared on July 15, 2013, and the case was closed by appellant on September 11, 2013. Appellant did not interview anyone on this case, including any neighbors.

Case #13-23873 (R-22)

This case involved burglary and theft which occurred on July 24, 2013. Appellant did not recall this case. According to his report he did not speak to the victim.

The report indicates that he checked receipts at We Buy Gold and M & M Jewelry for the missing items. The Investigation Report identifies the missing jewelry as gold hoop earrings and a gold necklace.

According to Officer Cuff's spreadsheet (R-2), the victim said she never spoke with a detective and she could not understand how he could have checked with a pawn shop because she never provided a description of her jewelry. The case was closed by appellant on October 14, 2013.

Special Agent Ronald Cuff from the CCPO also testified. He spent a year investigating all of the cases handled by the MPD DB during the 2012-2013 time period. He reviewed several hundred cases. As a result of his investigation, he sustained charges against every detective in the DB. He found that there were no written rules, regulations, or SOPs regarding case assignment and management. He also identified problems with LawSoft and that detectives did not always know when a case was assigned to them.

FINDINGS OF FACT

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, I deem that the testimony offered by all of the witnesses to be credible. Although J.L. changed the amount of what was stolen from her residence from $6,000 to $45,000, I do not deem that this makes her testimony less credible. She did not make an insurance

claim for reasons that are her own so there would be no reason for her to be untruthful. Therefore, I **FIND** as **FACT** that appellant did not speak to her as he reported in his report. (R-8.) Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** as **FACT** the following for the individual investigations:

Case No. 12-01302 (R-4)

Appellant processed the scene but did not document fingerprinting.

Appellant did not speak to suspects, neighbors or check for cameras in the area.

Case No. 12-02415 (R-5)

Appellant reviewed surveillance video and dusted bolt cutters but did not log either the video or the bolt cutters into evidence.

Appellant does not know why he did not log the items into evidence.

Appellant made no other attempt to identify a suspect.

Case No. 12-05014 (R-6)

Appellant does not recall this case; he did not check the neighborhood, go to the scene or speak to victims.

The incident occurred on February 18, 2012, and closed on March 29, 2012, because appellant did not have any leads.

Case No. 12-05949 (R-7)

A suspect was identified but appellant did not document any attempts to speak to the suspect.

Case No. 12-06241(R-8)

Appellant did not report how he attempted to contact the victim.

Appellant suspected a suspect in another case to be involved with this robbery but did not speak to that individual.

The incident occurred on March 1, 2012, and was closed by appellant on April 11, 2012.

Case No. 12-07074 (R-9)

There is no documentation that appellant went to recycling centers in the area to look for the copper wire stolen from Verizon.

Appellant took no further steps to solve this case after April 25, 2012.

The theft occurred on April 9, 2012.

Case No. 12-19675 (R-10)

Appellant does not recall the case, does not know the victim and does not remember preparing a report.

Appellant did not document steps taken to follow up with a suspect identified by the victim.

Case No. 12-20237(R-11)

A man was shot in the back and names of suspects were given.

Appellant does not recall any attempt to follow up or locate the suspects.

Case No. 12-20319 (R-12)

Jewelry was stolen from a residence, appellant arrested a woman that sold the stolen jewelry but did not attempt to identify a suspect that the arrested woman claimed gave her the stolen merchandise.

Case No. 12-23625(R-13)

Incident involving fetal demise occurred on July 29, 2012, and was closed by appellant on August 17, 2012.

Appellant did not document any attempt to contact CCPO.

Case No. 12-28256 (R-14)

Communication cables were stolen from Verizon; a suspect was identified but appellant made no attempt to locate the suspect and did not follow up with the victim.

The suspect was linked to nine other cases.

Case No. 13-00859 (R-15)

Appellant does not recall this case although it was assigned to him and he did report to the scene.

Appellant did not generate a report and did not document any work performed on the case.

Case No. 13-00889 (R-16)

The Incident involving a shooting occurred on January 9, 2013, and was closed by appellant on February 19, 2013.

Appellant made no attempt to interview neighbors, or identify two suspects and made no follow up with the victim.

Case No. 13-03501(R-17)

The incident occurred on February 3, 2013, and closed by appellant on May 21, 2013, because no leads were discovered.

Appellant does not recall this case.

A knife was recovered but it was not examined for fingerprints.

Appellant did not follow up with this investigation or make any efforts to solve the case.

Case No. 13-04887 (R-18)

The incident occurred on February 16, 2013, and closed by appellant on May 21, 2013, because no leads were discovered.

No leads were developed and appellant did not follow up with this investigation or make any efforts to solve the case.

Case No. 13-06796 (R-19)

The incident occurred on March 6, 2013, and closed by appellant on June 24, 2013.

Appellant falsely reported that he contacted the victim at his residence on March 7, 2013, but the victim was not released from the hospital until March 11, 2013.
A cell phone was recovered and placed in evidence but was not investigated.
Appellant did not attempt to contact a suspect or a witness that were identified.
Appellant did not follow up with this investigation or make any efforts to solve the case.

Case No. 13-07684 (R-20)

An individual was shot at a gas station during a robbery on March 14, 2013.
Appellant closed the case on June 24, 2013, with no indication he made any attempt to solve the case.
Appellant did not interview witnesses or return call of involved parties that attempted to contact him.
Appellant closed the case asserting that he was unable to develop any leads.

Case No. 13-20755 (R-21)

The incident occurred on June 30, 2013, and closed by appellant on September 11, 2013.
Appellant made several attempts to contact one victim of a shooting but made no attempts to obtain correct information of the other victim.
Items placed into evidence were not investigated and there was no activity between appellant's initial report and his next report closing the case.

Case No. 13-23873 (R-22)

The incident occurred on July 25, 2013, and closed by appellant on October 14, 2013.
Stolen Jewelry was vaguely described as hoop earrings and a gold necklace.
Appellant's report indicates that he checked the receipts of two pawn stores for the stolen items but does not provide detail as to when, if he spoke to anyone or if what was inspected.
Appellant did not follow up with the victim.

LEGAL ANALYSIS AND CONCLUSION

Under the Civil Service Act, a public employee may be subject to major discipline for various employment-related offenses, N.J.S.A. 11A:2-6. In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The City issued and served appellant with a PNDA charging him with the following:

Title 4A

4A:2-2.3(a)1	Incompetency, Inefficiency, or failure to perform duties
4A:2-2.3(a)6	Conduct unbecoming a public employee
4A:2-2.3(a)7	Neglect of Duty
4A:2-2.3(a)12	Other Sufficient Cause

Rules & Regs

3.3.2	Oath of Office
3.3.6	High Ethical Standards
4.1.1	Performance of Duty
4.1.3	Obedience to Law & Rules
4.1.8	Compromising Criminal Cases

General Orders

2-99 III A1(a)	General Conduct
2-99 III A2(a)	Conduct Unbecoming an Officer
2-99 III A3(c)	Accountability, Responsibility and Discipline

The FNDA listed nineteen cases assigned to appellant in which the above charges were sustained. (R-4 through R-22)

Of the nineteen cases to which the above charges applied, four of those cases also were identified in the FNDA as sustained charges of Inaccurate/False Reports and/or Untruthfulness. (R-8; R-19; R-20; R-22)

Rules & Regs

4.3.3	Inaccurate/False Report
4.12.6	Truthfulness

REPORTS. No employee shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false or improper information on records of the department

TRUTHFULNESS. Employees are required to be truthful at all times whether under oath or not.

Finally, the FNDA identified one charge to which General Order 4-78, Evidence, applied. (R-5)

Appellant argues that the FDNA alleges that at various times during the years 2012 and 2013 appellant failed to adequately perform his duties as a police officer. The specification contained in J-1 alleges that:

> On various dates throughout the year 2012 and 2013, Officer Felix Rivera was found to have wrongly and improperly closed out investigations assigned to him and also found to have improperly handled investigations, which are identified below, by neglecting to follow up on these crimes in order to

> solve same. Det. Rivera failed to conduct appropriate investigations on numerous cases and prepared inadequate reports on the following cases identified below. Furthermore, Officer Felix Rivera was untruthful and filed inaccurate, false or improper information on records of the department in the cases identified below. Furthermore, Det. Rivera failed to gather, or ignored evidence in gathered in the criminal cases identified below.

The second page of J-1 merely sets forth case numbers and the general sections of Title 4A, The Rules and Regulations of the City and the General Orders of the City. Appellant asserts that there are no factual allegations contained on the attachment setting forth with specificity what he is alleged to have done improperly.

In In the Matter of Benjamin Ortega, CSC Docket No. 2012-3621, OAL Docket No. CSR 8216-12 (2013), it was held that even though the specifications in that case consisted of a vague multipage narrative, the charges would be upheld in light of the evidence presented by the appointing authority at the hearing, which made evident what the actual allegations were. Appellant was provided with multiple opportunities during his IA interview to explain his actions in each of the nineteen cases. The appointing authority further made it evident at the hearing beginning December 2, 2015, before Hearing Officer, Robert Verry, what the specific allegations were. Finally, I **CONCLUDE** that the appointing authority, through testimony and evidence presented during this hearing has adequately specified the actions for which he is being charged for each of the nineteen cases outlined in the FNDA.

Under N.J.A.C. 4A:2-2.3(a) (1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (Note: Gaines

had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a County treasurer who could not balance the books, after the auditors tried three times to show him how.)

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "'of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must

> receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

In the present matter, the record reflects that appellant failed to perform several of his duties, specifically involving how to properly conduct an investigation as a detective. He clearly demonstrated an absence of judgment in a sensitive position requiring public trust in the agency's judgment. In several of the cases analyzed above, appellant admits that he should have done a better job and only provides lack of experience or heavy case load as a rationale. Accordingly, I **CONCLUDE** that the charges of a violation of N.J.A.C. 4A:2-2.3(a)(1) (incompetence, inefficiency, failure to perform duties) must be and is hereby **SUSTAINED** for each of the nineteen cases in question.

Respondent also sustained charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a) (6). To the extent that appellant is charged with violation of Rules and Regulations 3.3.6, which addresses High Ethical Standards, consideration of such violation will be addressed in concert with the current analysis.

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that "adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or

removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

In the present matter, the record reflects that appellant failed to perform duties required of him in his handling of each of the nineteen cases. In many of these cases, appellant wrote reports without making any effort to investigate those cases or in which he wrote a line "I could not identify any leads" or similar words which gave the false impression that he actually investigated those cases. Appellant understood how to perform his job responsibilities as he acknowledged at the outset of his IA interview when he described the duties and responsibilities of a detective and personally failed to perform those job responsibilities. Accordingly, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of N.J.A.C. 4A:2-2.3(a) 6 (conduct unbecoming a public employee), and Rules and Regulations 3.3.6, should be and are hereby **SUSTAINED**. I further **CONCLUDE** that appellant violated Rules and Regulations 4.1.8. by failing to properly investigate these criminal cases appellant interfered with the proper administration of criminal justice and potentially left criminals on the street to commit additional crimes.

Appellant has also been charged with Rules and Regulations 4.3.3, Inaccurate/False Report and 4.12.6 Truthfulness for the following four cases 12-06241 (R-8), 13-06797 (R-19), 13-07684 (R-20) and 13-23873 (R-22). Those Rules and Regulations state:

> **REPORTS.** No employee shall knowingly falsify any official report or enter or cause to be entered any inaccurate, false or improper information on records of the department
>
> **TRUTHFULNESS**. Employees are required to be truthful at all times whether under oath or not.

In one case, appellant states that he spoke with the victim about coming into the station to review evidence but the victim denied this in her testimony before this tribunal. (R-8.) In another case, he claimed to have interviewed a victim at his house the day after he was severely injured but the victim was still in the hospital at the time.

(R-19; R-19A.) In a third case, he asserted that he attempted to develop leads in a case when in fact he did not follow leads provided by other investigating officers. (R-20.) In the fourth case, appellant issued a two (2) line report in which he claimed he did not develop any leads and closed a case. (R-22.) Appellant only provided a generic description of the incident and his report does not state if he met with the victim. Without documentation to the contrary appellant's lack of specificity in his report leads a reader to presume that he did not attempt to develop any leads. Furthermore, appellant's untruthfulness and false report create issues whereby he cannot testify in any criminal court without a prosecutorial disclosure of his "Brady Issue," thereby, reducing his ability to serve as a police officer. This clearly constitutes behavior which could adversely affect the morale of the facility and undermine public respect in the services provided.

Respondent also sustained charges against appellant for neglect of duty, N.J.A.C. 4A:2-2.3(a)(7) for each of the nineteen cases. To the extent that appellant is charged with violation of Rules and Regulations 4.1.1, which addresses Performance of Duty, consideration of such violation will be addressed in concert with the current analysis. "Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/ collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "'the legal standard of reasonable conduct in the light of the apparent risk.'" Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

In the present matter, the record reflects that appellant failed to follow leads, did not interview witnesses, victims or suspects and failed to complete his investigation before closing cases. I **CONCLUDE** that this action constituted omissions of required duties, and

therefore, I **CONCLUDE** that the appointing authority has proven, by a preponderance of credible evidence, that the charge of N.J.A.C. 4A:2-2.3(a)(7) - Neglect of Duty, Rules and Regulations 4.1.1 should be and is hereby **SUSTAINED.**

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) - Other Sufficient Cause. Specifically, appellant is charged with violations of MPD Rules & Regulations 3.3.2 Oath of Office; 3.3.6 High Ethical Standards; 4.1.1 Performance of Duty; 4.1.3 Obedience to Law & Rules; 4.1.8 Compromising Criminal Cases; MPD General Orders III A1(a) General Conduct; III A2(a) Conduct Unbecoming; and III A3(c) Accountability, Responsibility and Discipline. I **CONCLUDE** that the consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(11) - Other Sufficient Cause have been addressed and **SUSTAINED** within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(1),(6) and (7).

Accordingly, I further **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12) - Other Sufficient Cause must be and is hereby **SUSTAINED**.

PENALTY

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty-years ago, 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." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523-24.

As the Supreme Court explained in In re Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, supra, 192 N.J. at 30-33 (citations omitted).]

In the case of In re Carter, 191 N.J. 474 (2007), the Court decided that the principle of progressive discipline did not apply to the sanction of a police officer for sleeping on duty and, notwithstanding his unblemished record, it reversed the lower court and reinstated a removal imposed by the Board. The Court noted the factor of public-safety concerns in matters involving the discipline of correction officers and police officers, who must uphold the law and "present an image of personal integrity and dependability in order to have the respect of the public." In re Carter, supra, 191 N.J. at 486 (citation omitted).

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Civil Service Commission (Commission) modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been

bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, supra, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

A penalty in this case is unavoidable. The case law setting sworn law enforcement officers apart from other public servants as "special" is consistent. The standard guiding their behavior and informing their discipline is strict:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.

[Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966); See also In re Phillips, 117 N.J. 567, 577 (1990)]

In the case of In re Carter, 191 N.J. 474, 485-486 (2007), affirming removal of a police officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal

> to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

To determine whether a lesser penalty than the respondent's termination of appellant is appropriate, the concept of progressive discipline is generally examined. Our courts uniformly have upheld the concept in a long line of cases, beginning with West New York v. Bock, 38 N.J. 500, 523 (1962): (an employee's past record of both discipline and commendations can be considered). See also In re Hermann, 192 N.J. 19, 21 (2007). However, the judiciary also agrees that progressive punishment can be waived when the offense involved is sufficiently egregious. In re Stallworth, 208 N.J. 182, 196-197 (2011). However, the Court in Hermann also declared that progressive discipline can be used to mitigate the penalty where there is a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. In re Hermann, 192 N.J. supra, at 32-33.

The appellant's disciplinary record is in not in evidence however I am satisfied that appellant's conduct in this case was egregious such that progressive discipline need not be considered. The public who is served, and other employees, deserve to be able to expect that in such situations the officer's investigation will be guided by concerns for safety and order above all else. To expect otherwise is to invite disorder and confusion in responding to such instances, possibly leading to worse, more dangerous situations, and serves to undermine the confidence the public places in the correctional system. It cannot be tolerated. Accordingly, I **CONCLUDE** that the respondent's action in removing the appellant from his position was justified.

DECISION AND ORDER

The respondent has proven by a preponderance of credible evidence the charges against appellant with violations of N.J.A.C. 4A:2-2.3(a)1—Incompetency, Inefficiency, or Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)6— Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3(a)7— Neglect of Duty; N.J.A.C. 4A:2-2.3(a)12— Other Sufficient Cause; Millville Police Department (MPD) Rules & Regulations 3.3.2 Oath of

Office; 3.3.6 High Ethical Standards; 4.1.1 Performance of Duty; 4.1.3 Obedience to Law & Rules; 4.1.8 Compromising Criminal Cases; MPD General Orders III A1(a) General Conduct; III A2(a) Conduct Unbecoming; and III A3(c) Accountability, Responsibility and Discipline, and I **ORDER** that these charges be and are hereby **SUSTAINED**. Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED**.

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. 40A:14-204.

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.

May 26, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: May 26, 2017.

Date Mailed to Parties: May 26, 2017

JSK/dm

APPENDIX

WITNESSES

For appellant:

None

For respondent:

Brian Starcher

J.L.

Ronald Cuff

EXHIBITS

Joint Exhibits

J-1 Final Notice of Disciplinary Action 31C, dated May 21, 2016

J-2 Millville Police Department Rules and Regulations

J-3 Millville Police Department Standards of Conduct

For appellant:

P-1 Email relating to Case Number 13-00859 (R-15)

P-2 Email, dated January 15, 2016

For respondent:

R-1 Internal Affairs Policy and Procedures

R-2 Cuff Spreadsheet

R-3 Rivera audio taped Internal Affairs interview with Starcher

R-4 Police Report for Case Number 12-01302
R-5 Police Report for Case Number 12-02415
R-6 Police Report for Case Number 12-05014
R-7 Police Report for Case Number 12-05949
R-8 Police Report for Case Number 12-06241
R-9 Police Report for Case Number 12-07074
R-10 Police Report for Case Number 12-19675
R-11 Police Report for Case Number 12-20237
R-12 Police Report for Case Number 12-20319
R-13 Police Report for Case Number 12-23625
R-14 Police Report for Case Number 12-28256
R-15 Police Report for Case Number 13-00859
R-16 Police Report for Case Number 13-00889
R-17 Police Report for Case Number 13-03501
R-18 Police Report for Case Number 13-4887
R-19 Police Report for Case Number 13-06797
R-19a Victim Medical Records relating to Case Number 13-06797
R-20 Police Report for Case Number 13-07684
R-21 Police Report for Case Number 13-20755
R-22 Police Report for Case Number 13-23873

STATE OF NEW JERSEY

In the Matter of Richard Sanders
Northen State Prison,
Department of Corrections

CSC DKT. NO. 2016-2910 & 2016-2911
OAL DKT. NO. CSV 03660-16 & 03662-16
(CONSOLIDATED)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matters.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03660-16

RICHARD SANDERS,

Appellant,

vs.

NORTHERN STATE PRISON, DEPARTMENT OF CORRECTIONS,

Respondent.

OAL DKT. NO. CSV 03662-16

RICHARD SANDERS,

Appellant,

CONSOLIDATED

vs.

NORTHERN STATE PRISON, DEPARTMENT OF CORRECTIONS,

Respondent.

David J. Heintjes, Esq., for Appellant

Marolhin D. Mendez, Deputy Attorney General, for Respondent New Jersey Department of Corrections (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Karen Campbell, Esq., for Respondent, Northern State Prison (NSP)

BEFORE **THOMAS R. BETANCOURT,** ALJ:

Record Decided: June 12, 2017 Record Closed: June 13, 2017

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Richard Sanders, appeals two Final Notices of Disciplinary Action, both dated February 1, 2016, providing for fifteen days suspension, and, termination from employment, respectively.

A prehearing conference was held on April 1, 2016, and a prehearing Order, dated April 4, 2016, was entered by the undersigned.

An Order consolidating the two above captioned matters was entered by the undersigned on April 4, 2016.

Respondent, DOC, filed a motion for summary decision with the OAL on July 22, 2016. Appellant filed his brief in opposition on August 26, 2016. Respondent filed its reply brief on September 9, 2016. The motion was denied by the undersigned by Order dated September 16, 2016.

A hearing was scheduled for May 15, 2017, whereupon the parties advised the undersigned that the matter was settled. The settlement agreement was placed upon the record. A settlement agreement was submitted to the undersigned on June 12, 2017, signed by the parties.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Appellant's appeal is withdrawn with prejudice.

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.

June 13, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 6-19-17

Date Mailed to Parties: JUN 19 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

db

OAL DTK. NO's: CSV 03660-16 AND CSV 03662-16

LAST CHANCE

SETTLEMENT AGREEMENT

IN THE MATTER OF

SANDERS, RICHARD

v.

NORTHERN STATE PRISON,
NJ DEPARTMENT OF CORRECTIONS

The parties in these appeals have voluntarily resolved all disputed matters and enter into the following last chance settlement, which fully disposes of all issues in controversy between them.

A. The Appellant was charged with the following:

1. The **Final Notice of Disciplinary Action** dated February 1, 2016 contained the following charges and the proposed discipline of a fifteen (15) day suspension without pay, and a removal:

    i. HRB 84-17, as amended A. Attendance: 1. Unsatisfactory Attendance: Abuse of Sick Leave, Chronic or excessive absenteeism. Failure to follow call off or call on procedure. Absent from work as scheduled without permission and/or without giving proper notice of absence. 13b. Unexcused lateness of 15 minutes or more.

B. The parties have agreed to the following:

1. The grievant withdraws his appeals and requests for hearings with OAL Docket Nos: CSV 03660-16 AND CSV 03662-16.
2. The employee shall be reinstated to the position **Institutional Trade Instructor 1 Cooking** Reinstatement of the Employee is contingent upon his first successfully clearing any and all DOC Department of Correction's (re)hiring prerequisites,

including, but not limited to, all background checks, fingerprinting, driver's license checks, etc.

3. The Final Notices of Disciplinary Action dated February 1, 2016 will be modified as follows:
    a. Removal modified to reinstatement with no back pay.
4. The grievant will not receive any back pay or attorney's fees from the appointing authority.
5. Any other days from the time of last suspension day until return to work shall be recorded as Approved Leave of Absence Without Pay. The parties acknowledge that under N.J.A.C 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer. Grievant is not entitled to any accrued leave time while on Leave of Absence Without Pay.

C. The Department of Corrections (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law.

D. Grievant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief.

E. Except for the assessment of Richard Sanders's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. The parties have read and understood the terms of this Last Chance Settlement Agreement and freely and voluntarily agree to be bound by each term in the Last Chance Settlement Agreement.

G. Appellant agrees that, pursuant to this Last Chance Settlement Agreement, any subsequent disciplinary charge as related to an attendance violation for a period of two (2) years following the date of the adoption of this settlement agreement by the Civil Service Commission shall result: (a) in a sanction of removal, and (b) no further settlement agreement will be provided to the appellant for any subsequent attendance disciplinary charge.

H. Grievant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

6/6/17
DATE

R. Sanders
Richard Sanders

6/6/17
DATE

David J. Heintjes
David J. Heintjes, Esq.
On behalf of Richard Sanders

6/6/17
DATE

Karen Campbell
Karen Campbell, Esq.
On behalf of Department of Corrections

6/6/17
DATE

Marolhin Mendez
Marolhin D. Mendez, DAG
On behalf of Department of Correction

CERTIFICATION

I, Richard Sanders, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Last Chance Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that once this settlement is executed, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/6/17
DATE

R. Sanders
Richard Sanders

7-13-17

STATE OF NEW JERSEY

In the Matter of Christopher Spivey
Newark School District

CSC DKT. NO. 2016-1610
OAL DKT. NO. CSV 19740-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Christopher Spivey, Heating and Air Conditioning Mechanic, Newark School District, 15 working day suspension, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on May 30, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

Re: Christopher Spivey

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 19740-15
AGENCY DKT. NO. 2016-1610

IN THE MATTER OF CHRISTOPHER SPIVEY,
NEWARK PUBLIC SCHOOL DISTRICT.

Christopher Spivey, appellant, pro se

Sabrina Styza, Associate General Counsel, for respondent Newark Public School District (Charlotte Hitchcock, General Counsel, Office of the General Counsel, attorneys)

Record Closed: January 11, 2017 Decided: May 30, 2017

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Newark Public School District suspended HVAC mechanic Christopher Spivey for fifteen working days for conduct unbecoming a public employee, neglect of duty, and other sufficient cause.

PROCEDURAL HISTORY

On or about July 30, 2015, the Newark Public School District served Christopher Spivey with a Preliminary Notice of Disciplinary Action (PNDA). (R-4.) A departmental hearing was held on August 21, 2015, and the charges of conduct unbecoming a public employee, neglect of duty, and other sufficient cause were sustained. (R-5.) On or about September 29, 2015, the Newark Public School District served Spivey with a Final Notice of Disciplinary Action (FNDA), suspending him for fifteen working days, beginning October 13, 2015, and ending November 2, 2015. (R-5.)

Spivey appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on December 1, 2015. The hearing was held on August 3, 2016, and the record remained open for post-hearing submissions. The record closed on January 11, 2017.

FACTUAL DISCUSSION

Richard Morales testified on behalf of the Newark Public School District. Christopher Spivey testified on his own behalf.

Background

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following **FACTS** in this case:

Richard Morales is the acting HVAC supervisor for the Newark Public School District. As supervisor, he dispatches work for several schools, and monitors personnel to insure the work is completed in a cost-effective and timely manner. It is important that HVAC personnel promptly be in and out of each school to avoid or minimize disruption to students and teachers.

HVAC personnel are monitored throughout the day. They punch in upon entering a school in the morning, punch out upon exiting a school in the afternoon, and punch in and out for lunch. Morales monitors where the punches are made. Morales advises employees daily where to punch in, either the night before or the morning of, before the employee punches in. District policy requires that the employee punch in at the school assigned, or at the last school where the employee worked. Morales keeps a log, the "Trades Weekly Timesheet" (Log) that reflects where each employee is to report daily in the morning. Typically, the employee calls Morales in the morning and tells Morales his or her location. Morales enters that information daily into the Log, and it should coincide with where the employee is supposed to be. If a location changes overnight because of an emergency that has arisen, the employee will be notified that night or before he or she punches in in the morning, and Morales records the change in the Log.

Morales compares the Log weekly with the computerized Kronos Punch Origin printout (Kronos). Kronos punch clocks are located in the schools throughout the Newark Public School District. Juan Guerrero is Morales's supervisor. A formal request for disciplinary action against Spivey was made by Guerrero on May 20, 2015, for alleged unauthorized punches made outside of assigned locations. (R-3.)

The HVAC shop is located in the Technology High School (Tech) basement. HVAC materials are kept in the shop. Morales does not remain in the shop all day. Morales drives around to various locations to verify that employees are at their assigned locations, that they have the necessary materials, and that their work is completed. He drives around the school district constantly, so he is both in the shop and in the field.

Spivey had been employed by the Newark Public School District for seven years when the PNDA was issued, and had no prior disciplinary history.

Testimony

Richard Morales

At the end of the week Morales compares the Log with Kronos to verify that employees are punching in at their assigned locations. An employee could tell Morales by phone that he or she was at a particular school, but Morales was able to thereafter verify that with Kronos. Any discrepancy would be noted, and Morales would personally speak to an employee about a discrepancy, and he would advise the employee that he or she was required to punch in at his or her assigned location. Multiple discrepancies would be referred for disciplinary action. At times, Morales's Log/Kronos checks are prompted by a "drive-by," where Morales sees an employee at a location other than his or her assigned location. Morales sometimes received complaints that Spivey was not where he was supposed to be.

At most of the schools the HVAC employees must go to, the classrooms are shut down. Thus, they must arrive and complete the work timely so that the teachers and students may return. Failure to punch in timely or at the appropriate location affects and significantly delays the work. By way of example, at times boilers shut down overnight and employees are dispatched immediately to correct the problem. Clocking in at another location delays the work, as sometimes it can take an hour to get from one location to another, by which time pipes may be frozen.

Morales supervised Spivey for approximately three years, and dispatched work orders and assignments to Spivey. Spivey was to be at his assigned location to complete his assigned work, and to meet other workers to assist in completing the work. Very rarely, if an emergency occurred in the middle of the night, Morales would contact Spivey before 8:00 a.m. and instruct him to go to a different location than the one he was assigned the night before. This change would be reflected on the Log.

Morales compared the Log to Kronos for Spivey and determined that there were numerous discrepancies, as follows:

Date and Time	Log Location	Kronos Location
1/5/2015 8:01:00 AM	Tech	W – Ivy Hill Main Office
1/8/2015 7:58:00 AM	Avon	N – Barringer 3rd floor
1/9/2015 7:56:00 AM	Barringer	N – Dr. William H. Horton
1/21/2015 7:50:00 AM	Ivy	S – Tech High Main 2
1/22/2015 7:54:00 AM	Tubman	N – Dr. William H. Horton
1/23/2015 8:00:00 AM	Tubman	S – Tech High Main Office 1
1/26/2015 7:53:00 AM	Newton	N – Dr. William H. Horton
1/28/2015 7:52:00 AM	Newton	N – Barringer Steam Main Office
1/29/2015 7:56:00 AM	Ivy	S – Tech High Main Office 1
1/30/2015 7:57:00 AM	Ivy	N – Franklin
2/2/2015 7:58:00 AM	MXS	N – Dr. William H. Horton
2/5/2015 7:56:00 AM	South St.	S – Tech High Main 2
2/6/2015 7:50:00 AM	South St.	W – Ivy Hill Main Office
2/9/2015 7:56:00 AM	South St.	N – Dr. William H. Horton Outside Main O
2/10/2015 7:57:00 AM	[E. A]lma Flag	S – Tech High Main 2
2/12/2015 7:49:00 AM	Clinton Ave.	S – Tech High Main 2
2/13/2015 7:52:00 AM	Clinton Ave.	N – Dr. E. Alma Flagg
2/17/2015 7:04:00 AM	Peshine/Eastside	S – Tech High Main 2
2/18/2015 7:47:00 AM	Eastside	S – Tech High Main 2
2/20/2015 7:58:00 AM	Eastside	S – Tech High Basement
3/3/2015 8:02:00 AM	Weequahic	S – Tech High Main 2
3/4/2015 7:59:00 AM	Weequahic	S – Tech High Main 2
3/6/2015 8:00:00 AM	Weequahic	N – Dr. William H. Horton
3/10/2015 7:59:00 AM	Weequahic	N – Dr. E. Alma Flagg
3/11/2015 8:02:00 AM	Dr. Horton	S – Tech High Main Office 1
3/17/2015 7:50:00 AM	Cleveland[1]	S – Tech High Main 2
3/19/2015 8:00:00 AM	Tubman[2]	S – Tech High Main 2
3/20/2015 7:55:00 AM	Abington	S – Tech High Main 2

[1] "Tech" was crossed out.
[2] "Tech" was crossed out.

Sometime in mid-to-late January 2015, after Morales noticed the discrepancies, he spoke to Spivey. Spivey should not have been punching in anywhere but the assigned location reflected in the Log. Morales spoke to Spivey at least four or five times, but despite the verbal warnings, Spivey's conduct did not change, so Morales referred him for disciplinary action. Spivey was referred for more than twenty discrepancies, but disciplinary referrals are made for as few as fifteen discrepancies. Morales notified his supervisor, Juan Guerrero, of the discrepancies, and Guerrero prepared the disciplinary action request.

District policy requires that the employee punch in at the school assigned, or at the last school where the employee worked. A memorandum is given to the employees, and it is available online. Spivey was notified of the policy, and there would be no reason for him to not be aware of the policy.

Once Morales assigns a job and the employee contacts him that morning to advise of his or her location, he writes it on the Log. Thereafter he checks Kronos for discrepancies. Morales estimated the Log to be "very accurate" or "95 percent." At times entries are made by another supervisor, but Morales estimated that 90 percent of the entries were his handwriting. A slash mark with another school reflected on the Log most likely reflects an emergency.

Normally, Morales gives Spivey his assignments the night before. Very rarely would Spivey be given an assignment in the morning, as that would be for an emergency. Morales has also gone to a school and given Spivey an assignment. The Log is accurate and is used to document where all his employees are during the day, what jobs were completed, and what they get paid for. Spivey's profile reflects every single school he worked at, based on work orders. There would not be a situation where an employee would not have a new assignment before punching out for the day. Morales notifies the employees before they punch out of their assigned location for the following morning, and if he does not, the employee is to return to the last job location.

If Spivey has finished an assignment in the morning, Morales would know from Spivey calling in. There are times when Spivey has finished a job assignment in the morning and been in a different location in the afternoon. Typically, he would be in one school per day, but has occasionally been in up to three schools in one day. If Spivey had to pick up parts at the shop, he would be assigned to Tech.

Spivey is due in at work at 8:00 a.m. Morales's understanding of why employees have clocked in at locations other than their assigned location was that it is done when the employee is late; the employee pulls over at another school and punches in to avoid being marked as late.

Regarding January 21, 2015, and January 23, 2015, Morales testified that Tech is their shop, but the shop is downstairs. There was no reason for Spivey to have been punching in at the main offices, which are upstairs and have nothing to do with the shop. A punch-in at either of the main offices would be a violation, as the proper location is the shop and that is why there is a separate Kronos downstairs. Additionally, the only time Spivey can punch in at Tech would be if they were having a meeting at the shop. Morales testified that a punch in at the Tech main office is a violation. That is upstairs where the children attend school, and there is too much "people traffic."

Morales did not recall specifically what was discussed during the telephone calls with Spivey. If Morales had ever called Spivey to change his location, it would have been recorded on the Log. Calls from Spivey could have been for any number of reasons, including that Spivey needed material, got stuck, or was not coming in.

Christopher Spivey

Spivey's telephone records reflect seven telephone calls, relevant to the twenty-eight days in question, as follows: On January 5, 2015, at 8:36 a.m., Spivey called the shop; on January 20, 2015, at 3:58 p.m., Morales called Spivey from his cell phone; on January 21, 2015, at 2:01 p.m., Spivey received a call from the shop; on January 28,

2015, at 2:54 p.m., Spivey called Morales; on February 5, 2015, at 10:11 a.m., Spivey called Morales; and on March 19, 2015, at 3:20 p.m., Spivey called Morales[3].

Sometimes Morales called Spivey the day before to give him his assignments. Morales called Spivey on January 20, 2015, at 3:58 p.m. and instructed him to report to Tech the following morning. Morales called Spivey on January 21, 2015, at 2:01 p.m. and instructed him to report to Dr. William H. Horton the following morning. Morales called Spivey on January 28, 2015, at 2:54 p.m. and instructed him to report to Tech the following morning. Morales called Spivey on February 4, 2015, at 2:30 p.m. and instructed him to report to Tech the following morning. Spivey called Morales at 10:11 a.m. on February 5, 2015, to let him know that he would be leaving early that day, at which time Morales instructed him to go to Ivy Hill the following day. Spivey left work at 11:36 a.m. on February 5, 2015.

Spivey initially testified that Morales called him at 3:20 p.m. on March 19, 2015, and instructed him to report to Tech the following morning. Spivey thereafter testified that he called Morales to tell him he was done at the site, and Morales instructed him to punch in at Tech the following morning.

Spivey denied that any of the cell-phone calls between Spivey and Morales were about work matters other than where Spivey was assigned to report the following day. Morales might call him during the day for an update on a job, at which point Spivey would tell Morales whether he was done or not, and Morales would give him an assignment, as needed. Spivey denied that he had conversations with Morales about the scope of a job and not about the next day's assignment. When they speak, it is about how the job is going, when it will be completed, and assignments for the next day.

Spivey admitted he was aware of the Newark Public School District Policy requiring him to "Kronos in" on time at his assigned location. He also admitted that not following the policy could affect the efficiency of the schools. Spivey denied punching it at locations

[3] On February 4, 2015 at 2:30 p.m., Spivey called Morales, but the telephone records reflect "CALL WAIT".

other than his assigned locations. The Kronos is accurate, but the Log is not. Spivey knows where to punch in, which is either the last school he worked at or where Morales instructs him to go when he calls. Spivey never received a verbal or written warning for the allegations in the PNDA. Spivey denied ever being advised that his Kronos punches did not match the Log. Sometimes Morales showed up at jobs and gave out work assignments for the following day.

Spivey punched in on January 28, 2015, at a location other than his assigned location because of snow and the inability to get to his assigned location at all that day. Spivey also testified that he had "absolutely no access to get to the school" on March 6, 2015, because of a snow storm on March 5, 2015.

Additional Findings of Fact

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Appellant's testimony with respect to several of the dates in question was inconsistent with and overborne by the record, including the documentary evidence and the concise, consistent, and credible testimony of Morales. By way of example, appellant claims that on January 5, 2015, he called to get a school assignment, but he had punched in at the Ivy Hill Main Office at 8:01 a.m. and did not call the shop until 8:36 a.m. If he had no assignment for that day, it is not clear why he would have waited more than half an hour to find out where he should be working.

Appellant also claims that Morales called him on January 20, 2015, at 3:58 p.m. and advised him to report to Tech in the morning on January 21, 2015. However, Morales testified that the Log would reflect the morning punch-in location—Ivy Hill—and it is observed that Spivey's subsequent two punches that day were Ivy Hill. Appellant claims that he received a call from Morales, from the shop, on January 21, 2015, at 2:01 p.m., and was advised to report to Dr. William H. Horton in the morning. However, Morales likewise testified that the Log would reflect the morning punch-in location—Tubman—and it is observed that Spivey's subsequent three punches that day were Harriet Tubman, and all but his morning punch the following day were also at Harriet Tubman.

Appellant claims that on February 5, 2015, he called Morales at 10:11 a.m. and was advised to report to Ivy Hill the following morning. Morales testified that the employees were generally contacted the night before or before punching out for the day, and it does not seem logical that an assignment would have been made with more than five hours remaining in the work day. Further, the morning punch-in location on the Log—South St.—was Spivey's last punch on February 5, 2015, and his two punches subsequent to his morning punch at Ivy Hill the following morning were also at South Street. Thus, the evidence suggests that Spivey was working at South Street the prior day, and was to continue working at South Street on February 6, 2015.

Spivey also testified that he was unable to get to his assigned location at all on January 28, 2015, because the roads were impassable due to snow. However, other than the morning punch at N – Barringer Steam Main Office, his other three punches were all from the Log-assigned school (Newton). Additionally, Morales pointed out that if Spivey could make it to Barringer by 7:52 a.m., there was no reason he could not have made it to Newton.

Spivey repeatedly claimed that Morales contacted him and told him to report to an assigned location other than the location reflected in the Log, but it is observed that on many of those occasions, Spivey ended up at the Log-assigned location by 11:30 a.m. Specifically, of the twenty-eight discrepancies in the period from January 5, 2015, through March 20, 2015, it is observed that on seventeen occasions (January 21, 2015, January

22, 2015, January 23, 2015, January 28, 2015, February 2, 2015, February 5, 2015, February 6, 2015, February 9, 2015, February 10, 2015, February 12, 2015, February 13, 2015, February 17, 2015, March 3, 2015, March 4, 2015, March 17, 2015, March 19, 2015, and March 20, 2015), Spivey punched out for lunch at his Log-assigned location, despite having punched in for the day elsewhere, which suggests that Spivey was indeed assigned to a different location than the one where he punched in.

Additionally, of the twenty-eight days reflected above, Spivey punched it at "S – Tech High Main 2" eleven times, and "S – Tech High Main Office 1" three times, none of which is the "S – Tech High Basement" location where the shop is, and Morales testified there would be no reason for him to punch in outside the shop.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

On at least seventeen occasions from January 5, 2015, through March 20, 2015, Spivey knowingly punched in at a school other than the school at which he had been assigned to report to work. Spivey was verbally warned by Morales not to punch in at a location other than his assigned location. Spivey was aware that punching in at a school other than the school at which he was assigned to work was a violation.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career-service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career-service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including conduct unbecoming a public employee, neglect of duty, and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(6), (7) and (12). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Spivey is charged with conduct unbecoming a public employee, neglect of duty, and other sufficient cause. The burden of proof is on Newark Public School District to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is "any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Appellate Division also held that conduct unbecoming is "any conduct which adversely affects the morale or efficiency of the bureau." Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

Spivey on at least seventeen occasions failed to timely report to his assigned job location, and instead punched in at another, presumably closer, location to avoid punching in late for work. He thereafter, while already on Newark Public School District time, would travel to his assigned location, delaying completion of work in the schools. Accordingly, I **CONCLUDE** that the charges of conduct unbecoming a public employee and neglect of duty are sustained.

The penalty imposed by Newark Public School District was a fifteen-working-day suspension. The Civil Service Commission may increase or decrease the penalty

imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee's reasonably recent history of promotions, commendations, and the like, as well as formally adjudicated disciplinary actions and instances of misconduct informally adjudicated.

Spivey has no prior disciplinary history, but the credible evidence reflects that Spivey, on at least seventeen occasions, punched in at a location other than his assigned job location, including after he was warned, knowing that doing so was a violation. Accordingly, I **CONCLUDE** that a fifteen-working-day suspension is an appropriate penalty in this matter.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee and neglect of duty are **SUSTAINED**, and that the penalty of a fifteen-working-day suspension is **AFFIRMED.**

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, P.O. 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.

5/30/17
DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 5/30/17

Date Mailed to Parties: MAY 31 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

dlc

APPENDIX

WITNESSES

For Appellant:

Christopher Spivey

For Respondent:

Richard Morales

EXHIBITS IN EVIDENCE

For Appellant:

P-1 Kronos Reminders

P-2 AT&T Records

For Respondent:

R-1 Trades Weekly Timesheets

R-2 Punch Origin

R-3 Request for Disciplinary Action

R-4 PNDA

R-5 FNDA

7-13-17

STATE OF NEW JERSEY

In the Matter of Caroline Tucker
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2017-3068
OAL DKT. NO. CSV 5486-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 13, 2017 BW

The Civil Service Commission, at its meeting of July 13, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 5486-17

AGENCY DKT. NO. 2017-3068

IN THE MATTER OF CAROLINE TUCKER,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Robert Little, IV, AFSCME Council One, for appellant, appearing pursuant to N.J.A.C. 1:1-5.4(a)6

Anita Pinkas, Director, Employee Relations, for respondent, appearing pursuant to N.J.A.C. 1:1-4.5(a)2

Record Closed: May 23, 2017 Decided: June 12, 2017

BEFORE **JOSEPH LAVERY,** ALJ t/a:

This matter concerns the appeal of Caroline Tucker from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on April 21, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

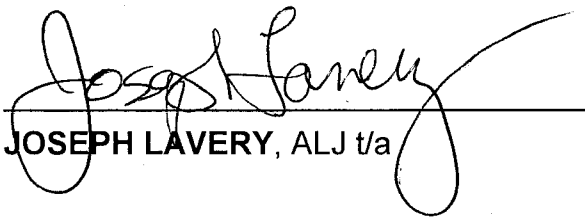
2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

June 12, 2017
DATE



JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 6/13/17

Date Mailed to Parties: 6/13/17

mph

OAL DKT. NO. CSV CSV 5486-2017

AGENCY DKT. NO. 2017-3068

SETTLEMENT AGREEMENT

IN THE MATTER OF

Caroline Tucker

AND

Vineland Developmental Center

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 3/24/17 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. AO4:08:		
2. A.3.1 Abandonment of job		
3. C.9.1. Insubordination	Removal/Resignation Not in Good Standing	1/27/17
4. E.1.1. Violation of rule		
5.		

B. The Appellant Caroline Tucker withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. A.3.1 and C.9.1	Withdrawn	
2. E.1.1.	Sustained	Reduced to 10 days Suspension, time served prior to 1/27/17 during period of leave without

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of Since 1/27/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

4. (Strike if not applicable) The Appellant agrees to a

✓ resignation in good standing

_____ general resignation

which shall be effective 1/27/17 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Dept. of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Caroline Tucker's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5/23/17
DATE

Appellant

5/23/17
DATE

Respondent

5-23-17
DATE

ON BEHALF OF APPELLANT

5-23-17
DATE

Bernadette H. Hughes, VDC
ON BEHALF OF

OAL DKT. NO. CSV 5486-2017

CERTIFICATION

I, Caroline Tucker, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/23/17
DATE

NAME

7-13-17

STATE OF NEW JERSEY

In the Matter of Brandy Valasa
Monmouth County,
Department of Corrections

CSC DKT. NO. 2015-2274
OAL DKT. NO. CSV 00207-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Brandy Valasa, County Correction Officer, Monmouth County, Department of Corrections and Youth Services, 10 working day suspension, on charges, was heard by Administrative Law Judge Carl V. Buck III, who rendered his initial decision on June 15, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

Re: Brandy Valasa

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00207-16
AGENCY DKT. NO. 2015-2274

IMO BRANDY VALASA, MONMOUTH COUNTY DEPARTMENT OF CORRECTIONS AND YOUTH SERVICES.

Patrick J. Caserta, Esq., for Brandy Valasa, appellant

Steven Kleinman, Esq., for Monmouth County Department of Corrections and Youth Services, respondent (Andrea I. Bazer, County Counsel, attorney)

Record Closed: May 1, 2017 Decided: June 15, 2017

BEFORE **CARL V. BUCK III**, ALJ:

STATEMENT OF THE CASE

Appellant Brandy Valasa (Valasa) appeals from a Final Notice of Disciplinary Action (FNDA), dated January 21, 2015, suspending her for ten days from her position as a County Correction Officer with the respondent Monmouth County Correctional Institution (MCCI). The charges arose from her alleged removal and photocopying of official documents for her own personal use.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) on July 03, 2014, charging her with the following:

1. N.J.A.C. 4A:2-2.3(a)(3)
2. Violation of Monmouth County Sherriff's Office Department of Corrections Rules and Regulations
    a. 3.20.030
    b. 3.20.260
    c. 4.30.020
3. Violation of Monmouth County Sherriff's Office Department of Corrections Policy and Procedures
    a. 1-3.13
4. Violation of Monmouth County Policy 701 regarding Employee Conduct and Work Rules

The factual specifications in the PNDA allege that appellant removed official documents and a logbook for the purpose of photocopying pages for her personal use without first obtaining the appropriate authorization as detailed in the Department Rules and Regulations. (R-1)

On January 21, 2015, the MCCI issued a FNDA sustaining the above charges. Appellant appealed and the matter was transmitted to the Office of Administrative Law (OAL) where it was filed on December 25, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on March 9, 2017. The record was held open for simultaneous written summations, which were filed on May 1, 2017, and the record closed on that date.

FINDINGS OF FACT

The following facts are not in dispute:

The MCCI is operated by the Monmouth County Sherriff's Office (Sherriff). Appellant is a corrections officer (CO) and has been an employee of the MCCI for approximately eleven years. On June 16, 2014, she was assigned to K-Pod. At 9.25 a.m., appellant removed the K-pod logbook from its standard location on the unit. She concealed the logbook in a sweater. She obtained the D/E keys from Officer Jamie Elliott. Appellant then opened the library door, returned the keys to Officer Elliott, entered the library and closed the library door behind her. She exited the library at 9.33 a.m. She returned to K-pod with the K-pod logbook similarly concealed in a sweater. (R-3, -4).

While in the library she used the library copier to make copies of page 100 of the logbook (R-5) and page 104 of the watch sheet pertaining to inmate L.S. (R-6).

TESTIMONY

In support of its case, respondent presented the testimony of **Lieutenant David Betten (Betten).** He has been employed by the MCCI for approximately twenty years. He became a Sergeant in 2007 and was promoted to Lieutenant in 2010. He was the watch commander during the 7:00 a.m.-3:00 a.m. shift on June 16, 2014, and testified concerning the incident.

He testified that he had received a telephone call (from a source requesting anonymity) advising him to review the video outside the K-pod unit at a certain time. After review of the video tape, he went to Jeffrey Equils, principal investigator for MCCI to tell Equils what he had seen on the tape; to wit, confirming the details of the incident elaborated upon above.

Betten testified that it was not normal for the logbook to be removed unless it was "full" and needed to be replaced. He also testified that there was a procedure in place should copies of pages needed to be made. He testified that removal of the logbook was a safety concern for MCCI and contained sensitive information pertaining to medical issues of the inmates and security issues concerning K -pod. If there had been an official document request, such request would be dealt with by the MCCI custodian of records.

Principal Investigator Jeffrey Equils (Equils) also testified for respondent. He has been employed by MCCI for approximately twenty-five years, the past ten as a principal investigator. He is in charge of the Internal Affairs (IA) unit whose purpose it is to investigate any violation of policies and procedures by inmates or staff. He testified that the incident was reported to him by Betten; specifically, that the appellant may have removed the log book. He then reviewed the video of her actions.

He testified that C.O.s are not given the authority to make copies of logbooks. He requested Betten to make a report of the incident. He also spoke with appellant who admitted she had made a copy of a page of the logbook and a copy of a watch sheet. Equils testified that appellant told him that she was concerned about a supervisor not performing their duties, but appellant declined to name the supervisor.

He further testified as to the MCCI "Confidentiality Statement" signed by appellant (R-14); specifically referencing sub section III:

> III. I will not remove confidential information from the agency except as authorized, by the appropriate administrator, in the performance of my duties, including, but not limited to consumer records, charts, correspondence or any other form of written or electronic documentation.

Brandy Valasa testified on her own behalf. She has worked at MCCI for approximately eleven years. She testified that on June 16, 2014, Sergeant Rutkowski was the sergeant in charge of the K-pod zone. The logbook was kept in the panel area in a secure location. Inmates were located in five separate pods off the panel area. On

the date in question two inmates were in the area for disciplinary reasons with twenty-three-hour lockdown stages and were to be monitored every thirty minutes for safety and security.

She testified that she had a concern with Rutkowski's signature on two watch sheets where he signed twice. She admitted that she did place the logbook under her sweater, she did remove the logbook from the area in which it was kept, and she did make copies from the logbook. However, she testified that she violated no rules in doing so.

Appellant testified that she made two copies from the logbook and gave those documents to Equils when Equils questioned her about the logbook. She testified that while in training she was told by the training department that she could have copies of any document that contained her name. She further testified that she did not remember asking anyone for approval to make these copies, nor did she tell anyone that she made the copies.

She testified that she was aware of several internal investigations at MCCI (one of which dealt with her husband, Anthony Valasa, who also worked at MCCI). She concealed the logbook as she was not sure what the situation at the facility was on that date relating to a number of these ongoing investigations. She again testified that she copied the pages out of a concern regarding the actions of Rutkowski.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee's rights and duties are governed by the Civil Service Act and the regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. A civil service employee who engages in misconduct related to his or her duties or who gives another just cause may be subject to major discipline. N.J.A.C. 4A:2-2.2 -2.3(a). In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a

preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. Super. 550 (1982); Atkinson v. Parsekian, 37 N.J. Super. 143 (1962).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant seeking a ten-day suspension. The appellant is charged with, among other things, conduct unbecoming a public employee and other sufficient cause. She is also charged with a violation of MCCI Rules and Regulations 3.20.030, 3.20.260 and 4.30.020, Policy and Procedure 1-3.13 Code of Ethics Policy and Monmouth County Policy 701 regarding Employee Conduct and Work Rules. The charges all relate to the appellant's removal of the K-pod logbook and photocopying pages from the log book for personal use without first obtaining appropriate authorization.

Conduct Unbecoming a Public Employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Lieutenant Betten and Investigator Equils testified as to the information received regarding copying pages from the logbook by appellant and the policies, procedures and charges stemming from that action on the part of appellant. The videotape revealed that appellant did remove the log book under a sweater, took the D/E keys to open the library, entered the library at 9:25 a.m. on June 16, 2014 and exited at 9:33 a.m. Appellant admitted that she copied pages from the logbook; albeit out of a concern regarding a procedure violation by another officer, Sergeant Rutkowski.

Appellant testified that she did not consider this action to be a violation of any rule at MCCI.

The issue of credibility is not in contention as appellant admitted the activity which is at the crux of the disciplinary charges.

Based on the testimony and findings, I **CONCLUDE** that the respondent has satisfied its burden of proving that appellant violated Monmouth County Sheriff's Office Department of Corrections Rules and Regulations 3.20.030, 3.20.260, and 4.30.020. Further, I **CONCLUDE** she has violated the Code of Ethics Policy 1-3.13 and County Policy 701 regarding Employee Conduct and Work Rules and that her actions constituted conduct unbecoming a public employee. I **CONCLUDE** that the charges are **SUSTAINED**.

PENALTY

Once a determination is made that an employee has violated a statute, rule, regulation, etc., concerning his/her employment, the concept of progressive discipline must be considered. West New York v. Bock, 38 N.J. Super. 500 (1962). While this case did not specifically use the phrase "progressive discipline," its facts strongly suggest that a record of progressive discipline should precede the ultimate penalty, which is removal. The concept of progressive discipline involves consideration of the number of prior disciplinary infractions, the nature of those infractions and the imposition of progressively increasingly penalties. It is well settled that correction officers, like police officers are held to a higher standard of conduct than other public employees because of the sensitive nature of the position they occupy. Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), cert. denied, 47 N.J. Super. 80 (1966). It has also been noted in corrections cases, that failure to adhere to security precautions could have potentially serious consequences, which may give rise to a more serious penalty regardless of the lack of any past disciplinary consequences. I/M/O Martha Hicks and Antonio Price, OAL Dkt. Nos. CSV 11373 and CSV 11494-13; 2014 N.J. Agen. Lexis 469 (2014).

The appellant received a ten-day suspension for her removing, concealing, and copying pages from the K-pod logbook at MCCI. She failed to adhere to behavior which goes beyond that expected from a Corrections Officer, from whom a higher standard of behavior is expected and required. The penalty is appropriate under the circumstances and is sustained. I therefore **CONCLUDE** that a ten-day working day suspension is appropriate under these circumstances.

DECISION AND ORDER

For the reasons stated above, I hereby **ORDER** that appellant's appeal is **DISMISSED**, and respondent's proposed ten-day suspension of Valasa is **AFFIRMED** based upon appellant's violation of N.J.A.C. 4A:2-2.3(a)(3), conduct unbecoming a public employee and other sufficient cause; violation of Monmouth County Sherriff's Office Department of Corrections Rules and Regulations Sections 3.20.030, 3.20.260 and 4.30.020; violation of Monmouth County Sherriff's Office Department of Corrections Policy and Procedures Section 1-3.13 Code of Ethics Policy and violation of Monmouth County Policy 701 regarding Employee Conduct and Work Rules.

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, P.O. 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.

June 15, 2017
DATE

CARL V. BUCK, III, ALJ

Date Received at Agency: 6/15/17

Date Mailed to Parties: 6/15/17

/lam

LIST OF EXHIBITS

For appellant:

None

For respondent:

R-1 Preliminary Notice of Disciplinary Action-Brandy Valasa (ten-day suspension effective TBD), dated July 3, 2014

R-2 Final Notice of Disciplinary Action (ten-day suspension effective January 24, 2015), dated January 21, 2015

R-3 Uniform Staff Report-Lieutenant David Betten, dated June 16, 2014

R-4 Electronic Surveillance Review Form, dated June 16, 2014

R-4a Video Recording of Incident on thumb drive, dated June 15, 2014

R-5 MCCI Logbook, page 11, dated June 15, 2014

R-6 MCCI Daily Inmate Watch Sheet for L. Stevens, dated June 15, 2014

R-7 Uniform Staff Report-Brandy Valasa, dated June 16, 2014

R-8 Memorandum from Principal Investigator Jeffrey Equils to case file, dated June 17, 2014

R-9 MCCI Logbook, page 100 [complete], dated June 15, 2014

R-10 MCCI Rules and Regulations 3.20.030, 3.20.260 and 4.30.020, dated May 2008-January 2014

R-11 Acknowledgement of Receipt of MCCI Rules and Regulations, signed by Brandy Zarkovacski, date February 17, 2010

R-12 Employee Guide to Policies, Benefits and Services-Policy 701, dated January 2017

R-13 Employee Acknowledgement Form for Employees Guide, signed by Brandy Zarkovacski, date February 16, 2010

R-14 Confidentiality Statement signed by Brandy Zarkovacski, dated February 16, 2010

R-15 Preliminary Notice of Disciplinary Action-Anthony Valasa (removal effective TBD), dated August 28, 2014

R-16 Official Reprimand, Brandy Zarkovacski, dated March 10, 2008

R-17 Post Order/Job Description #21, dated March 17, 2014

LIST OF WITNESSES

For appellant:

Brandy Valasa

For respondent:

Lieutenant David Betten

Principal Investigator Jefferey Equils

7-13-17

STATE OF NEW JERSEY

In the Matter of Abdul-Raheem Yasin
City of Newark,
Department of Water and Sewer

CSC DKT. NO. 2017-1732
OAL DKT. NO. CSV 19442-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 17 2017 BW

The appeal of Abdul-Raheem Yasin, Laborer 1, City of Newark, Department of Water and Sewer, removal effective September 1, 2016, on charges, was heard by Administrative Law Judge Julio C. Morejon, who rendered his initial decision on May 30, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

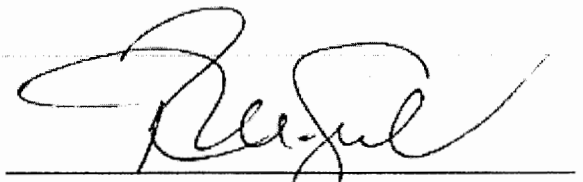
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 13, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Abdul-Raheem Yasin.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 13, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 19442-16
AGENCY DKT NO. CSC 2017-1732

IN THE MATTER OF ABDUL-RAHEEM YASIN, CITY OF NEWARK, DEPARTMENT OF WATER AND SEWER.

Arnold S. Cohen, Esq., for appellant Abdul-Raheem Yasin (Oxfeld Cohen, P.C., attorneys)

France Casseus, Assistant Corporation Counsel, for respondent City of Newark, Department of Water and Sewer (Corporation Counsel, City of Newark, attorneys)

Record Closed: April 12, 2017 Decided: May 30, 2017

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

STATEMENT OF THE CASE

Appellant, Abdul-Raheem Yasin (Yasin) appealed his termination by respondent, City of Newark, Department of Water and Sewer (Newark), effective September 1, 2016, for conduct unbecoming a public employee and other sufficient cause, resulting from an alleged written threat made by Yasin against his supervisor.

PROCEDURAL HISTORY

Yasin was served with a Preliminary Notice of Disciplinary Action (PNDA) on September 1, 2016, terminating Yasin on September 1, 2016, for conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a), and other sufficient cause. Yasin requested a departmental hearing, which was held on November 1, 2016. The Final Notice of Disciplinary Action (FNDA) affirming the termination was served on November 17, 2016. Yasin appealed the termination on November 18, 2016, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law, where it was filed on December 27, 2016.

A hearing was held on April 12, 2017, and the record was closed at the conclusion of the same.

FINDINGS OF FACT

Based on the testimony the parties submitted and my assessment of its credibility, together with the documents that the parties submitted and my assessment of their sufficiency, I **FIND** the following as **FACT**:

Prior to the commencement of the hearing, counsel for Newark made an oral motion to suppress certain photographs that Yasin had provided Newark during pre-hearing discovery. The photographs were contained in a CD (P-1). Newark argued that the photographs were not relevant and should not be considered in the underlying hearing. Yasin argued that the photos depicted the work site where Yasin claimed he was harassed and let to his termination.

The parties agreed that I should view the photos individually and then issue a ruling. Yasin produced a laptop computer that allowed me to view the photos individually in the presence of both counsel (P-1).

After reviewing the photographs on the CD and hearing the argument made by counsel, I ruled that the photos would not be excluded and Yasin could testify as the same, as a foundation for submission of the CD in evidence had been provided by Yasin.

Yasin does not dispute writing a note to his supervisor, Kareem Adeem, Assistant Director of Public Works (Adeem), on September 1, 2016, stating: "Kareem Herrill...suck my dick...see you in the streets." (R-1).[1] Yasin testified that the note was not meant as a threat but that he would be "out on the street" if he were terminated from his job. Adeem testified that he interpreted the second part of the note as a threat as "a possible physical problem" with Yasin if they were to see each other in the street. Yasin testified that he wrote the note because he was upset at being harassed on the work site. Andrea Hill Adebowale, Director of the Department of Water and Sewer (Adebowale) testified that the decision to terminate Yasin resulted from a perceived threat made by Yasin to Adeem, and by extension to other workers, which Newark could not tolerate.

Rita Adams (Adams), Assistant Chief Clerk, testified that on September 1, 2016, between 10:00 and 10:30 AM, Yasin came into the office at 239 Central Avenue, Newark, New Jersey (Central Avenue), looking for Adeem. Adams informed Yasin that Adeem was not in and that he would return later in the afternoon. Adams testified that Yasin appeared "anxious" and that he was pacing outside her office, while he waited for Adeem. Yasin then left and returned between 3:00 and 3:30 the same day. Adams testified that she saw Yasin again in the afternoon and she informed him that Adeem was not in, and if she could help him. Adams testified that Yasin said "No, it's between he and me", meaning Adeem. Adams asked Yasin if he would like to leave Adeem a note, since she did not know when he would return. Yasin said "yes" and Adams handed him a blank paper and pen for him to write a note. Yasin wrote the note, folded the paper and gave it to Adams, who then put the paper in an envelope and gave it to Michael Gelin, Assistant Director (Gelin) (R-1)

Adeem then testified. He gave his title as Assistant Director, Newark Department of Water and Sewer, and a description of his duties as responsible for the day-to-day

[1] Yasin testified that he knew Kareem Adeem as "Kareem Herrill" and referred to him as thus in the note.

operation of the Water and Sewer Department, which included the supervision of Yasin and other employees in the department. Adeem testified that on September 1, 2016, he had taken a vacation day, but did return to Central Avenue after 5PM, to pick up Gelin to attend a funeral. When Adeem met Gelin, he showed Adeem Yasin's note, to which Adeem responded "I don't know what's wrong with this guy". Adeem testified that he interpreted the first part of the note as an "invitation to look at his [Yasin's] private parts", and the second part as a threat that "if he [Yasin] saw me in the street, there would be a problem." Gelin told Adeem that he had brought the incident to the attention of the Director, Andrea Adelwabe (Adelwabe) and she was going to suspend Yasin because of the note. Adeem had no reaction to the same

Adeem then testified about two prior employment related incidents concerning Yasin. Adeem first recalled that a week or so before September 1, 2016, he saw Yasin driving a Department of Public Works (DPW) truck in the yard, and he questioned Yasin if he had authority to drive the truck, to which Yasin responded "No". Adeem told Yasin that he should not drive the DPW truck as he was not authorized to do so. There was no testimony provided if Yasin had been formally admonished for the same, or if it was just and exchange between Adeem and Yasin.

Adeem then recalled an incident that had occurred on August 31, 2016, involving Yasin and a work crew at a job site in Newark. Adeem recalled that a call had come in to the Central Avenue office informing him that Yasin refused to assist DPW employees dig a hole at a work site because of a "live wire" located in the hole that had been dug by DPW employees. Adeem spoke with "Mr. Di Silva" , the work site supervisor, who informed Adeem that the report of a wire was incorrect as it turned out to be a pipe. Adeem testified that Mr. Di Silva told him Yasin did not want to work in the hole because of the wire and that Yasin had called his union representative and was told he did not have to work at the site because of the complaint of a wire. Adeem then decided to have Yasin come back to Central Avenue to be reassigned to another work site. Adeem testified that he made this decision in order to defuse the situation with Yasin and other employees at the work site, and he did not want an "altercation" with Yasin and other employees at the site.

In response to questions from the bench concerning the employment relations between Adeem and Yasin, Adeem testified that he had originally hired Yasin two-years prior in 2015, when Yasin came off the "Special Reemployment List" and that he had worked at the City Hall location prior to working at Central Avenue.[2] Adeem stated that his relationship with Yasin was "great" and that he had no prior issues with him. Adeem testified further that Yasin had been previously disciplined for the unauthorized driving of a DPW truck from a water treatment plant that resulted in a four-month suspension from the department.

On cross-examination, Adeem answered that Yasin and other employees did not need to make an appointment to speak with him if the issue was not complicated. However, if an employee had a problem or had a procedural question, he recommended that the employees make an appointment to speak with Adeem at Central Avenue. Adeem said that he did not know Yasin had come by his office on September 1, 2016, until he met Gelin after work on said date.

Adelwabe then testified that she is the Director of the Newark Department of Water and Sewer, and has full responsibility for running and overseeing the department. Adelwabe first became aware of Yasin's note on September 1st, when Gelin called to inform her of the same. Gelin scanned and emailed it to her. Adelwabe testified that she was "outraged" when she read the contents of the note stating "see you in the streets" as she interpreted the statement as a threat of violence to Adeem, and a threat of violence in the workplace. Adelwabe testified that the reason for her reaction was because her department had had prior incidents of employees harming their supervisor, and she did not want this to occur again.

As a result of Yasin's note, Adelwabe suspended him immediately and removed Yasin from his employment as Adelwabe found Yasin's "conduct unbecoming of a public employee." (R-2). Adelwabe testified that Yasin had been previously suspended for four (4) months because he had taken a DPW truck out of the yard for several hours during

[2] Adeem testified that Yasin worked under his supervision for two weeks prior to September 1, 2016.

his work day. Upon his return from the suspension, Yasin was placed in the City Hall office, where he was assigned to conduct meter readings of residences and notifications to property owners concerning their water and sewer bills. Adelwabe testified that approximately two weeks prior to the incident she transferred Yasin to Central Avenue because she had determined that Yasin was not a "good fit" at City Hall. Adelwabe believed Yasin would be better suited for labor work at Central Avenue, as he wanted to work in a more labor intensive positon, such as digging holes in the street.

As for her decision to immediately suspend and then remove Yasin, Adelwabe testified that under the collective bargaining agreement, it was within her managerial right as the Director of the department to discipline and remove an employee for their conduct on the work site. (R-3). Adelwabe testified that as part of her investigation after receiving a copy of the note she spoke to Adeem and she concluded that for work safety reasons and because of prior work violence in her department, it was best to terminate Yasin's employment. Adelwabe testified that the words "meet you in the streets" was a threat to whomever the words were intended-the employees or the public. Adelwabe also testified that she had no prior issues with Yasin as an employee other than his four month suspension and underlying incident.

Prior to Yasin commencing his defense, Yasin was heard as to the admissibility of six separate videos clips taken by Yasin on August 25, and August 31, 2016 (P-1). After viewing the six video clips, and hearing from Yasin as to each, Newark's motion to suppress the video clips was denied as it was ruled that Yasin had provided a foundation for the video clips, and the clips depicted Yasin at his work site on the dates in question. As to the video's relevancy, Yasin would testify as to what was depicted in each clip in relation to his defense.

Video Clip No. 1(8/25/2016) P-1

Yasin is heard telling a co-worker Mr. Besemar, that "...he wanted to punish me...wants me to work too hard". Yasin testified that he was referring to his supervisor wanting to "punish him" by sending him to a work site.

Video Clip No. 2 (8/31/2016) P-2

Yasin is heard telling Mr. Brismar that "this is another dig-up...he wanted me to do it by myself", while holding paper containing an address that Yasin is heard saying is "a special list for me".

Yasin testified that the address on the paper refers to an address where a hole needs to be dug to fix an underground pipe, and that his supervisor wanted Yasin and Mr. Besemar to do the work alone-which Yasin said is impossible to do.

Video Clip No. 3 (8/31/2016) P-2

This video clip shows another DPW employee digging a hole with a pickaxe. There some undiscernible dialogue in the video background. Yasin testified that "Rocky" his supervisor tells him that he will "take a pickaxe and sever your spine" and Yasin is heard to say "cold".

Video Clip No. 4 (8/31/2016) P-2

Yasin is heard narrating the video while looking at a concrete slap covering a hole. Yasin states: "This is what happens when the holes break...and they sabotage and they want to harass you...they make you want to pick up... this whole slap of concrete...its heavy."

Video Clip No. 5 (8/31/2016) P-2

Yasin is heard telling his supervisor Mr. Delano that there is "some wires and stuff in there" and Mr. Delano tells Mr. Brismar to "get out of the hole." Yasin testified that Mr. Delano "threatened him" to get out of the hole.

Video Clip No. 6 (8/31/2016) P-2

This video shows Mr. Delano digging around a pipe and proclaiming that there is "no wire" and that the pipe is a "hollow pipe...allowing water underneath". Yasin testified that Mr. Delano is not an electrician and that he did not know that there was a yellow wire in the hole.

Overall, Yasin testified that the videos depicted that he was harassed at the worksite in being assigned to dig a hole without proper assistance; his work was being sabotaged because someone left a wire in the hole, and his supervisor," Mr. Delano", threatened him with violence by stating that he would "sever your [Yasin's] spine with a pickaxe." As a result, Yasin testified that he went to see Adeem to discuss the same on September 1st. Yasin would also testify that he went to see Adeem on September 1st because his union representative told him he had been suspended for the August 31st incident.

As for the first part of the note-"Suck my dick", Yasin testified that he was frustrated because of the "harassment" he was experiencing at the work site. The second part of the note-"See you in the streets" did not intend violence to Adeem, but was a reference to Yasin being previously homeless and he feared that he would homeless again if he were to be terminated. Yasin testified that he had been trying to meet and speak with Adeem to discuss the harassment by his supervisor and co-worker and that Adeem referred him to EEOC.

On cross-examination, Yasin testified that his union representative, Ms. Martha, called him on August 31st to inform him that he was pulled off the work site because he had complained about the wire in the hole, and that he was suspended on said date because of the same. This was the explanation Yasin gave as to why he went to see Adeem the next day on September 1st, to discuss his "suspension."[3] Yasin testified that

[3] However, as the record reflects, Yasin was not suspended because of the August 31st incident.

it was inappropriate for him to write what he did on the note that caused him to be terminated, but he did so because he was frustrated by perceived harassment in the workplace, and he thought he was suspended.

LEGAL ANALYSIS AND CONCLUSION

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483–86 (2007). Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)). Indeed, progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest, such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, supra, 192 N.J. at 33.

Here, Yasin admitted to having written a note to his supervisor which contained offensive and threatening language. I am not persuaded by Yasin's explanation that the words, "See you in the streets" meant that he would be homeless again if her were to lose his job. Yasin also attempts to play down his statement that "See you in the streets" was not threatening by stating that unlike Adelwabe, Adeem did not fear for his safety in response to the statement. Again, I am not persuaded by this position because Adeem had testified that he did interpret Yasin's words to mean that if he saw him in the street there would be a "physical problem", which can only be interpreted as nothing good.

Yasin had an opportunity to make an appointment with Adams to speak with Adeem but he failed to do because he was to upset and instead he chose to leave a note containing an offensive and threatening remark. Yasin also had an opportunity to reflect on what he would communicate to his supervisor, as he visited Adeem's office twice in one day. By his own admission Yasin was very upset when he went to see Adeem, because of his perceived work-place harassment and he was erroneously informed by his union that he had been suspended for the August 31st incident.

The testimony of Adelwabe reaffirms that she has a responsibility to her department and the City of Newark to protect the employees and residents from potential violence. Yasin's statement of "see you in the street" was interpreted as a threat of violence to Adeem and by extension other employees and the public.

Therefore, I **CONCLUDE** that Yasin engaged in conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a) (6) and that there also existed other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a) (12), to terminate Yasin.

Regarding the penalty to be imposed, Yasin has a prior discipline having been suspended for four months, and his misconduct does concern public safety or cause a risk of harm to persons or property. Indeed, termination would be proportionate to the offense. Therefore, I **CONCLUDE** that Newark's decision to terminate Yasin from his employment should be **AFFIRMED.**

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Newark's decision to terminate Yasin is **AFFIRMED**.

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, P.O. 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.

May 30, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: May 30, 2017

Date Mailed to Parties: JUN 1 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

Witnesses

For Appellant:

Abdul-Raheem Yasin

For Respondent:

Rita Adams
Kareem Adeem
Andrea Adelwabe

Documents

For Appellant:

P-1 Copy of CD containing six separate video clips taken on August 25, 2016 and August 31, 2016

For Respondent:

R-1 Note from Yasin to Adeem
R-2 Final Notice of Disciplinary Action (31-B), dated September 1, 2016
R-3 Agreement between City of Newark and the Service Employees International Union, Local 617, dated January 1, 2012 through December31, 2014

7/26/17

STATE OF NEW JERSEY

In the Matter of Peter Chirico
City of Newark,
Police Department

CSC DKT. NO. 2016-1413
OAL DKT. NO. CSV 00321-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 28 2017 BW

The appeal of Peter Chirico, Police Officer, City of Newark, Police Department, 9 working day suspension, on charges, was heard by Administrative Law Judge Jeffrey A. Gerson, who rendered his initial decision on June 29, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 26, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

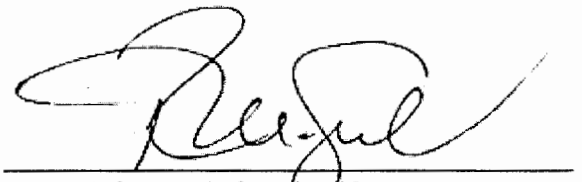
ORDER

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

Re: Peter Chirico

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. CSV 00321-16
AGENCY DKT NO. 2016-1413

IN THE MATTER OF PETER CHIRICO,
CITY OF NEWARK POLICE DEPARTMENT.

Shay Shailesh Deshpande, Esq., for petitioner Peter Chirico (Fusco & Macaluso, LLC, attorneys)

Joyce Clayborne, Esq, Assistant Corporation Counsel for respondent, City of Newark Police Department (Willie L. Parker, Corporation Counsel, attorney)

Record Closed: May 24, 2017 Decided: June 29, 2017

BEFORE: **JEFFREY A. GERSON**, ALJ t/a:

STATEMENT OF THE CASE

Peter Chirico, a Police Officer of the City of Newark, contested a 9 working day suspension pursuant to a Final Notice of Disciplinary Action dated September 18, 2015.

On or about September 28, 2015, Police Officer Chirico filed his major disciplinary appeal form resulting in the matter being transferred to the Office of Administrative Law on or about December 28, 2015 for a hearing.

On or about December 9, 2016, a brief was filed by the Newark Police Department requesting a dismissal of Officer Chirico's appeal contending that his 9 day suspension was as a result of a temporary restraining order entered as a result of a domestic violence complaint which required Officer Chirico to surrender his weapon.

On or about December 15, 2016, Chirico responded to the Motion/application contending that the Newark Police Department wrongfully suspended him prior to a hearing.

FINDINGS OF FACT

As a result of the stipulated and undisputed facts submitted by both sides, I **FIND** the following to be the uncontested **FACTS** of this matter.

In the early morning hours of September 8, 2015, Officer Chirico and his girlfriend, Carla Goncalves, got into a domestic dispute which resulted in Goncalves' filing of a Domestic Violence complaint with the City of Newark Police Department. Concurrently with the filing of the Domestic Violence complaint against Officer Chirico by Goncalves, she in addition requested a Temporary Restraining Order against Officer Chirico which was granted by a municipal court judge.

The Temporary Restraining Order prohibited Officer Chirico from possessing any weapons. Officer Chirico was served and signed for the TRO on September 8th at 8:50 p.m.

As a result of the TRO, the Newark Police Department issued an immediate suspension notice determining that Officer Chirico was unfit for duty as a result of the

weapon prohibition issued by the Municipal Court Judge. The immediate suspension notice was signed for by Officer Chirico in the evening hours of September 8, 2015. A Preliminary Notice of Disciplinary Action was prepared and served on Officer Chirico on that same date, September 8, 2015. The PNDA contained two charges and an immediate suspension, indefinitely, without pay.

Officer Chirico requested a hearing which was conducted at the local level on September 18, 2015. This hearing resulted in a lifting of the indefinite suspension and the reinstatement of Officer Chirico to a modified set of duties. The Final Notice of Disciplinary Action dated September 18, 2015 imposed the 9 day suspension which proceeded Officer Chirico's reinstatement to modified duty. It is that 9 day suspension which Officer Chirico now contests.

THE LAW

N.J.A.C. 4A:2-2.5 provides:

> (a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and afforded the opportunity for a hearing prior to the imposition of major discipline (which, under N.J.A.C. 4A:2-2.2(a)), includes removal and suspension for more than 5 days), except:
>
> 1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty . . .

In The Matter of Lanier v. The City of Jersey City, OAL DKT. No. CSV 7649-97 (April 29, 1998) a 10 day suspension on charges of inability to perform was sustained by an Administrative Law Judge. There, like here, the police officer was the subject of a TRO that required him to surrender his weapon. In granting the unopposed summary judgment motion of the Appointing Authority, the ALJ found:

> "The ability to carry a firearm is prerequisite for a uniformed police officer, according to the New Jersey Department of Civil Service, Division of County and Municipal Government Services "class specifications for a police officer", as well as the description of a police officer promulgated by the Department of Personnel, Division of Personnel Management . . .
>
> The Appointing Authority is not obligated to provide alternative assignments to its officers".

DISCUSSION

As a result of the TRO and the Preliminary Notice of Disciplinary Action, Officer Chirico was immediately suspended, a suspension which was without pay until September 18, 2015 when the City of Newark Police Department after a hearing, placed Chirico on modified duty and reinstated his pay.

It was the TRO which rendered Chirico unfit for duty since he was deprived of his weapon. Though the Preliminary Notice of Disciplinary Action also imposed an immediate suspension as a result of the pending criminal charges, it is the domestic violence TRO judicial Order which was served and acknowledged by Chirico which provides for the immediate suspension.

Though Chirico acknowledges that N.J.A.C. 4A:2-2.5(a)(1) provides for the immediate suspension if there is a finding that an officer is unfit for duty. He goes on to argue as follows:

> "It is undisputed on 9/18/16 Officer Chirico was placed on modified duty even though he could not carry his service weapon while the restraining order proceedings were going on.
>
> Eventually, the TRO was dismissed. However, it is unclear how in one instance Officer Chirico was deemed to be unfit for duty and then placed on modified duty even though he could not carry his weapon.

> The position taken by Newark Police Department is completely inconsistent. If an officer is unfit because he cannot carry a weapon then how can he be placed on modified duty even though he still cannot carry his weapon and the restraining order procedure was still going on."

Based on the above, Chirico contends that he could not be unfit for duty as a result of the TRO if he was able to be placed on modified duty and be reinstated with pay.

There is no legal citation nor legal support for Chirico's argument. A police officer deprived of his weapon cannot fulfill the complete duties of his position. The police Department of the City of Newark was within its authority to modify Chirico's duties assigning him administrative work not requiring the use or possession of a weapon. If Chirico's argument is that by placing him in a modified position allowing him to return to work was an inconsistent disposition of his charges, then the result would not be a dismissal as a result of the inconsistency, but rather a re-imposition of the suspension since the modification would not be in affect and Chirico would not have a weapon.

Nonetheless, the police department, though not required to do so, reinstated Chirico to modified duty despite his inability to fulfill his responsibilities fully due to lack of a weapon. The modified duties allowed Chirico to start receiving salary, but did not reinstate him to former status as an armed police officer. He was, therefore, still unfit for duty as a police officer due to the lack of a weapon, but not unfit for the modified duties.

Inconsistency, as contended by Chirico in the police departments treatment, even if it existed, which is far from proven, would still not lead to a legal argument recapturing lost pay. Since he was unfit for to carry out the full responsibilities of a

police officer by virtue of the judicially ordered TRO, he suffered a 9 day suspension without pay which was statutorily supported and procedurally and legally warranted.

ORDER

It is **ORDERED** that Peter Chirico's appeal of his 9 day suspension is **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

6/29/17
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 6/29/17

Date Mailed to Parties: JUN 30 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

sej

7-26-17

STATE OF NEW JERSEY

In the Matter of Yesmean Damon
Union County, Department of Public Safety

CSC DKT. NO. 2016-1578
OAL DKT. NO. CSV 19739-15
OAL DKT. NO. PTC 16570-15
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JUL 28 2017 **BW**

The appeal of Yesmean Damon, Sherriff's Officer, Union County, Department of Public Safety, removal effective August 31, 2015, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on March 16, 2017. No exceptions were filed.

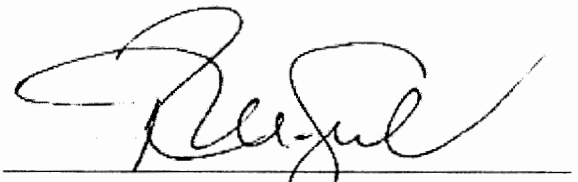
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 26, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Yesmean Damon.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
AND ORDER OF CONSOLIDATION
AND PREDOMINANT INTEREST
OAL DKT. NO. PTC 16570-15
AGENCY REF. NO. N/A

YESMEAN DAMON,
Petitioner,
v.
JOHN H. STAMLER POLICE ACADEMY,
Respondent.

IN THE MATTER OF YESMEAN DAMON, UNION COUNTY, DEPARTMENT OF PUBLIC SAFETY.

OAL DKT. NO. CSV 19739-15
AGENCY DKT. NO. 2016-1578

Mark A. Bailey, Esq., for petitioner Yesmean Damon (Law Offices of Mark A. Bailey, attorneys)

Elizabeth Farley Murphy, Esq., for respondent John H. Stamler Police Academy (Bauch Zucker Hatfield, attorneys)

Rachel M. Caruso, Esq., for respondent Union County (Roth D'Aquanni, attorneys)

Record Closed: February 10, 2017 Decided: March 16, 2017

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By Notice of Dismissal entered on or about August 27, 2015, the Police Training Commission (PTC) dismissed Yesmean Damon (petitioner) from her attendance at the John H. Stamler Police Academy (Academy) based on her failure to meet the minimum standards of the physical conditioning component of the Basic Course. On September 24, 2015, petitioner appealed and requested a hearing. On October 15, 2015, the appeal was transmitted to the Office of Administrative Law (OAL) where it was filed for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.[1]

I conducted case management discussions with the parties telephonically on December 16, 2015. Thereafter, petitioner obtained representation by counsel. Hearings were initially scheduled for February 24, 2016, but were adjourned at the request of petitioner's counsel. The hearing was re-scheduled for August 2016 but was also adjourned. The hearing took place on January 4, 2017. Post-hearing briefs were to be submitted no later than February 10, 2017, on which date the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Detective Edward Hanewald was the sole witness at the plenary hearing. He is the Academy's Lead Physical Fitness Training Instructor. Detective Hanewald has been certified by the PTC and has served as an instructor for seventeen years. Petitioner began at the Academy in July 2015. That session was to extend approximately ninety-six (96) days through December 2015. On August 27, 2015, petitioner was dismissed for failing to meet the minimum standards of the physical conditioning component of the Academy. Detective Hanewald stated that the dismissal was predicated upon her failure to fully participate in twenty conditioning sessions,

[1]As a result of her dismissal from the Academy, petitioner was also terminated from her position as a Sheriff's Officer with the Union County Sheriff's Department. A separately filed appeal from that employment action was docketed with the OAL as CSV 19739-15. County counsel requested that the employment action be stayed and placed on the inactive list until the determination of the within foundational decision. Under Administrative Procedure Rules and the predominant interest of the PTC, however, and in accordance with N.J.A.C. 1:1-17.1, I must consolidate the cases. It is so **ORDERED.**

which was more than twenty 20% percent of the total number of sessions there would have been for that class. The Academy requires recruits to fully participate in at least eighty (80%) percent of the sessions. A failure to perform in twenty of the sessions, even early in the class, mathematically precluded her from completing eighty (80%) percent and, therefore, mandated a dismissal from the Academy.

Specifically, the recruits are required to maintain a running pace during the running sessions, or they receive a Non-Participation in Physical Training Notice (Notice). They can fall back from the lead group but the failure to keep a non-walking pace is determined by an instructor walking behind or alongside the recruit. Detective Hanewald stated that if they cannot maintain a walking pace, they are given a Notice for that particular training session. Recruits will also receive a Notice if they stop during a run. In addition, there are calisthenics requirements and drills for which the recruits are coached on each aspect. If a recruit fails in any one component of the conditioning session, they receive a Notice for that entire morning. Damon received her twelfth Notice on August 17, 2015, and was counseled that she would be dismissed if she accumulated eight more. They do not allow a recruit to remain in the Academy if there is no chance of meeting the eighty (80%) percent requirement. When petitioner reached the twenty-notice mark, she was dismissed even though three months remained to the class.

Detective Hanewald testified that recruits are told during orientation what is required of them. Detective Hanewald was present during all or most of the physical conditioning sessions during this class and he did recall petitioner. He testified that she had a lot of difficulty with the runs as well as the exercises. Detective Hanewald explained that the Academy trainers documented through the Notices and videotapes of training sessions that petitioner failed to fully participate in scheduled activities on the following days. He identified the memos which were prepared, indicating petitioner had failed to fully participate on twenty separate occasions. (R-1 through R-20.)

1. July 28, 2015
2. July 29, 2015

3. July 30, 2015
4. August 3, 2015
5. August 5, 2015
6. August 7, 2015
7. August 10, 2015
8. August 11, 2015
9. August 12, 2015
10. August 13, 2015
11. August 14, 2015
12. August 17, 2015
13. August 18, 2015
14. August 19, 2015
15. August 20, 2015
16. August 21, 2015
17. August 24, 2015
18. August 25, 2015
19. August 26, 2015
20. August 27, 2015

I have reviewed these Notices and the corresponding video recordings.

On three occasions, petitioner was given Notices because she fell back to a walking pace, even though she tried to pump her arms to make herself look like she was running. On seven occasions, she failed at the running portion as well as some or all of the calisthenics or obstacle course portions. On ten occasions, petitioner was not feeling well and/or was not medically cleared to participate.

Detective Hanewald stated that the standards applied by all instructors are uniformly applied and objectively defined, albeit not with a minimum pace standard. He further explained that there were no excused absences due to illness or injury and each of those days would count as a non-participation. He considered this class to be unusually un-fit and remarked that nine of the recruits washed out.

On cross-examination, Detective Hanewald maintained that the requirements of the Academy with respect to physical conditioning are not dependent upon the type of position the recruit might fulfill once back at their local department. It is entirely irrelevant to petitioner's participation in the Academy that she may fill a sedentary position back at the Sheriff's Office. Furthermore, she was required to have been medically cleared before commencing the Academy class. The instructors guide the recruits and set the bar low at the beginning. They gradually build up the conditioning aspects but the program is not set up to accommodate those who are not physically fit to begin with.

I **FIND** based on these documented dates and the Detective's testimony that petitioner failed to fully participate in twenty sessions at the Academy.

LEGAL DISCUSSION

Petitioner's Dismissal from the Academy

Academies are given the power to dismiss or otherwise discipline recruits by the Police Training Act, which mandates successful completion of a basic training course at a school approved by the Police Training Commission as a prerequisite to a permanent appointment as a parole officer. N.J.S.A. 52:17B-67, -68. The PTC is vested with the power, responsibility, and duty to prescribe standards for approval of police training schools and the minimum qualifications for their instructors, and "to prescribe the curriculum, the minimum courses of study, attendance requirements, equipment and facilities, and standards of operation for such schools." N.J.S.A. 52:17B-71(a)–(d). The PTC is also responsible for certifying correction officers that have satisfactorily completed training programs. N.J.S.A. 52:17B-71(e).

The Academy is an approved police training facility and is governed by the provisions of N.J.S.A. 52:17B-66, et seq. As such, it is vested with power, responsibility and duty --

> [t]o issue and enforce rules consistent with Commission requirements which govern the conduct of trainees and the use of the school's facilities. Each trainee shall be furnished a printed copy of the rules at the commencement of the course . . . . These rules shall explicitly state which rule(s), the violation of which, may result in the trainee's suspension or dismissal from school.
>
> [N.J.A.C. 13:1-7.2(a)(3).]

N.J.A.C. 13:1-7.2(a)(8) vests the Academy with the power

> [t]o dismiss a trainee who has demonstrated that he or she will be ineligible for Commission certification, for unacceptable behavior or for other good cause.

As set forth in Greenwood v. State Police Training Center, 127 N.J. Super. 500, 510 (1992):

> [A]lthough the good-cause standard eludes precise definition, courts ordinarily uphold findings of good cause when the employee's performance is deficient or when the employee creates a risk of harm to himself or herself or others.

Good cause refers to the conduct of an employee that would justify dismissal. The example of such conduct noted by the Court in Greenwood was deficient performance. The Greenwood Court noted that courts have found good cause for termination in cases in which the discharge is prompted by a legitimate business concern.

The issues in this matter are whether petitioner failed to fully participate in twenty training sessions; and whether this failure constituted "good cause" for her dismissal from the Academy. As outlined in the PTC's Physical Conditioning Training Manual, the physical-conditioning exercise program must meet the following requirements:

1. Each exercise session, including the warm-up and cool-down phases, shall not exceed 70 minutes in length. (An additional 10 minutes, however, will be allowed for more highly fit trainees undergoing exercise. Also, additional time is permitted for trainees who require rest during the performance of speed and agility exercises . . . .)

2. Exercise sessions shall be conducted at least three days per week. Depending on local needs and resources, schools may increase the number of one-hour sessions up to five per week, but no more than one per day. A five-day exercise program is recommended.

3. A minimum of 40 physical conditioning sessions shall be scheduled in a five-day program, and 20 physical conditioning sessions shall be scheduled in a three-day program. In addition, a trainee must fully participate in eighty-percent of the scheduled physical training sessions, and meet the standard which produces the higher number of sessions based upon the course schedule. Failure to fully participate in eighty-percent of the total physical conditioning sessions shall be grounds for dismissal from the police academy.

4. Each exercise session shall consist of a warm-up phase, conditioning phase, and cool-down phase.

5. The conditioning phase shall consist of flexibility exercises, aerobic activities, calisthenics and strength exercises, and, on specified days, exercises geared to enhance speed and agility.

6. Academies may utilize training sites which are approved by the [PTC]. Whether outdoor, or indoor, approved sites may be utilized for physical fitness training . . . . When an academy utilizes a site located outside of their own academy property, the academy staff shall note this on the final course schedule.

7. Full participation shall be defined as participating continuously and without stopping in a twenty-minute run. Recruits shall demonstrate to staff their ability to engage in aerobic training running continuously for this period of time. Full participation in calisthenics and strength exercises shall be approved by the evaluation of physical training staff at each academy, on a recruit-by-recruit basis.

[P-1 (emphasis added).]

While petitioner argues that the "run" standard is too subjective because it is not based on a set metric such as pace per mile, it is clear from the findings above that petitioner's slow jog/walk was viewed as generously as possible by the instructors, who are trained to judge compliance. Moreover, petitioner also failed to fully participate in the callisthenic and obstacle portions of the physical fitness programs, and was also ill or injured on many occasions. There were only three dates when petitioner was judged to not have fully participated on the basis of just the running portion. In each instance of under-performance, it was clear on the videotapes that petitioner was not accomplishing the established exercise, whether it was running, push-ups, or scaling a wall. Here, petitioner was dismissed from the Academy due to her failure to fully participate in eighty (80%) percent of the required trainings sessions. Petitioner was advised of what was expected of her.

Having found that Damon failed to successfully complete twenty of the sessions just between July 28 and August 27, 2015, I **CONCLUDE** that she was dismissed from the Academy for "good cause." I **CONCLUDE** that respondent properly concluded that petitioner failed to meet the universal standards of the physical conditioning aspect of the PTC. Thus, it properly dismissed her from this class for good cause.

Petitioner's Termination of Employment

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined are whether the employee is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

An appointing authority may discipline an employee for, among other causes, an inability to perform duties. N.J.A.C. 4A:2-2.3(a)(3). The Department bears the burden

of proving the charges against petitioner by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). In this matter, the Department terminated petitioner's employment predicated on her inability to perform duties, stemming from her failure to successfully complete the training course at the Academy.

The statutory scheme governing police training dictates that successful completion of a police training course at a PTC-approved school is a mandatory prerequisite to a permanent appointment as a police officer. N.J.S.A. 52:17B-68 instructs that "every municipality and county shall require that no person shall hereafter be given or accept a permanent appointment as a police officer unless such person has successfully completed a police training course at an approved school." In other words, the training laws apply to all police officers and establish a classification of temporary or probationary employment for police officers until successful completion of the mandatory program of training. Borger v. Borough of Stone Harbor, 178 N.J. Super. 296, 301–02 (Ch. Div. 1981); see N.J.S.A. 52:17B-68, -69.

Pursuant to N.J.S.A. 52:17B-68, a mandatory prerequisite to a permanent appointment as a police officer is successful completion of a police-training course at a school approved by the PTC. The failure to complete this training is clearly grounds for termination of employment. Simply put, as a result of petitioner's dismissal from the Academy, petitioner could not perform the essential duties of her position. Accordingly, I **CONCLUDE**, as a matter of law and on the basis of the findings of fact and conclusions of law set forth above, that the Union County Sheriff's Office's determination to terminate petitioner's employment for failure to complete the Academy, a sine qua non to a permanent appointment, was within the scope of its authority and cannot be said to be arbitrary, capricious or unreasonable under the circumstances. It is up to her former employer to determine if she should be allowed to re-enroll in an Academy. Unless and until it does, petitioner cannot fulfill the requirements of her position as a Sheriff's Officer.

ORDER

For the reasons stated above, it is hereby **ORDERED** that the action of respondent John H. Stamler Police Academy of dismissing petitioner from the basic training course for good cause is **AFFIRMED.**

I hereby **FILE** my initial decision with the **POLICE TRAINING COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION,** which by law is authorized to make a final decision in this matter. If the Police Training 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.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision the **POLICE TRAINING COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies that may be within its statutory grant of authority.

Upon transmitting the record, the **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 16, 2017
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:
POLICE TRAINING COMMISSION

MAR 20 2017

Mailed to Parties:
id

Laura Dudics
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

P-1 PTC's Physical Conditioning Training Manual

For Respondent:

Det. Edward Hanewald

EXHIBITS IN EVIDENCE

For Petitioner:

None.

For Respondent:

R-1 Nonparticipation notice for July 28, 2015

R-2 Nonparticipation notice for July 29, 2015

R-3 Nonparticipation notice for July 30, 2015

R-4 Nonparticipation notice for August 3, 2015

R-5 Nonparticipation notice for August 5, 2015

R-6 Nonparticipation notice for August 7, 2015

R-7 Nonparticipation notice for August 10, 2015

R-8 Nonparticipation notice for August 11, 2015

R-9 Nonparticipation notice for August 12, 2015

R-10 Nonparticipation notice for August 13, 2015

R-11 Nonparticipation notice for August 14, 2015

R-12 Nonparticipation notice for August 17, 2015

R-13 Nonparticipation notice for August 18, 2015

R-14 Nonparticipation notice for August 19, 2015

R-15 Nonparticipation notice for August 20, 2015

R-16 Nonparticipation notice for August 21, 2015

R-17 Nonparticipation notice for August 24, 2015

R-18 Nonparticipation notice for August 25, 2015

R-18 Nonparticipation notice for August 26, 2015

R-19 Nonparticipation notice for August 27, 2015

R-20 Counseling Notice dated August 17, 2015

R-21 Video disk for August 3, 2015

R-22 Video disk for August 5, 2015

R-23 Video disk for August 10, 2015

R-24 Video disk for August 19, 2015

R-25 Video disk for August 20, 2015

R-26 Video disk for August 21, 2015

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION
PO BOX 085
TRENTON, NJ 08625-0085
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CHRISTOPHER S. PORRINO
Attorney General

ELIE HONIG
Director

YESMEAN DAMON,

Petitioner,

v.

JOHN H. STAMLER POLICE ACADEMY,

Respondent.

FINAL DECISION

OAL Docket No. PTC 16570-15

OAL Docket No. CSV 19739-15

(CONSOLIDATED)

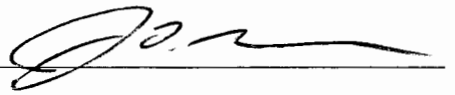
The Police Training Commission received an Initial Decision in this matter on March 20, 2017. This Final Decision was rendered within the time limits prescribed by N.J.A.C. 1:1-18.6 and N.J.A.C. 1:1-18.8.

Petitioner Yesmean Damon was enrolled in a basic training course at the John H. Stamler Police Academy. Petitioner was dismissed from the basic course on August 27, 2015 for failure to meet the minimum standards of the physical conditioning component of the basic course. Damon filed an appeal with the Police Training Commission, which was referred to the Office of Administrative Law.

A plenary hearing on the merits of petitioner's appeal was conducted by Administrative Law Judge Gail M. Cookson, ALJ on January 4, 2017. At issue was whether petitioner was properly dismissed from the basic training course. The record was closed on February 10, 2017. On March 16, 2017, Judge Cookson issued a thirteen page Initial Opinion which reviewed and weighed all of the evidence in the case. Judge Cookson concluded that the dismissal of petitioner Yesmean Damon from the John H. Stamler Police Academy was warranted and Affirmed the decision to dismiss her from the Academy.

On Wednesday, June 7, 2017, at a regular meeting of the Police Training Commission, the commissioners reviewed the Initial Decision rendered by Judge Cookson. The commissioners voted to **ADOPT** the Initial Decision as the **FINAL DECISION.**

POLICE TRAINING COMMISSION

By: 

Joseph F. Walsh - Designated Chairman

7/26/17

STATE OF NEW JERSEY

In the Matter of Doris Gonzalez
(Consolidated)

CSC Docket Nos. 2015-2633; 2016-770; 2016-1924 and 2016-1925
OAL Docket Nos. CSV 4313-15 and 20508-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JUL 28 2017

The appeals of Doris Gonzalez, Police Officer, City of Newark, Police Department, of her six-working day, 15 working day, 30 working day, and 45 working day suspensions, on charges, were heard by Administrative Law Judge Mumtaz Bari-Brown (ALJ), who rendered her consolidated initial decision on June 26, 2017. No exceptions were filed by the parties.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 26, 2017, accepted and adopted the Findings of Fact as detailed in the initial decision. However, while the Commission adopted the ALJ's recommendation to uphold the six and 15 working day suspensions and reverse the 30 working day suspension, it did not adopt the ALJ's recommendation to modify the 45 working day suspension to a 15 working day suspension. Rather, the Commission modified the 45 working day suspension to a 30 working day suspension.

DISCUSSION

Regarding the 45 working day suspension, the ALJ found that the appellant was guilty of the underlying charges relating to her misconduct, namely insubordination, neglect of duty, failure to be punctual and unprofessional use of language. Regarding the penalty, the ALJ stated that "given the obvious animosity between Department employees" and in order to equate this infraction "to the overall intertwined circumstance" between this infraction and two previous

infractions, that a 15 working day suspension was the appropriate penalty. The Commission does not agree.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the Commission finds that the appellant's actions during the incident underlying the 45 working day suspension were wholly inappropriate. Regardless of the apparent "animosity" that existed, the appellant's conduct and defiance towards a superior officer was inexcusable and worthy of a significant sanction. In this regard, the appellant works in a paramilitary setting where the chain of command must be maintained and respected. Further, in light of the fact that the six and 15 working day suspensions were sustained, the Commission finds that the appropriate penalty is a 30 working day suspension.

ORDER

The Commission finds that the appointing authority's imposition of six and 15 working day suspensions was appropriate and upholds those actions. Additionally, the Commission finds that the charges underlying the 30 working day suspension were not sustained and that suspension was properly reversed. Finally, the Commission finds that the 45 working day suspension should be modified to a 30 working day suspension.

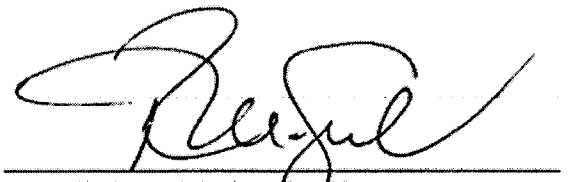
The appellant is entitled to a total of 45 working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12. In this regard *N.J.A.C.* 4A:2-2.12(a) provides that the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in

an appeal of a major disciplinary action. In this matter, charges were sustained and major discipline was imposed. Thus, counsel fees must be denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 26th DAY OF JULY 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

IN THE MATTER OF DORIS GONZALEZ,	OAL DKT. NO. CSV 04313-15
CITY OF NEWARK POLICE DEPARTMENT.	AGENCY REF. NO. 2015-2633

and

IN THE MATTER OF DORIS GONZALEZ,	OAL DKT. NO. CSV 20508-15
CITY OF NEWARK POLICE DEPARTMENT.	AGENCY REF. NOS. 2016-770, 2016-1924, & 2016-1925

Frank P. Arleo, Esq., for appellant Doris Gonzalez (Arleo & Donohue, attorneys)

Joyce Clayborne, Assistant Corporation Counsel, City of Newark, for respondent (Willie L. Parker, Corporation Counsel, attorney)[1]

Record Closed: April 10, 2017 Decided: June 26, 2017

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

[1] Andy Jung, Assistant Corporation Counsel, appeared at the hearing.

STATEMENT OF THE CASE

Appellant Doris Gonzalez (appellant or Gonzalez), a police officer employed by the City of Newark Police Department (respondent or Department), appeals four disciplinary charges and the resulting suspensions as follows:

Charge One—OAL Dkt. No. 04313-15

Charges for incident on September 28, 2014: Insubordination; Neglect of Duty; Obedience to Orders; Absent without Leave; Malingering; False Statements; (CAP #2014-118, IOP #2014-515). Appellant received a six-day suspension for this infraction.

Charge Two—OAL Dkt. No. 20508-15

Charges for incident on March 24, 2015: Absent without Leave; Neglect of Duty; (CAP #2015-056, IOP #2015-177). Appellant received a thirty-day suspension for this infraction.

Charge Three—OAL Dkt. No. 20508-15

Charges for incident on March 24, 2015: Insubordination; Neglect of Duty; Punctuality; Unprofessional Use of Language; (CAP #2015-057, IOP #2015-171). Appellant received a forty-five-day suspension for this infraction.

Charge Four—OAL Dkt. No. 20508-15

Charges for incident on March 9, 2015: Neglect of Duty; False Statements; (CAP #2015-050, IOP #2015-123). Appellant received a fifteen-day suspension for this infraction.

PROCEDURAL HISTORY

On March 27, 2015, the Civil Service Commission transmitted Charge One to the Office of Administrative Law (OAL) as a contested case. The matter was assigned to John Scollo, ALJ, under docket number CSV 04313-15.

On December 10, 2015, the Civil Service Commission transmitted Charges Two, Three and Four to the OAL, where they were assigned to Mumtaz Bari-Brown, ALJ, under docket number CSV 20508-15. The matters were consolidated by Order on February 18, 2016. A hearing was held on September 28, and November 15, 2016. The record remained open for receipt of post-hearing briefs, and closed on April 10, 2017. For good cause, an extension of time to complete the initial decision was granted. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

SUMMARY OF EVIDENCE

Charge One—OAL Dkt. No. CSV 04313-15 (6-Day Suspension)

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 18:8, **ACTS OF INSUBORDINATION**—Department members shall not commit acts of insubordination or disrespect to any superior officer (2 Counts).

CHARGE IB: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)2. An employee may be subject to discipline for: 2. Insubordination.

SPECIFICATION: On September 28, 2014, Police Officer Doris Gonzalez did commit an act of insubordination to Lieutenant Freddie Hill, a superior officer, to wit: after being given a direct order by Lieutenant Freddie Hill to remain on duty at the end of her tour to work mandatory overtime due to staff level shortage on the following shift, Police Officer Gonzalez immediately stated to Lieutenant Hill in a rude and disrespectful manner, "No, I ain't staying, I'm booking off sick, I'm taking antibiotics!" Moments later Police Officer Gonzalez responded to the Desk Area of the precinct where she stated to Lieutenant Hill "are you really going to make me stay, because if you are, I am going to book off sick." Lieutenant Hill responded, "Yes, I am ordering you to work overtime." At that point Officer Gonzalez became even more boisterous and defiant stating, "No, I ain't staying, I'm booking off sick!" Then [she] asked Police Officer Nathan Headd for a blue and white card because she was booking-off, after

retrieving the cards Officer Gonzalez filled out same and walked out of the precinct.

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 5:4.1, **OBEDIENCE TO ORDERS**—Police officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer.

SPECIFICATION: On September 28, 2014, Police Officer Doris Gonzalez did receive a lawful verbal order from Lieutenant Freddie Hill, a superior officer, directing her to remain on duty and work in mandatory overtime capacity following her tour of duty. Officer Gonzalez did disobey this order when she failed to comply as directed.

CHARGE III: Violation of Newark Police Department Rules and Regulations, Chapter 18:6, **NEGLECT OF DUTY**—Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IIIB: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)7. An employee may be subject to discipline for: 7. Neglect of Duty.

SPECIFICATION: On September 28, 2014, Police Officer Doris Gonzalez did neglect her duty when she failed to remain on duty and work in mandatory overtime capacity following her tour of duty as directed to do so by Lieutenant Freddie Hill, a superior officer.

CHARGE IV: Violation of Newark Police Department Rules and Regulations, Chapter 18:11, **MALINGERING**—Department members shall not feign illness, injury or incapacity to perform required duties, nor shall they fail to follow a lawful order issued by Police Surgeon or other Surgeon acting in his stead.

SPECIFICATION: On September 28, 2014, Police Officer Doris Gonzalez did feign illness, when after given a direct order by Lieutenant Freddie Hill to remain on duty and work in mandatory overtime capacity following her tour of duty, due to staff level shortage, Police Officer Doris Gonzalez booked off sick.

CHARGE V: Violation of Newark Police Department Rules and Regulations, Chapter 18:2, **ABSENCE WITHOUT LEAVE**—Police officers shall not be absent from duty except for illness or injury without the consent of a superior officer.

CHARGE VB: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)11. An employee may be subject to discipline for: 11. Absence without leave.

SPECIFICATION: On September 28, 2014, Police Officer Doris Gonzalez did absent herself from mandatory overtime at the Fifth Precinct without the consent of a superior officer.

CHARGE VI: Violation of Newark Police Department Rules and Regulations, Chapter 18:22, **FALSE STATEMENT**—Police officers shall not falsify any official report or record.

SPECIFICATION: On October 14, 2014, Police Officer Doris Gonzalez did submit an Administrative Report, DPI:1001, regarding her actions on September 28, 2014, with intent to deceive, in that she reported that "Lieutenant Hill failed to mention that when he first spoke to her in the report room, she made him aware of her health condition, at which time Lieutenant Hill stated to her, "he didn't care about her health condition and then ordered her to work overtime" although knowing in truth that said information was false and contrary to fact.

Summary of Testimony on Charge One

Respondent presented Lieutenant Freddie Hill, who testified that on September 28, 2014, Officer Gonzalez worked the 11-p.m.-to-7-a.m. shift. Prior to the end of the shift he realized there would be a staffing shortage on the next shift (7 a.m. to 3 p.m.). Per Department procedure he asked for volunteers to cover that shift, and, finding none, he checked the "involuntary overtime" ledger, which listed the next officer in line to work mandatory overtime. Officer Gonzalez was next on the list and, thus, Lieutenant Hill ordered Officer Gonzalez to work a mandatory overtime shift from 7 a.m. to 3 p.m. Lieutenant Hill maintained that Officer Gonzalez responded in a "nasty, . . . rude and disrespectful manner," saying, "No, I ain't staying, I'm booking off sick, I'm taking antibiotics!" (R-9.)

Shortly thereafter, he and Gonzalez were standing in the desk area of the precinct. Also present were officers Nathan Headd and Kiva Williams. Lieutenant Hill further maintained that Officer Gonzalez asked him if she "really" had to work the overtime shift and stated, "If so, I'm booking off sick!" (R-9.) Lieutenant Hill denied responding that he didn't care that she was sick. At that point, Officer Gonzalez asked Officer Headd for a blue-and-white card to book off sick. She then filled out the card, booked off sick, and walked out of the precinct. Hill described Gonzalez's demeanor as

"upset and angry." Later that day, at 3:15 p.m., Officer Gonzalez booked in for her scheduled shift.

Lieutenant Hill explained that the Police Department is a paramilitary organization and operates under a chain of command. For example, all police officers, including Officer Gonzalez, are considered as subordinate officers who must abide by all lawful orders from their superiors. Consequently, Officer Gonzalez's refusal to cover mandatory overtime constituted disobedience of a lawful order.

Lieutenant Hill also believed that Officer Gonzalez used the Department's sick-leave policy to circumvent his order to work mandatory overtime. (R-3; R-8.) Thus, disobeying his order also constituted insubordination (R-10), neglect of duty (R-12), malingering (R-13), absence without leave (R-14), and making a false statement (R-15).

Under cross-examination, Lieutenant Hill stated that he was unaware that Officer Gonzalez was a cancer survivor, and he did not question her about any of her medication. Lieutenant Hill acknowledged that he did not refer Officer Gonzalez to the police surgeon as required by Department rules. (R-14.) Nevertheless, Hill maintained, Gonzalez's refusal to work overtime constituted insubordination. (R-9.)

Appellant presented Officer Latasha Taylor, who worked the same shift as Officer Gonzalez on September 28, 2014. Taylor recalled that towards the end of the shift, Lieutenant Hill requested volunteers to work overtime. Officer Taylor heard Lieutenant Hill direct Officer Gonzalez to work the overtime shift. Taylor also heard Gonzalez respond that she was sick. However, Taylor did not hear Lieutenant Hill say that he did not care. Taylor could not recall any further details about the incident or whether Gonzalez stayed and followed the order to work overtime. Taylor noted that, to the best of her recollection, Gonzalez was not disrespectful.

Appellant acknowledged that her refusal to work overtime, as ordered by Lieutenant Hill, resulted in charges of insubordination, obedience to orders, neglect of duty, malingering, absence without leave, and false statements, for which she was given a six-day suspension beginning March 16, 2015, and ending March 23, 2015. (R-

1.) Appellant maintained, however, that she explained her reasons for not working overtime to Lieutenant Hill. She said that she told Lieutenant Hill that she was too sick to perform overtime duties due to a sinus infection, for which she was taking antibiotics. She also testified that the medication caused her body to retain water and her feet to swell. However, she denied speaking to Lieutenant Hill in a disrespectful, angry, and unprofessional manner. She disclosed that in 2009 she underwent radiation for thyroid cancer, which left two nodules on her throat and made it impossible for her to raise her voice. Gonzalez further testified that although she was too ill to work overtime, she felt better later that day and reported for duty at 3:15 p.m.

Regarding her Administrative Submission report (R-7), Gonzalez testified that she knew the importance of submitting a complete and accurate report. She maintained, however, that Lieutenant Hill would not allow her to include specific details describing her symptoms. She further maintained that she informed a Sergeant Eury of her illness.

Charge Two—OAL Dkt. No. CSV 20508-15 (30-Day Suspension)

> **CHARGE I**: Violation of Newark Police Department Rules and Regulations, Chapter 18:2, **ABSENCE WITHOUT LEAVE**—Police Officers shall not be absent from duty except for illness or injury without the consent of a superior officer (2 counts).
>
> **CHARGE IB**: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)11. Absence without leave.
>
> **SPECIFICATION I**: On March 24, 2015, Police Officer Doris Gonzalez, did absence herself from her tour of duty at the Fifth Precinct without consent of a superior officer.
>
> **CHARGE II**: Violation of Newark Police Department Rules and Regulations, Chapter 18:6, **NEGLECT OF DUTY**—Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.
>
> **CHARGE IIB**: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)7. An employee may be subject to discipline for: 7. Neglect of Duty.
>
> **SPECIFICATION**: On March 11, 2015, Police Officer Doris Gonzalez did neglect her duty when she failed to verify the return date of her

suspension upon service of Final Notice of Disciplinary Action, to clear up any discrepancies she may have.

Summary of Testimony on Charge Two

Appellant's thirty-day suspension relates to the incident of September 28, 2014, resulting in the six-day suspension.

Respondent presented Lt. Mathew Milton, who testified about Gonzalez's return to work after completing the six-day suspension. Lieutenant Milton's Administrative Submission states in part:

> SUBJECT: Absent without leave
>
> [I]n regards to Officer Gonzalez . . . not reporting for duty. Officer Gonzalez was scheduled to work March 24th and 25th 2015 for her regular tour of A1 squad . . . Officer Gonzalez was out the week of March 18th, 19th, 20th and 21st. I calculated from Officer Gonzalez's work days, that she would have still been on suspension for the 24th and 25th and the fact that she was on the Assignment Tour Sheet was a clerical error and adjusted the assignment sheet. I was later informed on the morning of 3/25/2015 that the suspension time was not work days, but rather consecutive days and Officer Gonzalez should have been at work for March 24th and 25th.
>
> [R-28.]

Lieutenant Milton further testified that he did not notify appellant about the schedule adjustment and that she was supposed to work on March 24, and March 25, 2015. He believed, however, that Lieutenant Lopez might have contacted Officer Gonzalez about the schedule change.

Respondent presented Sgt. Marc Priccaciante, who handled the internal investigation regarding Lieutenant Hill's allegations that "Officer Gonzalez's tone of voice seemed disrespectful as she verbally explained why she was late for duty because she had been out of work due to suspension." (R-37.) Sergeant Priccaciante

candidly testified that he was unsure how to calculate the days of Officer Gonzalez's suspension and return to duty. He believed she should have returned on March 24, 2015, if she was scheduled to work that day. But, if March 24, 2015, was a scheduled day off, then Officer Gonzalez's return date would have been March 25, 2015. Lieutenant Priccaciante sought advice on this issue from Sgt. Beatrice Golden, advocate unit supervisor.

Sergeant Golden has been employed by the Department for twenty-six years. Her duties as advocate unit supervisor include preparing the written disciplinary charges and serving the Final Notice of Disciplinary Action. She testified that suspension days for police officers are counted consecutively. On March 3, 2015, Sergeant Golden signed Officer Gonzalez's Final Notice of Disciplinary Action, which states, "The following disciplinary action has been taken against you: Suspension for 6 days, beginning March 16, 2015 and ending March 23, 2015." (R-1.) Thus, Gonzalez's return date was March 24, 2015. Golden maintained that Gonzalez had a duty to verify her return date and should have contacted the Department if she had questions.

Gonzalez acknowledged receiving notice of the six-day suspension (R-1). She maintained, however, that her suspension was not calculated on consecutive days. Rather, it covered her scheduled workdays. She further testified that prior to returning to work, she called the supervisor, who told her to return on March 25, 2015, because March 24, 2015, was a scheduled day off. Thus, after completing her six-day suspension she returned to work on March 25, 2015.

Appellant presented Officer Eduardo Roces, who testified that his suspension regarding the incident at 2 S. Place also listed consecutive days. Uncertain whether to apply scheduled work days, he contacted his union. Officer Roces maintained that he was given permission to serve his suspension based on his workdays.

Charge Three—OAL Dkt. No. CSV 20508-15 (45-Day Suspension)

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 18:8, **ACTS OF INSUBORDINATION**—Department

members shall not commit acts of insubordination or disrespect to any superior officer (2 Counts).

CHARGE IB: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)2. An employee may be subject to discipline for: 2. Insubordination.

SPECIFICATION I: On March 25, 2015, Police Officer Doris Gonzalez did commit an act of insubordination to Lieutenant Freddie Hill, a superior officer, to wit: after being given a direct order by Lieutenant Freddie Hill to submit an Administrative Report explaining the reason she was late for duty, Police Officer Gonzalez reported, "I just came back from suspension thanks to Lieutenant Hill."

SPECIFICATION II: On March 25, 2015, Police Officer Doris Gonzalez did commit an act of insubordination to Lieutenant Freddie Hill, a superior officer, to wit: during a conversation relative to Police Officer Gonzalez's lateness for duty, Officer Gonzalez stated to him in a rude and disrespectful manner, "It was thanks to you that I was suspended."

SPECIFICATION III: On March 25, 2015, Police Officer Doris Gonzalez did commit an act of insubordination to Lieutenant Freddie Hill, a superior officer, to wit: while providing Officer Gonzalez with a copy of the Administrative Report she wrote, Office Gonzalez rudely snatched the report from Lieutenant Hill's hand.

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 18:6, **NEGLECT OF DUTY**—Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IIB: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)7. An employee may be subject to discipline for: 7. Neglect of Duty.

SPECIFICATION: On March 25, 2015, Police Officer Doris Gonzalez did neglect her duty when she failed to speak to Lieutenant Freddie Hill, desk supervisor, advising him that she would be late for duty.

CHARGE III: Violation of Newark Police Department Rules and Regulations, Chapter 5:3.1, **PUNCTUALITY**—Police officers shall be punctual in reporting for duty.

SPECIFICATION: On March 25, 2015, Police Officer Doris Gonzalez failed to report for duty promptly at the Fifth Precinct.

CHARGE IV: Violation of Newark Police Department Rules and Regulations, Chapter 17:1.11, **CONCISENESS AND ORDINARY USE OF LANGUAGE**—Official Department correspondence shall be plain and concise in language. Statements shall be made in terms that cannot be misunderstood. Each paragraph shall deal with only one phase of the

general subject. Unnecessary introductory or explanatory paragraphs shall be avoided.

SPECIFICATION: On March 25, 2015, Police Officer Doris Gonzalez did violate the above rule when she submitted an Administrative Report, relative her failure to report for duty promptly at the Fifth Precinct, in that: Officer Gonzalez wrote, "I just came back from suspension thanks to Lieutenant. Hill."

Summary of Testimony on Charge Three

Appellant's forty-five-day suspension also relates to the incidents of September 28, 2014, followed by March 25, 2015. Respondent presented Lieutenant Hill, who testified that on March 25, 2015, Officer Gonzalez was late for duty without providing him notice. Thus, he ordered Officer Gonzalez to submit an administrative report documenting the reasons she was late for work. Hill maintained that after Gonzalez responded that she was unsure of the date she was due back, she stated in a rude and disrespectful manner, "Thanks to you that I was suspended!" After he reviewed her administrative report, she "very rudely snatched it" from his hand. (R-20.) Lieutenant Hill further maintained that her Administrative Submission included the unnecessary and unprofessional comment, "I just came back from suspension thanks to Lieutenant Hill." (R-18.) Lieutenant Hill concluded that her statement was not relevant to his order.

Sgt. Marc Priccaciante handled the investigation regarding Lieutenant Hill's claim that Officer Gonzalez was disrespectful in reporting the reason she was late for duty on March 25, 2015. Sergeant Priccaciante concluded that Officer Gonzalez conducted herself in the manner described by Lieutenant Hill, which constituted insubordination. (R-37.)

Charge Four—OAL Dkt. No. CSV 20508-15 (15-Day Suspension)

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 18:6, **NEGLECT OF DUTY**—Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IB: Violation of Civil Service Rule N.J.A.C. 4A:2-2.3(a)7. An employee may be subject to discipline for: 7. Neglect of Duty;

SPECIFICATION: On March 09, 2015, at 2 [S.] Place, Police Officers Doris Gonzalez and Eduardo Roces did neglect their duty when they failed to diligently carry out all of the duties, responsibilities and function of their positions and/or employment, in that: Police Officers Gonzalez and Roces were dispatched to a domestic violence assignment, both officers failed to exit their patrol unit to gain entry into the dwelling. Instead officers notified dispatch they were unable to gain access into the building. It was later determined that the building is unsecured and the locks were inoperable. As a result of Officers Gonzalez's and Roces's neglect the victim was assaulted a second time by the actor (the assault was overheard by call taker).

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 5:4.1, **OBEDIENCE TO ORDERS**—Police officers or civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer.[2]

SPECIFICATION: On March 09, 2015, at 2 [S.] Place, Police Officer Doris Gonzalez and Eduardo Roces did receive a verbal order from Lieutenant Mathew Milton, a superior officer, directing officers to detain and conduct a field interrogation on the actor involved in the domestic violence incident. Police Officers Gonzalez and Roces did disobey this order when they failed to comply as directed. As a result, the actor was able to leave the scene and later placed into custody by another unit.

CHARGE III: Violation of Newark Police Department Rules and Regulations, Chapter 18:22, **FALSE STATEMENTS**—Police officers shall not falsify any official report or record (2 counts).

SPECIFICATION I: On March 09, 2015, Police Officers Doris Gonzalez and Eduardo Roces did falsify an Official Record, to wit: dispatch communication, in that officers notified dispatch they were unable to gain access into dwelling of a domestic violence incident, although knowing in truth that said information was false and contrary to fact.

SPECIFICATION II: On March 09, 2015, Police Officer Doris Gonzalez and Eduardo Roces, did submit an Administrative, DPI: 1001, to their command with intent to deceive, in that they indicated "they were unable to gain access into the dwelling," although knowing in truth that said information was false and contrary to fact.

[2] Respondent dismissed the charge of Obedience to Orders prior to the OAL hearing.

Summary of Testimony on Charge Four

Appellant presented Officer Eduardo Roces, who testified about the incident on March 9, 2015, where he and his partner, Gonzalez, were working the midnight shift. They were dispatched to 2 S. Place on a domestic-violence call. Upon arrival, Gonzalez attempted to open the front door, which had been locked. Thus, he asked dispatch to contact the victim about the locked door. (R-29.) The victim responded that the door was not locked, but nevertheless came downstairs, and was followed by the man whom Roces described as the "actor." Roces called for backup, and three officers shortly arrived. When informed by the victim that she decided not to "press charges," Roces allowed the suspect to leave the premises. Roces acknowledged that he was disciplined and charged with neglect of duty.

Under cross-examination, Roces described the entrance as having two doors. (R-23; R-24; R-32.)

Respondent presented Lt. Mathew Milton, an eighteen-year veteran of the Department. He responded to the backup call at 2 S. Place. Lieutenant Milton was familiar with the building and had been dispatched to that address "ten to fifteen times." He described the entry and two doors leading into the hallway. Lieutenant Milton further testified that he had never found the doors locked. In fact, the exterior door was incapable of being locked due to a faulty pin mechanism. Additionally, the second door in the vestibule had a broken clasp, and, thus, could not be locked.

Lieutenant Milton further testified that upon arriving at the building, he observed Officer Roces with the suspect and the victim walking down the stairwell towards them. Lieutenant Milton "advised" Officer Roces to conduct a field inquiry and record check. Milton heard Gonzalez say, "It's taken care of." Lieutenant Milton then spoke with the victim about the incident while the suspect remained with officers Gonzalez, Roces and Lindsey. The victim told Lieutenant Milton that the doors do not lock, and when she went downstairs she was followed and assaulted. Lieutenant Milton recalled observing the suspect with Officers Gonzalez and Roces, and he assumed they were taking the suspect to the police station. However, they released the suspect, who left the area, but

was subsequently stopped and arrested by Officer Lindsey. During processing of the suspect's arrest, it was revealed that he had two open warrants, which the check would have disclosed before he left the scene of the incident.

Respondent also presented Lt. Lawee Colbert, Jr., who handled the investigation. He testified that the City closed the building after receiving numerous complaints, including the removal of door locks, which made the building unsecured. He further testified that when dealing with domestic-violence calls, police officers are required to go over questions on a special form, which would have been applicable in this situation.

Appellant described her view of the incident. Upon being dispatched to the domestic-violence call with her partner, Officer Roces, she found that the inner door was locked. Thus, the victim was asked to come downstairs and open the door. Officer Gonzalez then followed her back upstairs. Gonzalez observed no signs of physical injury, but testified that the victim was "drunk" and wanted the "actor" to leave the apartment. Gonzalez did not question the suspect, nor did she perform a record check prior to letting the suspect go. Prior to leaving the premises, Officer Gonzalez reported her observations to Lieutenant Milton. Officer Gonzalez maintained that based on her observation of, conversation with, and interaction with the victim, she followed protocol.

DISCUSSION

The Civil Service Commission has jurisdiction to hear major disciplinary disputes under N.J.S.A. 34:13A-5.3. Major discipline includes removal or fine or suspension of more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, failure to perform duties, and conduct unbecoming a public employee, among other things. N.J.A.C. 4:2-2.3. Appeals before the Commission are conducted as hearings de novo. East Patterson v. Dep't of Civil Serv., 47 N.J. Super. 55 (App. Div. 1957); Newark v. Civil Serv. Comm'n, 114 N.J.L. 406, 413 (Sup. Ct. 1935).

The City of Newark Police Department has the burden of proving the charges against Officer Doris Gonzalez by a preponderance of the credible evidence. N.J.S.A. 11A:1-1 to 12-6. Preponderance is the greater weight of credible evidence and convincing power presented, not necessarily dependent on the number of witnesses. State v. Lewis, 67 N.J. 47 (1975). Moreover, 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 (1958). And, where the standard is reasonable probability, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Lowe v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

A major factor in proving the charges against Officer Gonzalez is the credibility of the witnesses, whose testimony may be disbelieved, but may not be disregarded. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Thus, the trier of fact is not bound to believe the testimony of any witness, and may accept or reject, in whole or in part, the testimony. Application of Howard Sav. Bank, 143 N.J. Super. 1 (App. Div. 1976). Consequently, in assessing the credibility of the evidence, this tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth." Jackson v D.L. & W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933).

CONCLUSIONS

Charge One

On September 28, 2014, Officer Gonzalez disobeyed Lieutenant Hill's order to work overtime. She maintained she was too ill to work. Officer Gonzalez denied that her behavior towards Lieutenant Hill was disrespectful. Respondent charged appellant with insubordination, neglect of duty, obedience to orders, absence without leave, malingering, and false statements. Respondent imposed a six-day suspension.

Appellant does not dispute refusing Lieutenant Hill's order to work overtime. She maintained that her reason for disobeying a direct order was illness. It would have been sufficient and reasonable to simply explain that the symptoms she was experiencing

would interfere with her ability to properly carry out her duties. However, while Officer Gonzalez might have been suffering from a sinus infection, taking medication, and experiencing swollen feet, she nevertheless remained on her full shift without complaint to any of her fellow workers. Remarkably, subsequent to Lieutenant Hill ordering her to stay and work mandatory overtime, her response was intertwined with rude and disrespectful behavior towards a superior officer.

Respondent notes that insubordination is behavior that is "not submissive to authority: disobedient." (Respondent's Brief.) It may also embody "non-compliance and non-cooperation, as well as affirmative acts of disobedience." Ibid. Moreover, depending on the circumstances, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person.

Based upon the foregoing, and having had the opportunity to listen to the witnesses, observe their demeanor, assess their credibility, and review the documents in evidence, I **FIND** that Officer Gonzalez told Lieutenant Hill that she was too ill to work the overtime shift, and added, "No, I ain't staying, I'm booking off sick, I'm taking antibiotics!" I further **FIND** that Officer Gonzalez refused to work the overtime shift, booked off sick, and responded to a superior in a disrespectful and unprofessional manner.

The parties do not dispute that the Department is a paramilitary organization with a chain of command. Thus, police officers and civilian employees must obey lawful orders directed by superior officers. "Neglect of duty" has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title. Ortiz v. City of Newark, CSV 12056-04, Initial Decision (February 8, 2006), modified, MSB (April 6, 2006), <http://njlaw.rutgers.edu/collections/oal/> (citing Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564).

Based on the credible evidence presented by respondent, I **FIND** and **CONCLUDE** that Officer Gonzalez disobeyed a lawful order when she refused to work mandatory overtime and booked off sick. I also **CONCLUDE** that Officer Gonzalez's failure to report to mandatory overtime constituted neglect of duty. I further

CONCLUDE that Officer Gonzalez's behavior constituted insubordination, disobedience to orders, neglect of duty, and absence without leave.

Regarding the charges of malingering and false statements, the issue is whether Officer Gonzalez feigned illness, injury, or incapacity to perform required duties. The record reflects that prior to Lieutenant Hill's order to work the mandatory shift, Officer Gonzalez worked without incident or complaint. She describes her manner of speaking in response to Lieutenant Hill's order as "simply and matter-of-factly." (Appellant's Brief.) Feeling too ill to work overtime, she went home, took her medication, then felt better, and "booked back on for duty later that day but was off the next two days." Ibid. Appellant argues that her booking back on "meant simply that she was not requesting additional leave due to illness." Ibid. I have also considered appellant's administrative submission, including her testimony that Lieutenant Hill would not let her describe the symptoms of her illness in the report. Yet, she included Lieutenant Hill's remarks that "he didn't care she was sick." Respondent argues, "This makes no sense." I agree.

Respondent further notes that Officer Gonzalez's return to duty fifteen minutes after the overtime shift ended suggests that she either recovered from her illness or that her illness was never severe enough to prevent her covering the overtime shift. Respondent's argument on this issue is more persuasive than that presented by appellant. Consequently, I **CONCLUDE** that appellant's refusal to report for overtime without the consent of a superior officer constituted malingering and false statements.

Charge Two

Charge Two is directly related to the September 28, 2014, incident described in Charge One. This charge concerns the dispute between the parties regarding the date on which appellant was to return to work after serving the six-day suspension, beginning March 16, 2015, and ending March 23, 2015. Respondent contends that appellant should have returned on March 24, 2015. Appellant contends that her return date was March 25, 2015. Consequently, respondent charged that appellant's failure to return to work on March 24, 2015, constituted absence without leave and neglect of duty, for which she received a thirty-day suspension.

Respondent asserts that officers serve their suspension days consecutively, based on a Monday-through-Friday schedule. Moreover, they are provided notice at the time they are served with the Final Notice of Disciplinary Action. Officer Roces testified that he was confused over how to calculate his return date after a suspension. Sergeant Priccaciante candidly testified that he was unsure how to calculate Officer Gonzalez's return-to-duty date. He believed she should have returned on March 24, 2015, if she was scheduled to work that day. But, if March 24, 2015, was a scheduled day off, then Officer Gonzalez's return date would have been March 25, 2015. Eventually, Sergeant Priccaciante sought advice from Sergeant Golden, who testified that suspension days are counted consecutively. Since appellant's suspension for six days ran from March 16, 2015, to March 23, 2015, her return date was March 24, 2015. Sergeant Golden submits that if Gonzalez was unsure or did not know how to calculate the return date, she had a duty to contact the Department.

Respondent candidly conceded, "the March 25, 2015, Absence without Leave charge should have been dismissed because Appellant did not return to work as required on March 24, 2015, but did show up late to work on March 25, 2015." I agree. However, "unlike Officer Roces, the Appellant never received permission from the Police Director to serve her suspension days based on her work schedule. Despite being provided with notice that she was to serve her suspension days consecutively, [s]he was defiant and chose to improperly serve her suspension days." (Respondent's Brief.) Thus, respondent submits that appellant is guilty of absence without leave for March 24, 2015.

Respondent further asserts that Officer Gonzalez knew that her return date following her suspension "conflicted with her own opinion on how to serve the days." Ibid. "Despite being provided with notice as to how she was supposed to serve the days consecutively on a Monday through Friday schedule . . . she knew the suspension dates were for her working days." Ibid. Thus, respondent submits that appellant neglected to verify her return date, and therefore she is guilty of neglect of duty.

Appellant argues, "There was substantial confusion as to whether the suspension days should be calculated on a work day schedule or a calendar schedule." (Appellant's Brief.) I agree. Indeed, Sergeant Priccaciante and Sergeant Golden acknowledged that there is no written policy setting forth the calculation procedure. Appellant further notes that Sergeant Golden "conceded that if the return date after a suspension falls on an officer's day off, then the return date would be the officer's next day of duty." Ibid.

Officer Gonzalez maintained that she too was uncertain of how to calculate her return date, either March 24, or March 25, 2015. She further testified that she contacted her shift commander, who said the calculation of suspension days was based on the work schedule and not calendar days. Here, appellant's argument that the Department "has no clear explicit written policy concerning the calculation of suspension days" is unrefuted and persuasive. Moreover, there exists confusion among Department employees who interpreted return dates; some calculated consecutively, others applied work-day schedules or calendar days.

Based on the circumstance presented, I **CONCLUDE** that respondent failed to demonstrate by a preponderance of the credible evidence that appellant's failure to return to work on March 24, 2015, constituted absence without leave.

I further **CONCLUDE** that respondent failed to demonstrate by a preponderance of the credible evidence that appellant's failure to return on March 24, 2015, constituted neglect of duty.

Thus, I further **CONCLUDE** that Charge Two is unsupported and must be dismissed.

Charge Three

Charge Three also relates to the September 28, 2014, incident described in Charge One and Charge Two. It concerns appellant's alleged statements and demeanor towards Lieutenant Hill following her return to duty after serving the six-day

suspension. The Department charged Officer Gonzalez with insubordination, neglect of duty, failure to be punctual, and unprofessional use of language and imposed a forty-five-day suspension.

The parties do not dispute that Officer Gonzalez was late for work on March 25, 2015. However, they differ on the words spoken by Gonzalez and her attitude. Respondent maintains that appellant failed to notify Lieutenant Hill that she would be late for duty. Appellant maintained that she was unable to reach Lieutenant Hill, but notified the front desk. Upon her arrival, Lieutenant Hill questioned appellant and ordered her to submit an administrative report documenting the reason she was late. Respondent maintains that appellant responded, in a rude and disrespectful manner, "it was thanks to you that I was suspended!" (Respondent's Brief.)

Additionally, after Lieutenant Hill reviewed the administrative report and handed a copy to appellant, "she rudely snatched it" from his hand. Ibid. Gonzalez denied snatching the report from his hand. Regarding appellant's Administrative Submission, she included the statement, "I just came back from suspension thanks to Lieutenant. Hill." (R-18; R-20.) Lieutenant Hill believed her statement was not relevant to his order and again displayed disrespect to a superior officer.

Respondent asserts that appellant's verbal and written remarks, and "snatching" the report out of Lieutenant Hill's hand, constituted insubordination. Respondent further submits that appellant's denial that these acts occurred is incredible, because "she has shown herself to be brash and impulsive." (Respondent's Brief.) Respondent submits that Lieutenant Hill's testimony is credible; Officer Gonzalez's is not. The Department further maintains that appellant's failure to notify the Department that she would be late for work constituted neglect of duty.

Based on the evidence presented by the parties, including the opportunity to observe the demeanor of the witnesses, I am persuaded that Officer Gonzalez's behavior and the incidents occurred as presented by respondent. I **CONCLUDE** that appellant's conduct constituted insubordination, neglect of duty, failure to be punctual, and unprofessional use of language.

Charge Four

Charge Four relates to Officer's Gonzalez handling of a domestic-violence dispatch call on March 9, 2015. Respondent charged appellant with neglect of duty and false statements, and imposed a fifteen-day suspension. The parties acknowledged that appellant and her partner responded to a domestic-violence call. Appellant claims, however, that the door to the hallway at the premises was locked. Respondent claims it was not.

Respondent contends that appellant neglected her duty and made false statements when, "instead of rendering assistance to the victim, she lied to Dispatch that the door was locked." (Respondent's Brief.) Consequently, appellant's conduct caused the victim to leave the apartment, followed by her "boyfriend," who then assaulted her. Respondent further asserts that appellant failed to appropriately question the victim and failed to ask the suspect any questions. Moreover, no record check was conducted on the suspect. Officers Lindsey and Pinzon submitted statements that the building was unsecured when they entered. Respondent submits that it has met its burden of proving appellant guilty of the charges.

Appellant maintains that the doors were locked and, thus, prevented her from entering the building until the victim came downstairs and opened the door. Unfortunately, the victim's boyfriend followed and assaulted her. Appellant submits that she did not neglect her duty or make any false statements. Instead, appellant submits, "Officer Gonzalez and her partner may have been mistaken as to whether the door was actually locked or just stuck." (Appellant's Brief.)

Having carefully reviewed the evidence and having observed the demeanor of the witnesses, I am persuaded that the incident occurred as presented by respondent. Therefore, I **CONCLUDE** that appellant's conduct constituted neglect of duty and false statements.

PENALTY

In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). However, the courts should not adhere to rigid disciplinary guidelines in assessing penalties. To determine whether sufficient cause exists to justify the sanction, the conduct must be examined considering certain factors. Moreover, the employee's conduct must be evaluated in context with its relationship to the nature of the job and the circumstances, which may impact specific conduct. On appeal, the Board may modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). Indeed, the Board is empowered to substitute its judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Henry, supra, 81 N.J. at 579. However, the penalty imposed may not be so disproportionate to the offense and the mitigating factors that the administrative decision is arbitrary and unreasonable. Feldman v. Town of Irvington Fire Dep't, 162 N.J. Super. 177, 182 (App. Div. 1978), overruled on other grounds by Steinel v. Jersey City, 99 N.J. 1 (1985).

The charges against Officer Gonzalez are serious, and I have considered whether mitigating factors exist to reduce the penalty. Conversely, I have equally considered whether there are aggravating circumstances to warrant an increase in the penalty imposed by the Department. Although the record contains several inconsistencies in the appellant's testimony, this does not necessarily prove that her total testimony was untruthful. Indeed, some inconsistencies in a witness's testimony do not warrant an automatic discounting of that testimony as incredible. United Stations of N.J. v. Getty Oil Co., 102 N.J. Super. 459 (Ch. Div. 1968). The testimony must be such that the administrative law judge can reasonably conclude that the witness is wholly unworthy of belief. Accordingly, the trier of fact must carefully weigh the evidence before rejecting testimony, even if not directly contradicted, when it is contrary to the circumstances.

Charge One

Regarding Charge One, I **CONCLUDE** that the Department has proven the charges against appellant by a preponderance of the credible evidence. I further **CONCLUDE** that the six-day suspension is appropriate.

Charge Two

Regarding Charge Two, I **CONCLUDE** that the Department has not proven by a preponderance of the credible evidence the charges of absence without leave and neglect of duty. There exists among Department employees significant confusion over the proper calculation of the date of return to duty after serving a suspension. Consequently, I **CONCLUDE** that the evidence does not support the imposition of the thirty-day suspension, and this charge must be **DISMISSED**.

Charge Three

During this hearing, I closely observed the deportment of every witness, particularly the Department's charging witness and appellant. Both Lieutenant Hill and Officer Gonzalez appeared strong-minded, rigidly controlled, and at times indomitable. As the record developed, the charges against appellant, particularly the intensity of Charge Two and Charge Three, appeared to be in large part reflective of a festering growth of acrimony, not merely dislike between two individual employees of the Department, one superior in rank to the other.

Thus, while I **CONCLUDE** that the Department has proven the charges of insubordination, neglect of duty, failure to be punctual, and unprofessional use of language, given the obvious animosity between the Department employees, I **CONCLUDE** that the imposed forty-five-day suspension warrants a reduction making it more appropriate to the overall intertwined circumstance connecting Charge One, Charge Two, and Charge Three. I therefore **CONCLUDE** that a fifteen-day suspension is appropriate, justified, and supported by the credible evidence.

Charge Four

I **CONCLUDE** that the Department has proven by a preponderance of the credible evidence that Officer Gonzalez mishandled the domestic-violence call on March 9, 2015. Therefore, I **CONCLUDE** that the evidence supports charges of neglect of duty and false statements, for which the fifteen-day suspension is appropriate.

ORDER

Charge One

It is hereby **ORDERED** that the determination of the City of Newark Police Department to impose a six-day suspension on Officer Doris Gonzalez on Charge One is **AFFIRMED**.

Charge Two

It is hereby **ORDERED** that the determination of the City of Newark Police Department to impose a thirty-day suspension on Officer Doris Gonzalez on Charge Two is **REVERSED** and **DISMISSED**.

Charge Three

It is hereby **ORDERED** that the determination of the City of Newark Police Department to impose a forty-five-day suspension on Officer Doris Gonzalez on Charge Three is **REVERSED**. Instead, it is **ORDERED** that a fifteen-day suspension be imposed.

Charge Four

It is hereby **ORDERED** that the determination of the City of Newark Police Department to impose a fifteen-day suspension against Officer Doris Gonzalez on Charge Four is **AFFIRMED**.

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.

June 26, 2017
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: June 26, 2017

Date Mailed to Parties: June 26, 2017

dlc

APPENDIX

WITNESSES

Presented by Appellant:

Officer Doris Gonzalez

Officer Latasha Taylor

Officer Eduardo Roces

Presented by Respondent:

Lt. Freddie Hill

Lt. Mathew Milton

Sgt. Marc Priccaciante

Lt. Lawee Colbert, Jr.

Sgt. Beatrice Golden

EXHIBITS IN EVIDENCE

For Appellant:

None

For Respondent:

R-1 Final Notice of Disciplinary Action (w/Specification of Charges & Preliminary Notice of Disciplinary Action) dated March 3, 2015

R-2 NPD Rules & Regulations, 3:2.5 Lawful Orders

R-3 NPD Director's Memorandum on Equitable Distribution of Involuntary Overtime dated July 27, 2004

R-4 Officer Gonzalez Sick & Back on Duty Cards dated September 28, 2014

R-5 Administrative Submission of Officer Nathan Headd dated September 28, 2014

R-6 Administrative Submission of Officer Kiva Williams dated September 28, 2014

R-7 Administrative Submission of Officer Doris Gonzalez dated October 14, 2014

R-8 NPD General Order on Sick Leave Policy dated June 26, 2006

R-9 Investigative Submission of Lt. Freddie Hill dated November 3, 2014

R-10 NPD Rules & Regulations, 18:8 Acts of Insubordination

R-11 NPD Rules & Regulations, 5:4.1 Obedience to Orders

R-12 NPD Rules & Regulations, 18:6 Neglect of Duty

R-13 NPD Rules & Regulations, 18:11 Malingering

R-14 NPD Rules & Regulations, 18:2 Absence Without Leave

R-15 NPD Rules & Regulations, 18:22 False Statement

R-16 Final Notice of Disciplinary Action (w/Specification of Charges & Preliminary Notice of Disciplinary Action) dated July 21, 2015

R-17 NPD Rules & Regulations, 5:3.1 Punctuality

R-18 Administrative Submission of Officer Doris Gonzalez dated March 25, 2015

R-19 NPD Rules & Regulations, 17:1.11 Conciseness & Ordinary Use of Language

R-20 Investigation of Personnel Report by Lt. Freddie Hill dated March 27, 2015

R-21 Final Notice of Disciplinary Action (w/Specification of Charges & Preliminary Notice of Disciplinary Action) dated July 21, 2015

R-22 Picture of 2 S. Place

R-23 Picture of outer door at 2 S. Place

R-24 Picture of inner door at 2 S. Place

R-25 Recorded interview with domestic-violence victim

R-26 Administrative Submission of Lt. Mathew Milton dated April 19, 2015

R-27 NPD Rules & Regulations, 7:2.11 Render Assistance when Requested & 7:2.12 Investigative Disturbances

R-28 Administrative Submission of Lt. Mathew Milton dated March 26, 2015

R-29 NPD dispatch recording

R-30 Administrative Submission of Officer Magaly Pinzon dated April 25, 2015

R-31 Administrative Submission of Officer Marc Lindsey dated April 25, 2015

R-32 Administrative Submission of Officer Eduardo Roces dated April 19, 2015

R-33 Administrative Submission of Officer Doris Gonzalez dated April 19, 2015

R-34 Investigative Submission of Lt. Lawee Colbert, Jr., dated April 27, 2015

R-35 Final Notice of Disciplinary Action (w/Specification of Charges & Preliminary Notice of Disciplinary Action) dated July 21, 2015

R-36 Administrative Submission of Officer Doris Gonzalez dated April 13, 2015

R-37 Investigative Submission of Sgt. Marc Priccaciante dated April 22, 2015

R-38 Administrative Submission of Officer Doris Gonzalez dated April 29, 2015

R-39 Investigative Submission of Sgt. Marc Priccaciante dated May 2, 2015

R-40 Service of Final Suspension Notice dated March 11, 2015

R-41 Officer Doris Gonzalez Prior Disciplinary Record

7/26/17

STATE OF NEW JERSEY

In the Matter of Hayford Jarpa
Department of Military and Veterans Affairs, Veterans Haven Transitional Home

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2016-1783
OAL DKT. NO. CSV 19729-15

ISSUED: JUL 28 2017 BW

The appeal of Hayford Jarpa, Human Services Assistant, Department of Military and Veterans Affairs, Veterans Haven Transitional Home, 60 working day suspension, on charges, was heard by Administrative Law Judge Tama B. Hughes, who rendered her initial decision on May 9, 2017 reversing the 60 working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on July 26, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to the equivalent of 60 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to 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, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

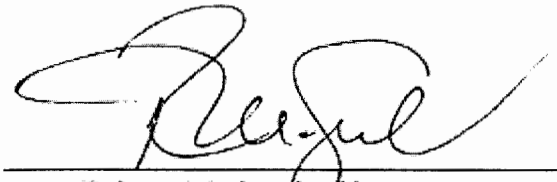
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Hayford Jarpa. The Commission further orders that appellant be granted the equivalent of 60 days back pay, benefits, and seniority. 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 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 or counsel fees.

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
JULY 26, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, Northern Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 19729-15
AGENCY DKT. NO. 2016-1783

IN THE MATTER OF HAYFORD JARPA,
VETERANS HAVEN TRANSITIONAL HOME,
DEPARTMENT OF MILITARY AFFAIRS.

William A. Nash, Esq., appearing for appellant, Hayford Jarpa, (Law Office of Nash Law Firm, LLC, attorneys)

Susan C. Sweeney, Administrator Employee Relations, appearing for respondent, Veterans Haven Transitional Home, Department of Military Affairs, appearing pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: March 27, 2017 Decided: May 9, 2017

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Appellant Hayford Jarpa, ("appellant") an Assistant at the Veterans Haven Transitional Home (VHTH or respondent), appeals a Final Notice of Disciplinary Action ("FNDA") and the sixty-day suspension for: 1) Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)(6)); 2) Other Sufficient Cause (N.J.A.C. 4A:2-2.3(a)(12))

specifically, notoriously disgraceful conduct (DD.230.05:C.16). Respondent's basis for the suspension originates from the arrest of appellant for second degree aggravated assault in violation of N.J.S.A. 2C:12-1(b)(2) which was ultimately downgraded and dismissed. Respondent alleges that appellant was untruthful about the arrest and subsequent investigation regarding the same.

PROCEDURAL HISTORY

On June 15, 2015, appellant was issued a Preliminary Notice of Disciplinary Action ("PNDA") suspending him with pay, effective June 11, 2015, due to appellant's arrest for aggravated assault on June 1, 2015. On June 25, 2015, an amended PNDA was issued to appellant suspending him without pay indefinitely. On September 1, 2015, a second amended PNDA was issued to appellant suspending him for 120 working days beginning on a date to be determined. On September 15, 2015, a third amended PNDA was issued to appellant suspending him for 120 days and provided appellant seventeen days within which to seek a departmental hearing. A departmental hearing was held on October 23, 2015, the result of which was the issuance of a FNDA on November 2, 2015, suspending appellant for sixty days. The appellant requested a hearing and the matter was filed at the Office of Administrative Law, on December 3, 2015, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. A settlement conference and prehearing conference were held on February 25, 2016, and August 19, 2016, respectively. The matter was heard on February 24, 2017, and February 27, 2017. The record closed on March 27, 2017.

TESTIMONY

Justin Seidel ("Seidel"), a Patrolman for the Buena Police Department testified that on May 31, 2015, at 12:57 a.m., he was dispatched to appellant's home on the report of a domestic matter. (R-3). Upon arrival, less than a minute later, he found appellant's son, Hayford Jarpa, Jr., ("Jarpa") standing outside, bleeding from a two-inch laceration on his head. Jarpa, who was highly intoxicated and stumbling at the time,

informed Seidel that he and his father had gotten into an altercation and appellant hit him with a folding chair. Due to the head injury, an ambulance was called and Jarpa was taken to the hospital where he was subsequently admitted, due to his level of intoxication. Appellant was not located at the residence and while Jarpa's mother was present, she did not want to speak to the police. Seidel stated that per protocol, all domestics go on warrants. In this case, the judge was telephonically contacted and an arrest warrant was authorized for aggravated assault with bail set at $2,500 at ten percent. Thereafter, a physical warrant was generated with a copy for the respondent. (R-7). Also generated were Incident and Case Detail reports detailing the events of the evening. (R-2 and R-4). Seidel testified that he drove by the residence a couple of times that night to try to serve appellant with the warrant, however, was unable to locate him.

On June 1, 2015, at 4:30 p.m., appellant turned himself in to the Buena Police Department where he was fingerprinted, photographed and posted bail. (R-5 and R-6). Appellant was given a copy of the bail receipt and informed that he was to appear in court on June 4, 2015. (R-10). Seidel stated that while he told the next shift to serve appellant with a copy of the warrant, he could not say for certain if that occurred. Seidel also stated that in his experience as a police officer, when a person is fingerprinted, photographed and pays bail, they understand that they have been arrested. The charges were downgraded by the county and ultimately dismissed in Municipal Court on August 27, 2015, (R-8, P-1 and P-2) due to a statement provided under oath by Jarpa that he did not want to proceed.

On cross-examination, Seidel stated that the police had been to the appellant's home once before on an unrelated, non-domestic matter. Seidel also testified that he did not know what time the incident occurred on May 31, 2015, or what time the appellant left the residence. Seidel also stated that he did not leave copies of the warrant at the house and did not inform the female (who he assumed to be appellant's wife) that there was an active warrant for appellant's arrest, just that he needed to go to the police station. Seidel further stated that while it is protocol to give a defendant a

copy of their arrest warrant, there is no documentation in the system to verify that had occurred in appellant's case.

Cindy Leese ("Leese"), Manager, Human Resources for the Department of Military Affairs testified that she is responsible for all personnel issues for respondent. Leese stated that her department received notification that appellant had been arrested and fingerprinted. Due to this notification, per protocol, on June 11, 2015, Leese informed appellant's supervisors that appellant had to be placed off duty with pay immediately. (R-14). Leese was informed later in the day via email by Staff Supervisor Leanne Donahue ("Donahue") that appellant had been placed off-duty and was also questioned about what had occurred. According to Donahue, appellant informed her that there had been a fight at his house when he was not there and that the police went to his home looking for him. When appellant went to the police station he was told that he had to appear in court on June 4, 2011. On June 4, 2015, appellant was informed that he had been charged with aggravated assault and asked if he had received the complaint, which he had not. According to appellant, he was told to wait to see what comes through by the court and then left. He has not heard from them since. (R-14). On this same date, Leese received a call from appellant who informed her that nothing happened involving him and that the judge said that everything was handled and that he could go home.

Leese stated that on June 12, 2015, she received another call from appellant who informed her that he had gone to the police station and was informed that the charges were dismissed. Leese told appellant that he needed to get something in writing to that effect and fax it over. Nothing was faxed over the next couple of days. On June 15, 2015, Leese received another call from appellant who stated that the police would not put anything in writing. When Leese questioned this, appellant indicated that he was going to get an attorney and that he had been allowed to go back home on June 4, 2015. On this same date, Leese spoke to the assistant prosecutor handling appellant's criminal matter. Leese was informed that appellant's charges would either go to the grand jury or go to municipal court but that they would not be dismissed.

Shortly thereafter, appellant was placed on leave without pay. (R-15). Due to appellant's inconsistencies in his statements to her, Leese created a timeline of calls. (R-16). Leese testified that she received a call from appellant on August 28, 2015, wherein appellant questioned whether Leese had received the fax he had sent. When she told him "no", he indicated that he would re-fax everything. Two fax sheets came in that were blank. (R-17 and R-18).

When questioned whether there was a policy requiring an employee to notify respondent if he/she were arrested, Leese said yes. When questioned where it was and whether it was in the Corrective and Disciplinary Action Booklet ("Disciplinary Booklet") (P-4), Leese stated that she does not use the book nor is she familiar with it. When questioned where the policy would be requiring such notification, Leese stated that she believed it was in the Title 4A book.

Leanne Donahue ("Donahue"), Staff Supervisor for respondent, testified that she is appellant's supervisor. On June 11, 2015, based upon a call and email that she received from Leese, she met with appellant to suspend him and collect his keys. At the time of the meeting, she questioned whether he was involved in any legal issues. Appellant thought a moment, hesitated and then informed her that there was a fight at his house but that he was not home when it had occurred. Appellant went on further to state that the police came to his house a couple of times looking for him. When appellant spoke to the police, he was told that he had been charged with aggravated assault and that he needed to appear in court on June 4, 2015. He appeared before the judge on that date but did not receive a complaint and was told to go home and wait. Donahue prepared a statement regarding this meeting. (R-12). Donahue had previously been unaware that there was a court date on June 4, 2015, prior to her meeting with appellant on June 11, 2015.

Alicia Bonner ("Bonner"), Staff Assistant for respondent, testified that she has been appellant's supervisor for the last five years. On June 11, 2015, she sat in the meeting wherein appellant was suspended. In questioning appellant about the incident

that occurred on June 1, 2015, appellant stated that there was a fight at his home. The next day while at work, the police came to his house looking for him. Appellant stated that he went to the police station after work and was told to report to court on a specific date. He did not state that he was charged with assault or that he was arrested. Appellant appeared in court on June 4, 2015, however the judge did not go forward with the matter. Bonner wrote a statement on the same date as the meeting regarding what was discussed. (R-11).

On cross-examination, Bonner stated that appellant was one of the best employees at the veteran's home and that she was "stunned" when he was being put out. Bonner stated that appellant has integrity, a work ethic and is reliable. At no time, has he been aggressive with patients. Bonner testified that she is aware that appellant's son is an alcoholic with several DUI's. Bonner further stated that she did not recall whether appellant had to go to court prior to June 11, 2015, however if he had to go to court on a work day, he would need permission to get off early.

Hayford Jarpa Jr. ("Jarpa") testified that he drinks daily. When he drinks, he doesn't black out. When questioned if anything happens when he drinks in excess, Jarpa stated that the first time that happened, he was in an accident. The second time was during his daughter's birthday party on May 30, 2015, at his parent's home when he had several different drinks. Jarpa stated that he does not remember the police being called at midnight on May 30, 2015, or a recollection of anything except for renting a "bouncing house" for the kids and at 6:30 p.m., bringing out the checkbook to pay for the delivery. Jarpa did not remember wanting to go to Atlantic City or his father taking his keys. Jarpa stated that his father did not hit him with a chair but he did remember slipping, falling and bleeding and waking up in the hospital the next day. He did not recall calling the police. Jarpa testified that he is a different person when he is drunk and that his dad has never hit him. He was not sure why he told the police that his father had hit him. When questioned if there was another party someplace on the same date, Jarpa said "yes," there was a graduation party for one of his parents' friend's child. Jarpa has been convicted of three DUI's. When questioned on cross-

examination if his story to the police about his dad hitting him was a lie, Jarpa said, yes. Throughout his testimony, Jarpa was smirking.

Hayford Jarpa, Sr. testified that he is a Liberian-born native and has lived in the United States for the past sixteen years. He is married with nine living children. He has a Bachelor of Arts Degree and a Master Degree from Manchester University. Appellant has worked for respondent for the past five years as a Human Services Assistant (HSA) and prior to that worked for the Division of Youth and Family Services. He has worked for the State of New Jersey since 2007.

Appellant stated that on May 30, 2015, there was a birthday party for two grandchildren at his home. There was alcohol at the party which started around 2:00 p.m. At 8:00 p.m., he told everyone to shut the party down. In-or-around that time, he left to go to a party that was being held by a member of the Liberian community. His son and son-in-law were drunk when he went to leave and they were about to get into a car to drive to Atlantic City. Appellant took the car keys away from his son. He has never hit his son. When he arrived home after midnight, he learned that his son was injured. His wife said that his son fell and was bleeding. Appellant testified that his wife believes the police took him, however someone else said that an ambulance came and took him. Appellant testified that he was only home for ten minutes when he left to go to the hospital. Once there, he met a Buena Police Officer whom he knew very well, however he couldn't remember his name. The Police Officer did not detain him at that time.

The next day, May 31, 2015, appellant went to work. Appellant testified that he worked two shifts - the midnight shift from 11:30 p.m. to 7:00 a.m. and the morning shift from 7:00 a.m. to 3:30 p.m. While at work he received a call from his wife stating that the police had been to their house looking for him. Appellant told his wife to go to the police station and see what they wanted and in so doing, was informed that appellant needed to turn himself in and bring bail money in the amount of $2,500 – ten percent or $250. After work, appellant went to the police station where he was finger printed,

photographed, paid bail in the amount of $250 and given a receipt. Appellant stated that he called Leese from the Police Station to inform her that he had been charged with aggravated assault and fingerprinted, but that he was told to go home. Leese informed appellant to put it in writing.

On June 2, 2015, appellant gave Bonner the bond receipt and requested a half-day off to go to court on June 4, 2015. On June 4, 2015, appellant went to court, showed the judge the bond receipt and was told to go home and wait. He was also told to go back to the police station to receive the charges. Appellant stated that he hired an attorney and the charges were dismissed. Appellant also stated that he told Leese that he had been arrested for aggravated assault. When questioned whether he hid anything from his supervisors or misrepresented anything, he said, no. Appellant testified that both Leese and Bonner were lying when they said they did not know what was happening prior to June 11, 2015. Leese was lying because he called her from the Police Station to inform her that he had been arrested and was also incorrect in her statements in (R-16). Bonner was lying because she gave him a half day off on June 4, 2015, to go to court.

The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as

to its truth. In re Perrone, 5 N.J. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** that on May 31, 2015, appellant was charged by Buena Police Department for Aggravated Assault in violation of N.J.S.A. 2C:12-1B(2) and bail was set at $2,500 at ten percent. I **FIND** Jarpa's testimony disingenuous. However, I further **FIND** that no evidence was presented that appellant assaulted Jarpa with a steel folding chair on May 31, 2015, causing him bodily injury. I further **FIND** that no evidence was presented that appellant intentionally left his residence to elude or evade the police.

I **FIND** that on June 1, 2015, when appellant learned that the police were looking for him, he turned himself in. I **FIND** that upon turning himself in, appellant was formally arrested and processed by the Buena Police Department, posted bail in the amount of $2,500 at ten percent ($250) and received a bail receipt that reflected both the charges and court appearance date of June 4, 2015. I **FIND** that appellant was cognizant of the charges levied against him at that time and the fact that he had been placed under arrest when he was fingerprinted, photographed and posted bail – regardless of whether he was served with a copy of the warrant.

I **FIND** that appellant's testimony was not credible when he testified that he had contacted Leese from the police station to report his arrest. I **FIND** that respondent was not formally made aware of appellant's arrest until June 11, 2015, when Leese received notification that appellant had been arrested and fingerprinted. I **FIND** that while respondent has a disciplinary booklet, there is nothing contained therein, nor was there credible evidence presented, that requires an employee to disclose an arrest.

I **FIND** that appellant was responsive to his supervisors when questioned about the criminal charges levied against him. However, appellant was misleading to Leese regarding the case status. I **FIND** that the "incident's giving rise to the charge(s) and

the date(s) on which it/they occurred" identified in the PNDA, first through third amendments thereto, and the FNDA, do not identify or mention appellant's failure to disclose his arrest, inconsistent information and/or lack of candor regarding his arrest or case status. I **FIND** that no evidence was presented to support the supposition that respondent's failure to report his arrest or accurately report the status of the criminal matter was in violation of a departmental policy, employee handbook or the disciplinary booklet.

LEGAL DISCUSSION AND CONCLUSION

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the Office of Administrative Law (OAL) to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Here, respondent was charged with violating N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a State Employee and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause, specifically, DD.230.05:C.16 – Notoriously Disgraceful Conduct.

Conduct Unbecoming a Public Employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental

unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The "incident's" giving rise to the FNDA identifies the following basis for the sustained charges: 1) warrant for the arrest of appellant for a domestic violence incident; 2) appellant striking Jarpa with a steel folding chair causing him bodily injury; and 3) leaving the scene when 911 was called.

The record reflects that appellant was charged with aggravated assault on May 31, 2015, and formally arrested the following day when he voluntarily went to the police station after learning that the police were looking for him. These charges were dismissed in August 2015, and no evidence was presented at the hearing to support a finding that appellant assaulted his son or attempted to evade or elude the police.

Respondent argues that the charge of conduct unbecoming was properly sustained due to appellant's lack of candor or truthfulness surrounding his arrest and case disposition. Respondent further asserts that given appellant's position as a direct care worker at a facility charged with rehabilitation and care of at-risk population, such conduct cannot be tolerated thereby supporting a finding of conduct unbecoming.

Appellant's alleged failure to be truthful or forthcoming regarding his arrest and pending case disposition was not one of the enumerated "incident's" identified on the FNDA or the amended PNDA's as the basis for the disciplinary action.

Plain notice is the standard to be applied when considering the adequacy of disciplinary charges filed against public employees. Pepe v. Township of Springfield, 337 N.J. Super. 94, 97 (App. Div. 2001). Hammond v. Monmouth County Sheriff's Dep't, 317 N.J. Super. 199, 204 (App. Div. 1999): "No provision of law empowers the public employer to prosecute charges before the Board which the appointing authority has, itself, dismissed after the required local disciplinary proceedings have been held." Cf. N.J.S.A. 11A:2-13, -14, -15; City of Orange v. De Stefano, 48 N.J. Super. 407, 419-20 (App. Div. 1958). Stated otherwise, charges are a sine qua non of a valid disciplinary proceeding. It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority. The de novo hearing on the administrative appeal is limited to the charges made below. West New York v. Bock, 38 N.J. 500, 522 (1962) "Where an employee who is entitled to notice of "cause" and hearing before discharge is tried on one specific charge, as here, and is found not guilty thereof but solely of other charges, never specified or actually tried before either the original hearer or on appeal to the Commission, the penalty imposed will be set aside." City of Orange v. De Stefano, supra, 48 N.J. Super. 407; Kramer v. Civil Serv. Comm'n, 120 N.J.L. 599 (Sup. Ct. 1938). However, if the person had reasonable notice in time to defend at the hearing, then the core concerns of fairness are met.

In Campbell v. Department of Civil Service, 39 N.J. 556 (1963), Bernard Campbell ("Campbell") was charged with incompetency, inefficiency and poor service ratings. During the hearing, evidence was introduced relating to two additional matters which occurred during the pendency of the hearing which bore on Campbell's fitness to continue in his position. Campbell was advised that the two matters would also be considered by the Acting Commissioner of the Department of Labor and Industry. Campbell did not introduce any evidence to meet the two new charges, however

introduced evidence bearing on the other ten other charges. Upon the close of the hearing, the Acting Commissioner sustained the charges and removed Campbell from his position. Thereafter, a hearing de novo was held before the Civil Service Commissioner who sustained Campbell's removal. On appeal, one of the arguments set forth by Campbell was the contention that the appointing authority failed to enumerate the cause which constituted the grounds for removal and the act of the employee constituting such cause. In upholding the Civil Service Commissioner's findings, the Court stated:

> ...the preliminary notice of disciplinary action which was served by the Department of Labor and Industry upon Mr. Campbell was on a form prepared by the Commission and referred to both of the quoted grounds for removal. While the notice might well have set forth the specifics supporting the general charges of incompetency and inefficiency, Mr. Campbell was made fully aware of them during the days of hearing before the Department and was afforded ample opportunity to meet them. Furthermore, his appeal before the Civil Service Commission was de novo and by that time Mr. Campbell was thoroughly familiar with the individual charges, including the additional charges of injudicious conduct in Burkley and improper practice before the Division during his suspension. He was undoubtedly entitled to fair notice and opportunity to be heard. See West New York v. Bock, 38 N.J. 500, 522 (1962). But he had that, he never made formal application for further particularization, and if there was any procedural irregularity it did not prejudice him...

Campbell further argued that the charges outside of the preliminary notice were improperly considered. In response to this argument, the Court found that the charges were duly raised before the Acting Commissioner and that Campbell was advised that they would be considered and that he could introduce evidence to meet them. He did not. The Court went on to state:

> ...in any event, the original notice may be considered as having been amended or supplemented to include them specifically. On his appeal, they were part and parcel of the

> charges heard de novo by the Commission which fairly received evidence with respect to them from both the Department and the appellant... Campbell supra at 580.

The instant matter is distinguishable from Campbell in that the appellant was not provided notice that respondent's charges were premised upon lack of candor or truthfulness surrounding his arrest and case disposition. Even assuming arguendo appellant had been placed on notice of such a charge, no credible evidence was presented at the hearing to support such a finding.

Based upon the foregoing, I **CONCLUDE** that respondent has not met its burden in demonstrating a violation of N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming a State Employee) under either the assault charge or failure to truthfully report the arrest/case disposition.

Having not met its burden demonstrating a violation of N.J.A.C. 4A:2-2.3(a)(6) - Conduct Unbecoming a State Employee, I **CONCLUDE** that the charge of violation of N.J.A.C. 4A:2-2.3a(6) Conduct Unbecoming a State Employee is hereby **DISMISSED**.

Appellant was also charged with a violation of N.J.A.C. 4A:2-2.3(a)12 (other sufficient cause) specifically, a violation of departmental directive 230.05:C.16 (notoriously disgraceful conduct). There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation" Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <hjttp://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>. Likewise, notoriously disgraceful conduct is not defined in the Disciplinary Booklet nor did respondent introduce into evidence any rules, provisions or employee handbook which gives further definition to the charge. Black's Law Dictionary, sixth edition, defines "notorious" as "generally known and talked of; well or widely known; forming a

part of common knowledge, or universally recognized" and "disgrace" as "ignominy; shame; dishonor."

As noted above, the incident giving rise to the PNDA (as amended) and the FNDA, was appellant's arrest for aggravated assault. This aggravated assault charge was downgraded and ultimately dismissed. No evidence was presented at the hearing to support a finding that appellant assaulted his son or attempted to elude the police. Respondent argues that the sustained charges were based upon appellants "incorrect, inconsistent and nonsensical information pertaining to his arrest and subsequent disposition of a criminal matter where he was a named defendant." The PNDA (as amended) and FNDA do not articulate this basis, nor is it supported by the record.

Based on the foregoing, I **CONCLUDE** that respondent has not met its burden in demonstrating a violation of Other Sufficient Cause, specifically violation of DD.230.05 (Notoriously Disgraceful Conduct).

Having not met its burden demonstrating a violation of DD.230.05 - Notoriously disgraceful conduct, I **CONCLUDE** that the charge of violation of N.J.A.C. 4A:2-2.3a(12), Other Sufficient Cause, specifically DD.230.05:C.16 Notoriously Disgraceful Conduct, is hereby **DISMISSED**.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming a State Employee and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause, specifically DD.23-05:C.16 Notoriously Disgraceful Conduct be **DISMISSED**. It is further **ORDERED** that appellant be awarded back pay and reasonable attorney fees. The amount of back pay shall be mitigated in accordance with guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

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.

May 9, 2017
DATE

Tama B. Hughes
TAMA B. HUGHES, ALJ

Date Received at Agency: 5/9/17

Date Mailed to Parties: 5/11/17

/vj/lam

APPENDIX

WITNESSES

For appellant:

Hayford J. Jarpa, Jr.

Hayford J. Jarpa, Sr.

For respondent:

Justin J. Seidel – Police Officer – Buena Police Department

Cindy Leese – Manager Human Resources, Department of Military Affairs

Leanne Donahue – Staff Supervisor, Veterans Haven South

Alicia Bonner – Staff Assistant 1, Veterans Haven South

EXHIBITS

For appellant:

P-1 Municipal Court Finding Codes

P-2 Complaint-Warrant

P-3 Letter (Mattleman, Weinroth & Miller, PC)

P-4 Corrective and Disciplinary Action Booklet

For respondent:

R-1 Final Notice of Disciplinary Action, Preliminary Notice of Disciplinary Action, Preliminary Notices of Disciplinary Action Amendments one through three

R-2 Buena Police Department Domestic Violence Incident Report

R-3 Buena Police Department CAD Activity Report

R-4 Buena Police Department – Case Detail (two pages)

R-5 Buena Police Department Supplemental Report (four pages)

R-6 Buena Police Department Arrest Docket (two pages)

R-7 Buena Police Department Domestic Violence Complaint – Warrant (one page)

R-8 NJ Automated Complaint System Charge Disposition Maintenance (one page)

R-9 Not submitted into evidence

R-10 Municipal Court Bail Receipt Franklin Joint Municipal Court

R-11 Statement – Alicia Bonner

R-12 Statement – Leanne Donahue

R-13 Not submitted into evidence

R-14 E-mail dated June 11, 2015

R-15 Email dated June 16, 2015

R-16 Time Line for Hayford Jarpa

R-17 Memorandum for The Record

R-18 Fax Sheets (blank)

7/26/17

STATE OF NEW JERSEY

In the Matter of Nick Kirey
City of Millville School District

CSC DKT. NO. 2016-3825
OAL DKT. NO. CSV 06704-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 26, 2017 BW

The Civil Service Commission, at its meeting of July 26, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06704-16
AGENCY DKT. NO. 2016-3825

IN THE MATTER OF NICK KIREY,
CITY OF MILLVILLE, SCHOOL DISTRICT.

Thomas F. Karpousis, Esq., for appellant (O'Brien, Belland and Bushinsky, LLC, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart and Scatchard, P.A., attorney)

Record Closed: July 5, 2017 Decided: July 10, 2017

BEFORE **CATHERINE A. TUOHY,** ALJ:

This matter concerns the appeal of Nick Kirey from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on May 3, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 10, 2017
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 7.11.17

Date Mailed to Parties: 7.11.17

/mel

Enc.

SEPARATION/RESIGNATION AGREEMENT AND GENERAL RELEASE

This Separation/Resignation Agreement and General Release ("Agreement") is made on this 22th day of May, 2017, by and between Nick Kirey ("Mr. Kirey") and the Millville Board of Education, Cumberland County, New Jersey ("Board") (hereinafter collectively referred to as the "Parties").

WHEREAS, Mr. Kirey was employed as a Lead Building Maintenance employee for the Board; and

WHEREAS, on April 12, 2016, the Board issued a Final Notice of Disciplinary Action ("FNDA") against Mr. Kirey; and

WHEREAS, effective April 12, 2016, pursuant to the FNDA, the Board removed Mr. Kirey from his position as a Lead Building Maintenance employee; and

WHEREAS, on April 27, 2016, Mr. Kirey appealed the Board's issuance of the FNDA and his removal from employment by filing an appeal with the New Jersey Civil Service Commission; and

WHEREAS, Mr. Kirey's Civil Service appeal was transferred to the Office of Administrative Law, docketed as OAL Dkt. No. CSV 06704-2016 S, Agency Ref. No. CSC Dkt. #2016-3825, and scheduled for hearing on March 30, 2017; and

WHEREAS, after good faith negotiations, the Board and Mr. Kirey desire to resolve amicably all matters and issues arising out of Mr. Kirey's employment relationship with the Board and separation therefrom; and

WHEREAS, the Board and Mr. Kirey have concluded that, effective the date this Agreement is signed by both parties, their employer-employee relationship shall terminate via the resignation of Mr. Kirey; and

WHEREAS, this Agreement, and the execution and implementation of same, shall not be construed or considered an admission of liability and/or wrongdoing by the Board, its present and former board members, officers, employees, agents and servants, said liability and/or wrongdoing being expressly denied.

NOW, THEREFORE, in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Mr. Kirey and the Board agree as follows:

1. Ms. Kirey hereby submits his irrevocable letter of resignation and the Board hereby accepts such resignation, which the parties have agreed will be considered in good standing pursuant to N.J.A.C. 4A:2-6.1,. The irrevocable letter of resignation with is attached as Exhibit "A" to this Agreement. Effective at the close of business on May 2017, Mr. Kirey's employment with the Board shall, in all respects, cease.

2. In consideration of Mr. Kirey's irrevocable resignation and General Release set forth in Paragraph 4 below, the Board will send a letter to the Civil Service Commission withdrawing the April 12, 2016 FNDA. Additionally, the Board will pay Mr. Kirey for back wages and his accrued sick leave in the amount of $40,000, less normal payroll deductions. Payment to Mr. Kirey shall be delivered to Thomas Karpousis, Esquire of O'Brien, Belland & Bushinsky, LLC. Said payment will be made within 30 days of Board approval of this Agreement.

3. Mr. Kirey's resignation shall extinguish all employment rights, and he shall have no re-employment rights.

4. Mr. Kirey, his executors, heirs and assigns, **RELEASES AND DISCHARGES** the Board and any and all of its former and current members, officers,

employees, agents, contractors, representatives, predecessors, successors and assigns, from any and all liability, claims, demands, causes of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which he may have had, now has, or may hereafter have for any reason whatsoever on account, arising out of or in consequence of Mr. Kirey's employment relationship and/or separation of employment from the Board, including, but not limited to:

(a) All federal and state statutory claims and any amendments to such statutes, including but not limited to claims arising under the New Jersey Law Against Discrimination, the New Jersey Civil Rights Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Age Discrimination in Employment Act of 1967, including the Older Workers' Benefit Protection Act, the Americans with Disabilities Act of 1990, the Rehabilitation Act, the Employee Retirement Income Security Act of 1974, the Fair Labor Standards Act, the Uniformed Services Employment and Reemployment Rights Act of 1994, the National Labor Relations Act, the Federal Warn Act, the Family and Medical Leave Act of 1993, the Occupational Safety and Health Act, the Equal Pay Act, the New Jersey Minimum Wage Law, the New Jersey Wage and

Hour Law, Equal Pay Law for New Jersey, the New Jersey Worker Health and Safety Act and the Labor Management Relations Act;

(b) All claims arising under the United States or New Jersey Constitutions;

(b) All claims arising under any Executive Order or derived from or based upon any state or federal regulations;

(c) All common law claims, including but not limited to any and all rights to discovery, breach of contract, tort claims, claims for wrongful discharge, constructive discharge, violation of public policy, breach of an express or implied contract, breach of an implied covenant of good faith and fair dealing, negligent or intentional infliction of emotional distress, hostile work environment, defamation, conspiracy, tortious interference with contract or prospective economic advantage, promissory estoppel, equitable estoppel, fraud, misrepresentation, detrimental reliance, retaliation and negligence;

(d) Excluding the payment set forth in this Agreement, all claims for any compensation including, back wages, front pay, punitive damages, pay increases, bonuses or awards, fringe benefits, disability benefits, severance benefits, reinstatement, retroactive seniority, pension benefits, contributions to retirement plans, or any other form of economic loss;

(e) All claims for personal injury, including physical injury, mental anguish, emotional distress, pain and suffering, embarrassment, humiliation, damage to name or reputation, interest, liquidated damages and punitive damages;

(f) Any claims arising out of the terms and conditions of Mr. Kirey's employment with the Board and the separation of such employment;

(g) Any rights to reemployment with the Board;

(h) Any grievance pursuant to any Board policy or regulation and any collective bargaining agreement; and

(j) All claims for costs, interest and attorneys' fees.

5. This Agreement sets forth the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the Parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

6. Nothing contained in this Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, or any liability to any other party.

7. This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the Parties hereto, as well as their respective successors and assigns.

8. This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

9. This Agreement may be signed in counterparts and that facsimiles of signatures as well as electronic signatures through the use of email or "pdf" files will have the same force and effect as original signatures.

10. The undersigned officer of the Board is fully authorized to execute this Agreement on the Board's behalf.

11. The Parties have executed this Agreement without duress or coercion, and have done so with the opportunity to consult counsel. No other party has made representations, warranties, promises or agreements not set forth herein and no party relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

12. The terms of this Agreement are the product of good faith negotiations between the Parties and their respective counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

13. The Parties, including their agents and members of District Administration, agree to maintain in confidence and not to disclose the terms of this Agreement, including but not limited to any facts surrounding Mr. Kirey's employment and separation from employment, unless otherwise required by state or federal law, such as the New Jersey Open Public Records Act. It shall not be considered a breach of the obligation of confidentiality for Mr. Kirey to make disclosure of the settlement terms to his immediate family (who shall first be expressly advised of the same requirement of confidentiality), or to make disclosure of the settlement terms and the underlying events in order to obtain private and confidential legal, tax or financial advice or to his union representatives, or to respond to any inquiry from any governmental entity or agency. The parties agree that, if asked about the Agreement by anyone, including any member of the media, they will respond only: "That the matter concerns a personnel matter for which no comment can be made as it is confidential."

14. Mr. Kirey is provided with 21 days to review this Agreement and may revoke his signature of this Agreement within seven (7) calendar days of signing it by delivering written notice of revocation to Joseph F. Betley, Esq., Capehart Scatchard, 8000 Midlantic Drive, Suite 300 South, Mt. Laurel, NJ 08054. If Mr. Kirey has not revoked his signature of this Agreement by written notice received within the seven (7) day period, it becomes effective immediately thereafter.

15. The Board agrees to provide a neutral reference regarding Mr. Kirey's employment with the Board to prospective employers should Mr. Kirey apply for an employment position with another employer in the future. The Board will only provide

said prospective employers with the dates of Mr. Kirey's employment, the titles and positions he held, and the amount of his last salary.

16. The Parties agree not to disparage or make any negative remarks or statements about the other Parties. For purposes of this, "disparage" shall mean any negative statement whether written, oral, or via the internet or social media websites.

17. This Agreement is subject to formal approval by the Board.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date above written.

Nick Kirey 5-22-17
Nick Kirey Date

Bryce Kell Date
Business Administrator/Board Secretary
Millville Board of Education

David Gentile 5/22/17
David Gentile Date
Superintendent
Millville Board of Education

Lisa Santiago Date
Board President
Millville Board of Education

7/26/17

STATE OF NEW JERSEY

In the Matter of Charles Knighton, Jr.
Voorhees Fire District

CSC DKT. NO. 2017-310
OAL DKT. NO. CSV 12319-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 26, 2017 BW

The Civil Service Commission, at its meeting of July 26, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 12319-16

AGENCY DKT. NO. 2017-310

IN THE MATTER OF
CHARLES KNIGHTON, JR.,
VOORHEES FIRE DISTRICT.

John F. Pilles, Jr., Esq., for appellant Charles Knighton, Jr.

Eric J. Riso, Esq., for respondent Voorhees Fire District (Platt & Riso, attorneys)

Record Closed: June 5, 2017 Decided: June 26, 2017

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

On August 16, 2016, the above referenced matter was filed at the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. On November 23, 2016, the matter was placed on the inactive list of cases pending the dissolution of the Fire District, as well as to explore settlement. Just prior to the matter coming off the inactive list the parties advised that the dissolution of the Fire District had been dissolved and consolidated into a municipal fire department. A telephone conference call scheduled for March 29, 2017 was canceled as the parties represented that the matter had settled.

A Settlement Agreement and General Release indicating the terms of settlement was signed by the parties and forwarded to the undersigned on May 8, 2017. I sought clarification regarding language used therein. On June 5, 2017 a letter of clarification was received amending paragraph 1(a) of the settlement agreement and general release and it provides "Employer agrees that all references to Employee's demotion shall be removed from Employee's personnel file." Both the Settlement Agreement and General Release and the letter of clarification are attached hereto and made a part hereof.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

June 26, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 6/28/17

Date Mailed to Parties: 6/28/17

/caa

PLATT & RISO, P.C.

Attorneys at Law

* Stuart A. Platt, platt@prlawoffice.com
** Eric J. Riso, eriso@prlawoffice.com
** CherylLynn Walters, cwalters@prlawoffice.com

* Member of NJ & NY Bars
** Member of NJ & PA Bars

May 17, 2017

Honorable Laura Sanders, Acting Director/Chief A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

RE: Charles Knighton, Jr. and Voorhees Fire District No. 3
Appeal of Demotion
O.A.L. Docket No. CSV 12319-2016 S
Our File No. 16-0105

Dear Judge Sanders:

Further to the conference call held on May 16, 2017 regarding the above-referenced matter, please accept this letter on behalf of myself and Mr. Pilles regarding the Settlement Agreement and General Release. The parties agree that Paragraph 1(a) should be amended to provide as follows: "Employer agrees that all references to Employee's demotion shall be removed from Employee's personnel file." Provided this is acceptable, it is respectfully requested that Your Honor issue a decision enforcing/approving the settlement and, in turn, that the matter be transferred back to the Civil Service Commission so that a Final Decision can be rendered with respect to same.

You Honor's time and attention to this matter is greatly appreciated. Should Your Honor have any additional questions or concerns, please do not hesitate to contact me.

Respectfully submitted,

ERIC J. RISO
For the Firm

EJR/
cc: John F. Pilles, Jr., Esquire (via e-mail)
Chief Louis J. Bordi - Fire & Emergency Services Director (via e-mail)
L:\16-0105\Charles Knighton Labor Matter\l-ALJ Sanders-051717.doc

I hereby consent to the terms and conditions set forth above:

John F. Pilles, Esquire
Attorney for Charles Knighton, Jr.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "this Agreement") is entered into on this 30th day of March, 2017, by and between Charles Knighton, Jr. (hereinafter referred to as "Releasor" or "Employee") and the Voorhees Township Fire District No. 3 ("Fire District") n/k/a the Voorhees Township Fire Department ("VTFD"), its past, present and future agents, servants, employees, representatives and elected officials and the Township of Voorhees (hereinafter referred to as "Township," "Releasees" or "Employer")

WHEREAS, on or about July 21, 2016, Employee was demoted from the position of lieutenant to firefighter by the Fire District; and

WHEREAS, Employee challenged his demotion by filing an appeal with the Civil Service Commission, which is currently pending as a contested matter before the Office of Administrative Law ("OAL") under Docket No. CSV 12319-2016 S; and

WHEREAS, the Fire District has since been dissolved such that the Employee is now a member of the VTFD and, as such, an employee of the Township; and

WHEREAS, the Employee and the VTFD have engaged in negotiations and have settled all controversies between them, including Employee's claims that he was wrongfully demoted, as well as any and all related claims which could have been asserted as of the date of this Agreement, whether such claims are presently known or unknown; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and have not been finally adjudicated, and that no party admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid the costs of litigation;

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. **Terms of Settlement and Consideration**:

   (a) Employer withdraws the disciplinary action and rescinds the demotion of the employee.

   (b) Employee shall be restored to the position of lieutenant effective April 1, 2017.

   (c) Employee shall not receive any back pay associated with his restoration to the position of lieutenant; however, the pay he received as firefighter for the time period during which he was demoted (August 18, 2016 to April 1, 2017) shall be adjusted to reflect compensation and deductions at Step 15, as opposed to Step 14.

(d) Restoration to the position of lieutenant and the adjusted payment as provided for above is contingent upon Employee's execution of this Agreement as well as the dismissal with prejudice of his disciplinary appeal, which is currently pending under OAL Docket No. CSV 12319-2016 S.

(e) Employee agrees that but for this General Release and Settlement Agreement, he would not be entitled to the aforesaid payment and other terms of settlement described herein.

2. **Dismissal of Action**: Employee understands and agrees that a dismissal with prejudice of his pending disciplinary appeal will be filed with the Office of Administrative Law and/or Civil Service Commission, it being understood and agreed that the terms of said dismissal are expressly incorporated by reference within this Agreement as if fully set forth herein.

3. **Release in Consideration for the Payment and Other Consideration Provided for in this Agreement**: In consideration of the payment and other consideration provided for in this agreement, Releasor, personally and for his estate and his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Fire District, VTFD and/or Township, its past, present and future agents, servants, employees, and elected officials, based upon any act, event or omission occurring before the execution of this Agreement, including, but not limited to, any events related to, arising from, or in connection with Releasor's employment and/or association with the Fire District, VTFD and/or Township. Releasor specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Fire District, VTFD and/or Township based upon any act, event or omission occurring before the date of execution of this Agreement, including but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations and/or common law. Releasor specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or relationship and/or association with the Fire District, VTFD and/or Township, based upon any act, event or omission occurring before the effective date of this Agreement, including but not limited to, any claim that was asserted or could have been asserted under any Federal and/or State statutes, regulations and/or common law, expressly including, but not limited to, any potential claim relating to the following (along with any amendments thereto):

(a) The National Labor Relations Act;

(b) Title VII of the Civil Rights Act of 1964;

(c) Sections 1981 through 1988 of Title 42 of the United States Code;

(d) The Employment Retirement Income Security Act of 1974;

(e) The Immigration Reform Control Act;

(f) The Americans with Disabilities Act of 1990;

(g) The Age Discrimination & Employment Act of 1967;

(h) The Fair Labor Standards Act;

(i) The Occupational Safety & Health Act;

(j) The Family & Medical Leave Act of 1993;

(k) The Equal Pay Act;

(l) The New Jersey Law Against Discrimination;

(m) The New Jersey Minimum Wage Law:

(n) The Equal Pay Law for New Jersey;

(o) The New Jersey Worker Health & Safety Act;

(p) The New Jersey Family Leave Act;

(q) The New Jersey Conscientious Employee Protection Act;

(r) Any anti-retaliation provision of any statute or law;

(s) Any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any provision of any federal state constitution, any public policy, contract, tort or common law, as well as for all losses, injuries or damages (including back pay, front pay, compensatory and/or punitive damages, attorney's fees and litigation costs).

4. **No Claims Permitted/Covenant Not to Sue**: Releasor waives his right to file any charge or complaint on his own behalf and/or participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on their behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency, against the Defendant, except if such waiver is prohibited by law. Should any charge or complaint be filed, Releasor agrees that he will not accept any relief or recovery therefrom. Releasor confirms that no such charge, complaint or action exists in any forum or form other than the disciplinary appeal pending under pending under OAL Docket No. CSV 12319-2016 S, and hereby covenants not to file any charge, complaint or action in any forum or form against the Fire District, VTFD and/or Township based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Releasor, it shall be dismissed with prejudice upon presentation of this Agreement.

5. **Attorney's Fees and Costs**: Employee agrees that he will bear his own costs and attorney's fees which have been incurred in connection with the within matter and in connection with the negotiation and preparation of this Agreement and that no amounts other than the adjustment payment to be made pursuant to Paragraph 1(b) of this Agreement shall be sought by or owed to Employee or his attorneys by the Fire District, VTFD and/or Township in connection with this matter.

6. **No Admission of Liability**: By entering into this settlement agreement, Employer does not acknowledge any wrongdoing or liability for the allegations set forth in the pending disciplinary referenced above. To the contrary, Employer believes and maintains that it acted in accordance with state and federal law and that all actions taken in connection with Employee's employment and discharge were justified, lawful and in accordance with accepted business practices.

7. **Confidentiality**: Employee agrees that the terms, amount and fact of this Agreement, and the nature of all claims that were or could have been raised, as well as any information disclosed by the parties in the negotiations of this matter are confidential. This paragraph shall not prevent Employee from disclosing the fact or amount of the settlement to his attorney, accountant or members of her immediate family, each of whom shall first be advised of the confidentiality provision of this Agreement. In the event that he or they are asked about this litigation, Employee hereby agrees, and they agree, to state only that "the matter has been settled." Employee recognizes and agrees that the representations, promises and covenants set forth in this paragraph constitute a material and significant part of this Agreement and that the Employer would not have entered into this Agreement absent such agreement and, therefore, any violation of this paragraph by Employee will constitute a material violation and breach of this Agreement.

Should Employee be requested to provide a copy of this Agreement to any person or entity by subpoena or court order, he shall notify Employer in writing at least fourteen (14) days prior to any return date of any subpoena or upon receipt of any court order. If served with any notice or court order within the fourteen (14) day period prior to the return date, Employee shall immediately make such notification as soon as reasonably practicable.

It is expressly recognized and agreed, however, that this provision may be limited by and is subject to Employer's obligation to comply with various state and federal statutes regarding the disclosure of records and information including, but not limited to, the Open Public Records Act. In addition, this provision shall not be interpreted as prohibiting the Employer from responding to any requests for information and/or documents by any State and/or Federal agency and/or otherwise responding to a duly issued subpoena.

8. **Not Admissible or Precedential**: This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein, or to enforce the terms of this Agreement.

9. **Entire Agreement and Headings**: This Agreement embodies the entire agreement and understanding between the parties and supersedes all prior agreements and understandings related to the subject matters hereof. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning of this Agreement or its provisions.

10. **Modifications and Amendments**: This Agreement shall not be modified or amended except by writing duly executed and signed by the parties hereto.

11. **Severability**: The parties agree that if any court declares any portion of this agreement unenforceable, the remaining portion shall be fully enforceable.

12. **Applicable Law**: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey in Gloucester County.

13. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, EMPLOYEE ACKNOWLEDGES THAT:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS;

C. HE AGREES WITH EVERYTHING IN IT;

D. HE HAS CONSULTED WITH HIS LEGAL REPRESENTATIVES PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE; AND

E. HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed the day and year first above written.

ATTEST:

By: CHARLES E. KNIGHTON Jr

CHARLES KNIGHTON, JR.

STATE OF NEW JERSEY :
: ss
COUNTY OF CAMDEN :

I certify that on this 30 day of March, 2017, CHARLES KNIGHTON, JR. personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

NOTARY PUBLIC

MARIA PUMPHREY
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES MAY 6, 2020

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed the day and year first above written.

ATTEST:

VOORHEES TOWNSHIP
FIRE DEPARTMENT

By: _____

_____
CHIEF LOUIS J. BORDI - DIRECTOR
OF FIRE & EMERGENCY SERVICES

STATE OF NEW JERSEY :
: ss
COUNTY OF CAMDEN :

I certify that on this 11th day of April, 2017, Chief Louis J. Bordi, Director of Fire & Emergency Services, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

_____
NOTARY PUBLIC

MARIA PUMPHREY
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES MAY 6, 2020

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed the day and year first above written.

ATTEST:

By: Lee Olen

TOWNSHIP OF VOORHEES

MICHELLE NOCITO - DIRECTOR OF PUBLIC SAFETY

STATE OF NEW JERSEY :
: ss
COUNTY OF CAMDEN :

I certify that on this 17th day of April, 2017, Michelle Nocito, Director of Public Safety, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

Dianna Ober
NOTARY PUBLIC

DIANNA OBER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 7/23/2021

7/26/17

STATE OF NEW JERSEY

In the Matter of Vincent Maiaroto
Voorhees Township Fire Department

CSC DKT. NO. 2015-2611
OAL DKT. NO. CSV 04489-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 26, 2017 BW

The Civil Service Commission, at its meeting of July 26, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachments

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 04489-15

IN THE MATTER OF VINCENT MAIAROTO,
VOORHEES TOWNSHIP (FIRE DEPARTMENT).

John F. Pilles, Jr., Esq., for appellant Vincent Maiaroto

Eric J. Riso, Esq., for respondent Voorhees Fire District (Platt & Riso, attorneys)

Record Closed: June 5, 2017 Decided: June 26, 2017

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

On March 30 2015, Firefighter Vincent Maiaroto (appellant) was served with a Final Notice of Disciplinary Action (FNDA) terminating him on March 10, 2015 on charges of failure to report to duty. After receipt of the FNDA, Maiaroto, by letter received at the Office of Administrative Law (OAL) on March 31, 2015, requested a hearing. The case was filed on that date. (N.J.S.A. 40A:14-202(d)).

Additionally, the appellant has agreed to extend the previous agreement to toll the time under N.J.S.A. 40A:14-201(b)(2), which states that, "If the officer or firefighter or his representative requests and is granted a postponement of a hearing or any other delay before the 181st calendar day, the calendar days that accrue during that postponement or delay shall not be used in calculating the date upon which the officer

or firefighter is entitled, pursuant to subsection a. of this section, to receive his base salary pending a final determination on his appeal."

On April 8, 2015, the matter was assigned to Robert Bingham, ALJ. After numerous telephone conferences were held, hearing dates were scheduled for multiple dates between July 23, 2015 and November 4, 2016; however, they were adjourned due to discovery, pending motions, witness unavailability, and, finally, Judge Bingham's nomination to Superior Court. The matter was then reassigned to the undersigned.

Prior to the scheduling of new hearing dates, the matter was placed on the inactive list of cases on November 23, 2016, pending the dissolution of the Fire District, as well as to explore settlement. Just prior to the matter coming off the inactive list the parties advised that the dissolution of the Fire District had been dissolved and consolidated into a municipal fire department. A telephone conference call scheduled for March 29, 2017 was canceled as the parties represented that the matter had settled. A Settlement Agreement and General Release indicating the terms of settlement was signed by the parties and forwarded to the undersigned on May 8, 2017. I sought clarification regarding language used therein. On June 5, 2017 a letter of clarification was received amending paragraphs" "1(a) "has been completed and Mr. Maiaroto has been cleared for duty. The parties acknowledge that the language regarding waiver of Mr. Maiaroto's right to appeal in the event he is charged with unexcused tardiness during the six (6) month probationary period contained in Paragraph (1)(b)(2) is not enforceable. Finally, the parties agree that Paragraph 1(g) should be amended to provide as follows: "Employer agrees that upon successful completion of the six (6) month probationary period provided herein, all references to the charges giving rise to the Disciplinary Appeal shall be removed Employee's personnel file."

Both the Settlement Agreement and General Release and the letter of clarification are attached hereto and made a part hereof.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

June 26, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: 6/28/17

Date Mailed to Parties: 6/28/17

/caa

PLATT & RISO, P.C.

Attorneys at Law

* Stuart A. Platt, platt@prlawoffice.com
** Eric J. Riso, eriso@prlawoffice.com
** CherylLynn Walters, cwalters@prlawoffice.com

* Member of NJ & NY Bars
** Member of NJ & PA Bars

May 17, 2017

State of New Jersey
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049

Attn: Honorable Laura Sanders, Acting Director/Chief A.L.J.

RE: Vincent Maiaroto and Voorhees Fire District No. 3
Appeal of Disciplinary Discharge
O.A.L. Docket No. CSR 04489-2015 S
Our File No. 16-0105

Dear Judge Sanders:

Further to the conference call held on May 16, 2017 regarding the above-referenced matter, please accept this letter on behalf of myself and Mr. Pilles regarding the Settlement Agreement and General Release. The fitness for duty exam requirement set forth in Paragraph 1(a) has been completed and Mr. Maiaroto has been cleared for duty. The parties acknowledge that the language regarding waiver of Mr. Maiaroto's right to appeal in the event he is charged with unexcused tardiness during the six (6) month probationary period contained in Paragraph (1)(b)(2) is not enforceable. Finally, the parties agree that Paragraph 1(g) should be amended to provide as follows: "Employer agrees that upon successful completion of the six (6) month probationary period provided for herein, all references to the charges giving rise to the Disciplinary Appeal shall be removed Employee's personnel file."

Provided the above is acceptable, it is respectfully requested that Your Honor issue a decision enforcing/approving the settlement and, in turn, that the matter be transferred back to the Civil Service Commission so that a Final Decision can be rendered with respect to same.

You Honor's time and attention to this matter is greatly appreciated. Should Your Honor have any additional questions or concerns, please do not hesitate to contact me.

Respectfully submitted,

ERIC J. RISO
For the Firm

EJR/
cc: John F. Pilles, Jr., Esquire (via e-mail)
Chief Louis J. Bordi - Fire & Emergency Services Director (via e-mail)

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I hereby consent to the terms and conditions set forth above:

John F. Pilles, Esquire
Attorney for Vincent Maiaroto

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter "this Agreement") is entered into on this 31ST day of MARCH, 2017, by and between Vincent Maiaroto (hereinafter referred to as "Releasor" or "Employee") and the Voorhees Township Fire District No. 3 ("Fire District") n/k/a the Voorhees Township Fire Department ("VTFD"), its past, present and future agents, servants, employees, representatives and elected officials and the Township of Voorhees (hereinafter referred to as "Township," "Releasees" or "Employer")

WHEREAS, Employee was terminated from his employment with the Fire District effective March 10, 2015; and

WHEREAS, Employee challenged his termination by filing an appeal with the Civil Service Commission, which, in turn, transferred the matter to Office of Administrative Law ("OAL") for an administrative de novo review, which is pending under OAL Docket No. CRS 0449-2015 S ("Disciplinary Appeal"), in accord with those procedural and substantive due process rights provided by Title 40A of the New Jersey Statutes; and

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WHEREAS, the Fire District has since been dissolved such that the Employee is now a member of the VTFD and, as such, an employee of the Township; and

WHEREAS, the Employee and the VTFD have engaged in negotiations and have settled all controversies between them, including Employee's claims that he was wrongfully discharged, as well as any and all related claims which could have been asserted as of the date of this Agreement, whether such claims are presently known or unknown; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and have not been finally adjudicated, and that no party admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid the costs of litigation;

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. **Terms of Settlement and Consideration**:

   (a) Employee shall be reinstated as an employee effective April 1, 2017, subject to passing a physical and psychological fitness for duty exam, at the same pay rate and with the same seniority status as though he had never been separated from employment.

   (b) Employee and the VTFD agree that (1) the first six months of Employee's reinstatement shall be probationary such that Employee shall be subject to discharge in the event he is charged with unexcused tardiness during said

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probationary period; (2) Employee will not appeal and/or challenge such discharge in any fashion; and (3) upon expiration of said six (6) month probationary period, Employee's disciplinary record shall be expunged in its entirety.

(c) Employee waives any request for remittance by the Township to the New Jersey Division of Pensions for either/both employer and/or employee contributions for lost pension credit. Any attempt to "buy back" service time lost as a result of his termination will be at Employee's sole discretion and, in that event, funded solely and exclusively by Employee.

(d) The Township agrees to pay Employee the settlement amount of Twenty-Five Thousand Dollars ($25,000.00), representing reimbursement of legal fees incurred, not lost wages.

(e) Payment as provided for above is contingent upon Employee's execution of this Agreement as well as the dismissal with prejudice of his Disciplinary Appeal.

(f) Employee agrees that, but for this General Release and Settlement Agreement, he would not be entitled to the aforesaid payments and other terms of settlement described herein.

(g) VTFD, as the successor in interest of the Fire District, hereby withdraws with prejudice those disciplinary charges from which Employee has pursued the Disciplinary Appeal.

2. **Dismissal of Action**: Employee understands and agrees that a dismissal with prejudice of his pending Disciplinary Appeal will be filed with the Office of Administrative Law and/or Civil Service Commission, it being understood and agreed that the terms of said dismissal are expressly incorporated by reference within this Agreement as if fully set forth herein.

3. **Release in Consideration for the Payment and Other Consideration Provided for in this Agreement**: In consideration of the payment and other consideration provided for in this agreement, Releasor, personally and for his estate and his heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that he may have against the Fire District, VTFD and/or Township, its past, present and future agents, servants, employees, and elected officials, based upon any act, event or omission occurring before the execution of this Agreement, including, but not limited to, any events related to, arising from, or in connection with Releasor's employment and/or association with the Fire District, VTFD and/or Township. Releasor specifically waives, releases and gives up any and all claims arising from or relating to his employment and/or association with the Fire District, VTFD and/or Township based upon any act, event or omission occurring before the date of execution of this Agreement, including but not limited to, any claim that was asserted or could have been asserted under any federal and/or state statutes, regulations and/or common law. Releasor specifically waives, releases

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and gives up any and all claims arising from or relating to his employment and/or relationship and/or association with the Fire District, VTFD and/or Township, based upon any act, event or omission occurring before the effective date of this Agreement, including but not limited to, any claim that was asserted or could have been asserted under any Federal and/or State statutes, regulations and/or common law, expressly including, but not limited to, any potential claim relating to the following (along with any amendments thereto):

(a) The National Labor Relations Act;

(b) Title VII of the Civil Rights Act of 1964;

(c) Sections 1981 through 1988 of Title 42 of the United States Code;

(d) The Employment Retirement Income Security Act of 1974;

(e) The Immigration Reform Control Act;

(f) The Americans with Disabilities Act of 1990;

(g) The Age Discrimination & Employment Act of 1967;

(h) The Fair Labor Standards Act;

(i) The Occupational Safety & Health Act;

(j) The Family & Medical Leave Act of 1993;

(k) The Equal Pay Act;

(l) The New Jersey Law Against Discrimination;

(m) The New Jersey Minimum Wage Law:

(n) The Equal Pay Law for New Jersey;

(o) The New Jersey Worker Health & Safety Act;

(p) The New Jersey Family Leave Act;

(q) The New Jersey Conscientious Employee Protection Act;

(r) Any anti-retaliation provision of any statute or law;

(s) Any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any provision of any federal state constitution,

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any public policy, contract, tort or common law, as well as for all losses, injuries or damages (including back pay, front pay, compensatory and/or punitive damages, attorney's fees and litigation costs).

4. **No Claims Permitted/Covenant Not to Sue**: Releasor waives his right to file any charge or complaint on his own behalf and/or participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on their behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency, against the Defendant, except if such waiver is prohibited by law. Should any charge or complaint be filed, Releasor agrees that he will not accept any relief or recovery therefrom. Releasor confirms that no such charge, complaint or action exists in any forum or form other than the Disciplinary Appeal pending under OAL Docket No. CRS 0449-2015 S, and hereby covenants not to file any charge, complaint or action in any forum or form against the Fire District, VTFD and/or Township based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Releasor, it shall be dismissed with prejudice upon presentation of this Agreement.

5. **Attorney's Fees and Costs**: Employee agrees that he will bear his own costs and attorney's fees which have been incurred in connection with the within matter and in connection with the negotiation and preparation of this Agreement and that no amounts other than the payment to be made pursuant to Paragraph 1(d) of this Agreement shall be sought by or owed to Employee or his attorneys by the Fire District, VTFD and/or Township in connection with this matter.

6. **No Admission of Liability**: By entering into this settlement agreement, Employer does not acknowledge any wrongdoing or liability for the allegations set forth in the Disciplinary Appeal and/or with respect to any disciplinary action taken against Employee. To the contrary, Employer believes and maintains that it acted in accordance with state and federal law and that all actions taken in connection with Employee's employment and discharge were justified, lawful and in accordance with accepted business practices.

7. **Confidentiality**: Employee agrees that the terms, amount and fact of this Agreement, and the nature of all claims that were or could have been raised, as well as any information disclosed by the parties in the negotiations of this matter are confidential. This paragraph shall not prevent Employee from disclosing the fact or amount of the settlement to his attorney, accountant or members of her immediate family, each of whom shall first be advised of the confidentiality provision of this Agreement. In the event that he or they are asked about this litigation, Employee hereby agrees, and they agree, to state only that "the matter has been settled." Employee recognizes and agrees that the representations, promises and covenants set forth in this paragraph constitute a material and significant part of this Agreement and that the Employer would not have entered into this Agreement absent such agreement and, therefore, any violation of this paragraph by Employee will constitute a material violation and breach of this Agreement.

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Should Employee be requested to provide a copy of this Agreement to any person or entity by subpoena or court order, he shall notify Employer in writing at least fourteen (14) days prior to any return date of any subpoena or upon receipt of any court order. If served with any notice or court order within the fourteen (14) day period prior to the return date, Employee shall immediately make such notification as soon as reasonably practicable.

It is expressly recognized and agreed, however, that the this provision may be limited by and is subject to Employer's obligation to comply with various state and federal statutes regarding the disclosure of records and information including, but not limited to, the Open Public Records Act. In addition, this provision shall not be interpreted as prohibiting the Employer from responding to any requests for information and/or documents by any State and/or Federal agency and/or otherwise responding to a duly issued subpoena.

8. **Not Admissible or Precedential**: This Settlement Agreement and General Release is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein, or to enforce the terms of this Agreement.

9. **Entire Agreement and Headings**: This Agreement embodies the entire agreement and understanding between the parties and supersedes all prior agreements and understandings related to the subject matters hereof. The headings in this Agreement are for purposes of reference only and shall not limit or otherwise affect the meaning of this Agreement or its provisions.

10. **Modifications and Amendments**: This Agreement shall not be modified or amended except by writing duly executed and signed by the parties hereto.

11. **Severability**: The parties agree that if any court declares any portion of this agreement unenforceable, the remaining portion shall be fully enforceable.

12. **Applicable Law**: This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret this Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey in Gloucester County.

13. **Effective Date**: This Agreement will become effective on the date on which Employee executes this Settlement Agreement and General Release.

14. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, EMPLOYEE ACKNOWLEDGES THAT:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP

VM

IMPORTANT RIGHTS;

C. **HE AGREES WITH EVERYTHING IN IT;**

D. **HIS ATTORNEY NEGOTIATED THIS SETTLEMLENT AGREEMENT AND GENERAL RELEASE WITH HIS KNOWLEDGE AND CONSENT;**

E. **HE HAS CONSULTED WITH HIS ATTORNEY PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE; AND**

F. **HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY.**

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed the day and year first above written.

ATTEST:

By: 03/31/17

VINCENT MAIAROTO

STATE OF NEW JERSEY :
: ss
COUNTY OF CAMDEN :

I certify that on this 31st day of MARCH, 2017, VINCENT MAIAROTO personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

NOTARY PUBLIC
JOHN F. PILES, JR
ATTORNEY AT LAW
STATE OF NEW JERSEY

VM

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed the day and year first above written.

ATTEST:

By: Lee Ober

VOORHEES TOWNSHIP
FIRE DEPARTMENT

CHIEF LOUIS J. BORDI - DIRECTOR
OF FIRE & EMERGENCY SERVICES

STATE OF NEW JERSEY :
: ss
COUNTY OF CAMDEN :

I certify that on this 17th day of April, 2017, Chief Louis J. Bordi, Director of Fire & Emergency Services, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

Dianna Ober
NOTARY PUBLIC

DIANNA OBER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 7/23/2021

VM

IN WITNESS WHEREOF, the undersigned has caused these presents to be executed the day and year first above written.

ATTEST:

By: Dee Ober

TOWNSHIP OF VOORHEES

MICHELLE NOCITO - DIRECTOR OF PUBLIC SAFETY

STATE OF NEW JERSEY :
: ss
COUNTY OF CAMDEN :

I certify that on this 17th day of April, 2017, Michelle Nocito, Director of Public Safety, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his/her act and deed.

Dianna Ober
NOTARY PUBLIC

DIANNA OBER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 7/23/2021

VM

John F. Pilles, Jr.
Attorney at Law
Lumberton Holly Office Center
774 Eayrestown Road, Suite L1
Lumberton, New Jersey 08048-3100

July 14, 2017

State of New Jersey
Civil Service Commission
Division of Appeals and Regulatory Affairs
44 South Clinton Avenue
Post Office Box 310
Trenton, New Jersey 08625-0310

Attention: Nicholas F. Angiulo
Deputy Director

Re: Vincent Maiaroto
and Voorhees Township Fire District No. 3
O.A.L. Dkt. No. CSR 04489-2015 S
Appeal of Disciplinary Discharge
(Administrative De Novo Review)
Our File No. 01-0770-01

Dear Deputy Director Angiulo:

I respond to your inquiry electronically transmitted to my office yesterday morning involving settlement in the above referred matter.

Your suggestion that Mr. Maiaroto's time, during which he was unemployed pending appeal of disciplinary charges issued by Voorhees Township Fire District No. 3 ("District"), be designated as "a leave of absence without pay" is acceptable to the petitioner so long as such designation does not preclude him ability to "buy back," at some future time, pension service credit for military deployment taken during his employment tenure with the District. It is my understanding that the New Jersey Division of Pensions and Benefits will provide such opportunity to any member whose civilian employment was interrupted by military deployment.

Licensed to Practice in:

Telephone (609) 267-7711
Telefax (609) 267-9303

New Jersey
Texas

Very truly yours,

JOHN F. PILLES, JR.

JFP/krs
cc: Mr. Vincent Maiaroto
Eric J. Riso, Esq.
01-0770-01

P.S. This letter was dictated prior to my telephone conversation this morning with Eric J. Riso. Esq. He has authorized me to communicate on his behalf, that Voorhees Township does not have any objection with your recommendation.

Angiulo, Nicholas

From: Angiulo, Nicholas
Sent: Thursday, July 13, 2017 8:58 AM
To: 'eriso@prlawoffice.com'; 'pilles@verizon.net'
Subject: Vincent Maiaroto v. Vorhees Township Fire Department - SETTLEMENT

Importance: High

Mr. Pilles and Mr. Riso:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Vincent Maiaroto from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Maiaroto will be reinstated on April 1, 2017. However, while the settlement indicates that he will not receive back pay for the time from his removal to his reinstatement, we need to know how that time should be reflected in his official personnel record. I assume, absent his "buying back" that time, it should be recorded as a leave of absence without pay?

Please let me know the intention of the parties as soon as possible. An email reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

7/26/17

STATE OF NEW JERSEY

In the Matter of Ellen Russell
Vineland Developmental Center,
Department of Human Services

CSC DKTS. NOS. 2016-4140 & 2016-4141
OAL DKT. NOS. CSV 08808-16 & 08809-16
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: [redacted] 28 2017 **BW**

The appeals of Ellen Russell, Senior Cottage Training Technician, Vineland Developmental Center, Department of Human Services, of two removals effective May 24, 2016, on charges, were heard by Administrative Law Judge Jefferey R. Wilson, who rendered his initial decision on June 12, 2017. No exceptions were filed.

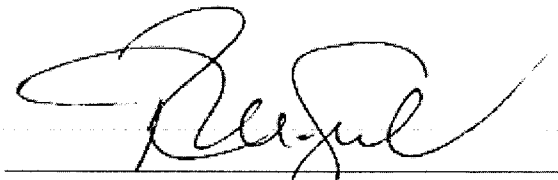
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 26, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Ellen Russell.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 08808-16
AND CSV 08809-16
AGENCY DKT. NO. 2016-4141
AND 2016-4140
(**CONSOLIDATED**)

IN THE MATTER OF ELLEN RUSSELL,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant, Ellen Russell (Nash Law Firm, LLC, attorneys)

Christopher Weber, Deputy Attorney General, for respondent, Department of Human Services, Vineland Developmental Center (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: April 10, 2017 Decided: June 12, 2017

BEFORE **JEFFREY R. WILSON**, ALJ:

STATEMENT OF THE CASE

Appellant, Ellen Russell, appeals her removal effective May 24, 2016, as a Senior Cottage Training Technician (SCTT), by respondent, Department of Human Services (DHS), Vineland Developmental Center (VDC), for chronic and excessive absenteeism. The respondent alleges that the appellant accumulated approximately fifty-one full days and twenty-three partial days of unauthorized time away from work between January 1, 2015, and February 12, 2016.

PROCEDURAL HISTORY

This matter arises from two separate removal actions initiated by the respondent. The Preliminary Notice of Disciplinary Action (PNDA) on the first was filed on August 21, 2015; the second on February 16, 2016. The Final Notices of Disciplinary Action (FNDA) on the first and second removal action were filed on May 23, 2016. Both actions involve allegations of infractions for chronic and excessive absenteeism, abuse of sick time and unauthorized absences. The actions were initiated in sequence, but were simultaneously finalized on May 23, 2016.

Following a consolidated departmental hearing, the appellant filed a timely appeal of her removal and requested a hearing. The matters were transmitted to the Office of Administrative Law (OAL) where they were filed on May 11, 2016, under Docket Nos. CSV 08808-16 and CSV 08809-16, respectively.

On December 19, 2016, the respondent filed a motion for summary decision. (R-1.) The appellant filed her response on March 27, 2017 (A-1.) The respondent filed its rebuttal brief on April 10, 2017, (R-2) and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The **FACTS** of this case are not in dispute:

The appellant was employed as a SCTT at the VDC since August 16, 1997. (R-1 at Exhibit 1.) The VDC is governed by DHS. Consistent with DHS policy, VDC employees are subject to disciplinary action for excessive absenteeism and related infractions.

On August 27, 2015, the appellant was issued a PNDA, dated August 21, 2015, charging her with four violations of Administrative Order 4:08: Section A-2.11 "Absent from work as scheduled without permission but with giving proper notice of intended absence."; Section A-1.6 "Chronic or excessive absenteeism from work without pay."; Section A-9.7 "Abuse of sick time."; Section E-1.1 "Violation of a rule, regulation, policy, procedure, order or administrative decision; as well as N.J.A.C. 4A:2-2.3(a)(4) "Chronic or excessive absenteeism or lateness." (R-1 at Exhibit 2.)

The PNDA alleged that the appellant accumulated thirty-six full and fourteen partial days of unauthorized absences from January 1, 2015, through August 21, 2015[1]. The PNDA also alleges that the appellant "exhausted the total sick time allotted to [her] for 2015, approximately 15 days, by March 6, 2015." Finally, the PNDA noted that appellant's absences violated the DHS policy on attendance and absences (R-1 at Exhibit 11[2]), and had "a negative impact on the operations of the unit" and "the quality of service" provided to VDC clients. The PNDA sought appellant's removal from employment.

Appellant was also served with a notice dated August 27, 2015, requiring her to provide medical documentation for any absence due to illness or injury until December 31, 2015. (R-1 at Exhibit 4.) The appellant appeared before a VDC hearing officer on May 12, 2016, who recommended that removal be upheld based on appellant's excessive absenteeism and significant history of infractions for absenteeism. (R-1 at Exhibit 5.) On May 23, 2016, respondent issued a FNDA, removing the appellant from service effective May 24, 2016[3]. (R-1 at Exhibit 6.)

---

[1] See Time Review Logs (R-1 at Exhibit 3.)
[2] The appellant acknowledged receipt of the VDC Personnel Circular #95-89 (Time Away from Work for Illness or Injury for Employees) on February 3, 2016. (R-2 at Exhibit 2.)
[3] The appeal of this removal was filed with the OAL on June 14, 2016, under OAL DKT. NO. CSV 08808-16.

On February 28, 2016, the appellant was issued a PNDA dated February 16, 2016, charging her with four violations of Administrative Order 4:08: Section A-2-12 "Absent from work as scheduled without permission but with giving proper notice of intended absence; Section A-4.7 "Chronic or excessive absenteeism from work without pay"; Section A-9.8 "Abuse of sick time; and Section E-1.2 "Violation of a rule, regulation, policy, procedure, order or administrative decision; as well as N.J.A.C. 4A:2-2.3(a)(4) "Chronic or excessive absenteeism or lateness"; N.J.A.C. 4A:2-2.3(a)(6) "Conduct unbecoming a public employee"; and N.J.A.C. 4A:2-2.3(a)(12) "Other sufficient cause." (R-1 at Exhibit 7.)

The PNDA alleged that the appellant accumulated fifteen full and nine partial days of unauthorized absences from August 22, 2015, through February 16, 2016[4]. Additionally, the PNDA notes that the appellant failed to provide medical documentation as required in connection with four of her absences in January 2016, and February 2016. The PNDA also re-alleges that the appellant "exhausted the total sick time allotted to [her] for 2015, approximately 15 days, by March 6, 2015." Finally, the PNDA noted that the appellant's absences violated the DHS policy on attendance and absences, (R-1 at Exhibit 11) and had "a negative impact on the operations of the unit" and "the quality of services" provided to VDC clients. The PNDA sought appellant's removal from employment.

The appellant appeared before a VDC hearing officer on May 12, 2016, who recommended that removal be upheld based on appellant's excessive absenteeism and significant history of infractions for absenteeism. (R-1 at Exhibit 9.) On May 23, 2016, respondent issued two FNDA's, removing the appellant from service effective May 24, 2016[5]. (R-1 at Exhibit 10.)

On June 1, 2016, appellant's Report of Separation or Transfer Work Sheet was forwarded to VDC payroll. (R-2 at Exhibit 5.) The Work Sheet indicated that as of May 24, 2016, the appellant had a balance of negative thirty-two sick leave days; no vacation

[4] See Time Review Logs (R-1 at Exhibit 8.)
[5] The appeal of this removal was filed with the OAL on June 14, 2016, under OAL DKT. NO. CSV 08809-16.

days; negative four administrative leave days; no compensatory time; and no days in her paid leave bank.

Since 2000, the appellant has received twenty-three disciplinary actions for excessive absenteeism or similar offenses, excluding the two at hand. Progressive discipline included oral counseling, written warnings and a total of one hundred nineteen days of suspension. The current removal actions constitute her sixth and seventh infractions for excessive absenteeism, her seventh and eight infractions for abuse of sick time, and her eleventh and twelfth infractions for unexcused absences. (R-1 at Exhibit 12.)

In 2003, the appellant received a five-day suspension for three unexcused absences. In 2005, she was suspended once for five days for excessive absences (sixteen and two partial days), and a second time that year, for one day for abuse of sick leave. In 2008, the appellant received a three-day suspension for excessive and unauthorized absences (eighteen total days). She was suspended five days in 2009 for unauthorized absences (thirteen per the PNDA and six per the settlement agreement). In 2010, she was suspended for twenty days following two actions for removal based upon a myriad of excessive and unauthorized absences between October 2009 and May 2010.

Pursuant to an October 16, 2014, settlement agreement, the appellant received a forty-five day suspension for unauthorized absences and abuse of sick leave occurring in 2013. That settlement agreement required the appellant to attend counseling with the employee advisory service, established pursuant to N.J.A.C. 4A:6-4.10. (R-2 at Exhibit 3.) The appellant attended her initial meeting, but never returned for scheduled follow-up visits. (R-2 at Exhibit 4.)

LEGAL ANALYSIS AND CONCLUSIONS

N.J.A.C. 1:1-12.5(b) provides that a motion for summary decision may be granted if the papers and discovery which have been filed, 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 prevail as a matter of law. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitled the moving party to summary judgment. Id. at 520.

Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. at 536. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). However, "the court must grant all the favorable inferences to the non-movant." Brill, supra, 142 N.J. at 536.

In her responsive papers, the appellant does not dispute any of the facts as presented by the respondent. Instead, she claims that she suffers from depression and has been under the care of Robert S. Patitucci, MD[6] for depression. She further claims that she "provided doctor notes to her employer and certainly would have provided any medical evidence required." (A-1 at Affidavit of Appellant.) In support of these claims, she provides a document titled "Work", dated January 12, 2017. (A-1 at Exhibit B.) This document appears to be from Dr. Patitucci, listing only the thirty-six full days of unauthorized absences included in the first FNDA issued on May 23, 2016. It does not address the fourteen partial days of unauthorized absences. Furthermore, the document does not address any of the full or partial unauthorized days of absence included in the second FNDA issued on May 23, 2016. Most interestingly, this document was not even created until seven months after the within petitions were filed with the OAL.

[6] Robert S. Patitucci, MD is a primary care provider offering services that include: EKG, Immunizations, Medical Marijuana Program, On-site blood draws, School, Sport and Camp Physicals, Spirometry Testing, Suboxome Program and Well Care for all ages. (A-2 at Exhibit 7.)

In support of her opposition to respondent' motion seeking summary decision, the appellant asserts the following five arguments:

First, the appellant argues that the Civil Service Act (The Act) is to be liberally construed toward attainment of broad tenure protection. This assertion does not serve to dispute any facts. It merely restates the law applicable to the discipline of employees protected by the provisions of The Act. The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A.11A:1-2(b). To carry out this policy, The Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of The Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). Here, the appellant is charged with chronic or excessive absenteeism or lateness, N.J.A.C. 4A:2-2.3(a)(4).

Second, the appellant argues that in appeals of major discipline, the appointing authority has the burden of proof to show that its actions are justified. Again, this assertion does not serve to dispute any facts. It merely restates the law applicable to the discipline of employees protected by the provisions of The Act.

In an appeal from major discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, supra, 90 N.J. 550. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove

violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

Third, the appellant mistakenly argues that there is no definition as to what constitutes "excessive absenteeism" and therefore each case should be reviewed on its own unique facts. However, "excessive absenteeism" is clearly defined in the DHS Personnel Circular #95-89. (R-1 at Exhibit 11.) The appellant acknowledged receipt of the circular on February 3, 2016. (R-2 at Exhibit 2.) The policy defines "excessive absenteeism" as:

> Paid or unpaid days away from the job for illness or injury which exceed six in any six pay periods which does not otherwise require a doctor's certificate...Excessive absenteeism shall also be defined as ten (10) paid or unpaid days for sick purposes in twelve (12) pay periods not otherwise requiring a doctor's certificate.

An identical recitation of the definition of excessive absenteeism is included in the Employee Notices of Medical Evidence Required issued to the appellant on August 27, 2015, (R-1 at Exhibit 4) February 11, 2016, and April 29, 2016. (R-2 at Exhibit 6.)

Fourth, the appellant argues that relevant factors must be considered, including number of absences, the time span between the absences and the negative impact on the workplace. This assertion does not serve to dispute any facts. It merely restates the law applicable to the discipline of employees protected by the provisions of The Act.

Finally, the appellant mistakenly argues that there is a genuine issue of material fact as to the amount of time available to the appellant beyond the fifteen days of sick time she is permitted. It is undisputed that on June 1, 2016, appellant's Report of Separation or Transfer Work Sheet was forwarded to VDC payroll. (R-2 at Exhibit 5.) The Work Sheet indicated that as of May 24, 2016, the appellant had a balance of negative thirty-two sick leave days; no vacation days; negative four administrative leave days; no compensatory time; and no days in her paid leave bank.

I **CONCLUDE** that under the Brill standards this matter is appropriate for summary disposition. The appellant has failed to raise some "colorable inferences" or interested fact regarding her termination and the underlying facts supporting same. The allegations are supported by tangible evidence and the facts presented by the appellant in her opposition papers are insufficient to raise disputed facts in the record. Lo Russo v. State-Operated Sch. Dist. of Jersey City, Essex County, 97 N.J.A.R.2d (EDU) 505, 506 (citing Borough of Franklin Lakes v. Mutzberg, 226 N.J. Super. 46, 57 (App. Div. 1988).

Accordingly, I **CONCLUDE** that since the appellant failed to submit competent evidential materials to raise a dispute as to a material fact, this matter is ripe to be determined by a motion for summary decision.

DISCIPLINARY ACTION

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A2-1.4(a); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 et seq. New Jersey's Civil Service Act is construed liberally in order to protect employees from arbitrary discipline. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965); Prosecutors, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952).

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Grounds for discipline include, among other things, insubordination, chronic or excessive absenteeism or lateness, conduct

unbecoming a public employee, and neglect of duty. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (7).

Here, the appellant was charged with chronic or excessive absenteeism or lateness because she was absent without authorization for at least thirty-six full days and fourteen partial days from January 1, 2015, to August 21, 2015, and she was absent without authorization for at least fifteen full days and nine partial days from August 22, 2015, to February 16, 2016. This does not include her sixty-six days of leave of absence without pay from October 20, 2015, to January 19, 2016. (R-2 at Exhibit 1.)

Since 2000, the appellant has received twenty-three disciplinary actions for excessive absenteeism or similar offenses, excluding the two at hand. Progressive discipline included oral counseling, written warnings and a total of one hundred nineteen days of suspension. The current removal actions constitute her sixth and seventh infractions for excessive absenteeism, her seventh and eight infractions for abuse of sick time, and her eleventh and twelfth infractions for unexcused absences. (R-1 at Exhibit 12.)

An employee may be subject to discipline for chronic or excessive absenteeism. N.J.A.C. 4A:2-2.3(a)(4). While there is no precise number that constitutes "chronic," it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App. Div. 2001) (under the Law Against Discrimination (LAD), excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act); Svarnas v. AT&T Commc'n, 326 N.J. Super. 59, 79 (App. Div. 1999) ([a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise); see also Dudley v. Calif. Dep't of Transp., 2000 W.L. 328119 (9th Cir. 2000) (a diabetic with frequent absences who failed to provide adequate medical documentation and could not provide a definite return to work date was not a qualified individual).

Furthermore, in Hatcher v. Northern State Prison, CSV 3684-01, Initial Decision (November 18, 2002), http://njlaw.rutgers.edu/collections/oal/, the court held that:

> [T]here is no way to reasonably accommodate the unpredictable aspect of an employee's sporadic and unscheduled absences. Svarnas v. AT&T Communications, 326 N.J. Super. 59, 77 (App. Div. 1999). As noted by the New Jersey Supreme Court, "just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid. Especially in times of budgetary constraint, it is important that management utilize existing staff efficiently and effectively. "We do not expect heroics," but "being there," i.e., appearing for work on a regular and timely basis is not asking too much. State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

I **CONCLUDE** that the appellant had been excessively absent from work sufficient to warrant disciplinary charges. The respondent had a right to expect that she would be present at work, willing and able to work. Certainly, respondent is not obligated to continue to employ a person who either cannot or will not perform her job duties on a regular basis. Frequent absences cause disruption in the public work place and create a hardship for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them. I, therefore, **CONCLUDE** that the respondent has met its burden of proof regarding excessive absenteeism in this case.

The Civil Service Commission's recent decision in In re Morales, 2015 WL 8636730, discussed the long-standing legal authorities that support an employer's right to discipline an employee with the penalty of removal. See also N.J.S.A. 11A:2-6(a)(1).

Specifically, chronic absenteeism has been found to be sufficient just cause for the removal of an employee in multiple circumstances. In re Wiley, CSV 48-13, Initial Decision (Nov. 3, 2014), aff'd, Civil Serv. Comm'n (Dec. 17, 2014), http://njlaw.rutgers.edu/collections/oal/; In re Ciuppa, CSV 04702-11, Initial Decision (Apr. 24, 2014), aff'd, Civil Serv. Comm'n (Jun. 4, 2014), http://njlaw.rutgers.edu/collections/oal/; Brown v. Trenton State Prison, 13 N.J.A.R. 466 (Merit System Board Sept. 7, 1988); In re Pribramsky, CSV 11877-14, Initial Decision (Jul. 23, 2015), aff'd, Civil Serv. Comm'n (Sept. 2, 2015), http://njlaw.rutgers.edu/collections/oal/.

PENALTY

Principles of progressive discipline should be considered in the removal actions of civil service employees. Bock, supra, 38 N.J. 500. The determination of whether a specific act supports removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself and an evaluation of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976). The frequency, number and continuity of the employer's warnings indicate the progression of the discipline. Ibid. On appeals from disciplinary action, the Merit Board may redetermine guilt or modify a penalty originally imposed. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980). The Board is empowered to substitute its own judgment on the appropriate penalty, even if the local appointing authority has not clearly abused its discretion. Id. at 579. The Board must consider an employee's past record, including both mitigating factors and prior discipline when determining the appropriate penalty to be imposed. Bock, supra, 38 N.J. at 523. The frequency, number and continuity of the employer's warnings, previous discipline and other measures indicate the progression of the discipline. It is clear from the record that the appellant had a history of poor attendance. This history must be considered under the framework of progressive discipline.

The sustained charges against appellant are serious in nature and major disciplinary action is warranted. Based upon the foregoing disciplinary actions and upon the totality of the record, I **CONCLUDE** that removal is the appropriate penalty.

ORDER

It is hereby **ORDERED** that the respondent's motion for Summary Decision is **GRANTED**. The removal of the appellant from her employment as a SCTT with the VDC is hereby **AFFIRMED**. Petitioner's appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION,** who by law is authorized to make a final decision in this matter. If the Superintendent of the Division of State Police 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 **CIVIL SERVICE COMMISSION – DIVISION OF APPEALS AND REGULATORY AFFAIRS, P.O. 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.

6-12-17
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency: June 12, 2017

Date Mailed to Parties: June 12, 2017

JRW/dm

APPENDIX

WITNESSES

For Appellant:

None

For Respondent:

None

EXHIBITS

For Appellant:

A-1 Appellant's brief filed with the Office of Administrative Law on March 27, 2017

For Respondent:

R-1 Respondent's brief filed with the Office of Administrative Law on December 19, 2016

R-2 Respondent's brief filed with the Office of Administrative Law on April 10, 2017

~~7/26/2017~~
7/26/2017

STATE OF NEW JERSEY

In the Matter of Luis Valle,
City of Passaic, Department of Public Works

CSC DKT. NO. 2017-1984
OAL DKT. NO. CSV 00314-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 28, 2017 BW

The appeal of Luis Valle, Building Maintenance Worker, City of Passaic, Department of Public Works, removal effective December 2, 2016, on charges, was heard by Administrative Law Judge Carol I. Cohen, who rendered her initial decision on June 20, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of July 26, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission, at its meeting of July 26, 2017, acknowledged the settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
JULY 26, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 00314-17
AGENCY DKT. NO. 2017-1984

IN THE MATTER OF LUIS VALLE, CITY OF PASSAIC, DEPARTMENT OF PUBLIC WORKS.

Curtis T. Jameson, Esq. for Appellant Luis Valle

Eric M. Bernstein, Esq. for Respondent City of Passaic, Department of Public Works (Eric M. Bernstein & Associates, attorneys)

Record Closed: June 9, 2017 Decided: June 20, 2017

BEFORE **CAROL I. COHEN**, ALJ t/a:

STATEMENT OF THE CASE

The Appellant is seeking to enforce a settlement that was put on the record on April 5, 2017; compel the Appellant to sign the Settlement Agreement and General Release; and incorporate the Settlement Agreement and General Release in the Initial Decision.

PROCEDURAL HISTORY

On December 2, 2016, the Appellant received a Final Notice of Disciplinary Action removing him from his position as Laborer/Maintenance Worker on the grounds that he had executed a Last Chance Agreement in March 2014 and he had not lived up to the terms of the Agreement. Based on the Last Chance, he was not entitled to a hearing. The grounds for removal included incompetency, inefficiency, failure to perform duties, insubordination, Inability to perform duties, chronic or excessive absenteeism, conduct unbecoming a public employee, neglect of duty and other sufficient caused. The Appellant filed an appeal on December 20, 2016. The matter was forwarded to the Office of Administrative Law (OAL) on January 10, 2017. A prehearing conference was held on January 26, 2017 and the matter was set down for a hearing on April 5, 2017. After extensive discussions between the parties and a discussion with the ALJ, the Appellant agreed to settle the matter and a settlement was put on the record[1]. On April 27, 2017 the court was informed that the Appellant was refusing to sign the settlement agreement, that memorialized the terms of the agreement which had been put on the record, and which had been forwarded to his attorney by Mr. Bernstein on April 6, 2017. The Respondent was instructed to file a Motion to Enforce the Settlement. The motion was received by the court on May 30, 2017.

ARGUMENTS OF THE PARTIES

The city argued that the Petitioner testified under oath that he accepted the terms of the settlement. There was no coercion, duress, fraud, dissatisfaction or questioning of the terms. In addition, the settlement was promptly reduced to writing within one day of the hearing and accepted by Mr. Valle's attorney. Subsequent to that, the Petitioner refused to sign the written Agreement. The City contended that an oral contract was created on April 5, 2017 and the written agreement, pursuant to Civil Service laws, merely memorialized the terms that were testified to and accepted by the Petitioner the day prior. The City pointed to the decision in In re Smith, CSV 6370-07, Initial Decision (December 17, 2007), affirmed, Merit System Board (January 30, 2008),

[1] See Transcript attached.

http://njlaw.rutgers.edu/collections/oal/, which was upheld by the Merit System Board. In that matter, on the day of the plenary hearing, the employee authorized her agent to settle the case. The employee then reconsidered and refused to sign the written agreement. In rendering his opinion upholding the settlement, the ALJ pointed out that there is a strong public policy favoring settlement of litigation. When a settlement is voluntary, it is binding on the parties. A settlement is equivalent to a contract and, if freely entered into, without fraud or other compelling circumstances, it should be honored and enforced. In addition, the fact that the oral agreement is later reduced to writing, makes it no less enforceable. Passaic also cited In re Tenure Jones, EDU 08618-05, Initial Decision (May 8, 2007), http://njlaw.rutgers.edu/collections/oal/, in which an unsigned draft settlement agreement was found to be a settlement. The ALJ's decision was subsequently upheld by the Commissioner of Education. In adopting the ALJ's decision the Commissioner of Education stated that what was required to enforce a settlement was that the Court determine:

> From the written order/stipulation or from the parties' testimony under oath that the settlement is voluntary, consistent with the law and fully dispositive of all issues. In controversy, the judge shall issue an initial decision, incorporating the full terms and approving the settlement. N.J.A.C. 1:1-19.1

Passaic argued that the present matter factually mirrored both Smith and Jones. The settlement was fairly negotiated and reached in the presence of the attorneys for the litigants. The settlement was then put on the record. The Petitioner assented to the terms of the Agreement under oath. Therefore, the terms of the Agreement should be incorporated into an Initial Decision.

The Petitioner did not file a responsive brief and made no argument in opposition to the City's motion.

CONCLUSIONS OF LAW

New Jersey has a "strong public policy in favor of settlement." Department of Public Advocate v. N.J. Board of Public Utilities, 206 N.J. Super. 523, 528 (App. Div.

1985). The courts have "strained" to uphold settlements. Ibid. The fact that the agreement is later reduced to writing does not mean that the oral contract is unenforceable, as long as the parties intended to be bound by the terms of the oral agreement. Berg Agency v. Sleepworld-Willingboro, Inc. 136 N.J. Super. 369, 374 (App. Div. 1975).

On April 5, 2017, the parties appeared for a hearing. Prior to the beginning of the hearing, I asked the attorneys if there had been any settlement negotiations and if there was any chance of resolving the matter. The attorneys and their clients took part in extensive settlement negotiations. In my presence, there was a discussion about the fact that, if there was an adverse ruling, Mr. Valle's pension could possibly be forfeited. Mr. Valle questioned whether the "last chance" agreement could be enforced. I said that if he wanted a hearing on the issues, then we would proceed to trial. Finally, Mr. Valle stated that he wished to settle the matter. At that point we went on the record and Mr. Bernstein outlined the terms of the Settlement. They included that:

1. Mr. Valle agreed that he was resigning in good standing as of December 2, 2016.
2. Any monies that he was owed up to December 2, 2016 would be paid to him through the City's Department of Human Services.
3. A neutral reference would be provided to Mr. Valle if he required a reference for another employment.
4. The City would take no action against Mr. Valle's pension.
5. The City would take no action against Mr. Valle's unemployment.
6. The Appellant would withdraw his appeal with prejudice.

Mr. Valle was sworn in and asked whether he heard the terms as outlined by Mr. Bernstein; if he understood the terms; if he had any questions regarding the terms; if he was under the influence of drugs or anything that could affect his ability to enter into the Agreement fully and fairly; if he was coerced into entering into the Agreement; if he was satisfied with the representation he had received; and if he had any questions of the attorneys or the court regarding the Settlement. Mr. Valle's responses to the questions were such that it was clear that he had entered into the Agreement voluntarily and with an understanding of the terms of the Agreement.

While the Appellant has chosen not to file a responsive brief, it is clear that at the time the settlement was put on the record, he fully understood the terms of the agreement and the implications of the Settlement, and consented to same. As ALJ Masin annunciated in the Jones matter, when there is clearly a meeting of the minds, the law contemplates that a binding agreement has been created, even though it is reduced to writing subsequently. While Mr. Valle may have remorse at this time, that does not negate the fact that he agreed to the settlement under oath and with the advice of counsel. I therefore, **CONCLUDE** that the terms of the Agreement that were negotiated by the parties; spread forth on the record; and later memorialized in a writing, are the terms of the Settlement.

ORDER

Based on the foregoing, it is **ORDERED** that the terms of the Agreement as outlined above are binding on the parties and are hereby incorporated in the Initial Decision.

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.

June 20, 2017
DATE

Carol I Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: June 20, 2017

Date Mailed to Parties: June 20, 2017

STATE OF NEW JERSEY

In the Matter of Sabura Alexander
Hudson County,
Department of Family Services

CSC DKT. NO. 2017-614
OAL DKT. NO. CSV 13677-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 22, 2017 BW

The appeal of Sabura Alexander, Human Services Specialist 4, Hudson County, Department of Family Services, 120 working day suspension, on charges, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on July 11, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 16, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

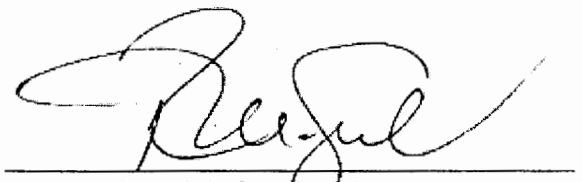
ORDER

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

Re: Sabura Alexander

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13677-16
AGENCY DKT. NO. 2017-614

IN THE MATTER OF SABURA ALEXANDER, HUDSON COUNTY DEPARTMENT OF FAMILY SERVICES,

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Terry Woodrow, Esq., for Appellant (Staff Attorney, AFSCME Council 52, attorneys)

Daniel W. Sexton, Esq., Assistant County Counsel for Respondent (Donato J. Battista, County Counsel, attorneys)

Record Closed: June 14, 2017 Decided: July 11, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Appellant, Sabura Alexander, a Human Service Specialist IV (HSS4) Supervisor, appeals a one-hundred-twenty day suspension issued by respondent, Hudson County Department of Family Services (Respondent or County), effective April 19, 2016. Respondent alleges that appellant's conduct was unbecoming a public employee on

July 20, 2016, while raising her tone of voice to her supervisor and that she was insubordinate, neglected her duty and other sufficient cause exists.

PROCEDURAL HISTORY

On July 26, 2016, respondent issued a Preliminary Notice of Disciplinary Action against appellant and an administrative hearing was held on August 15, 2016. A Final Notice of Disciplinary Action issued on August 19, 2016 upheld the charges.

On September 6, 2016, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were scheduled for May 1 and 2, 2017. The matter was settled on May 1, 2017, and the settlement was placed on the record. Appellant subsequently changed her mind and the hearing was held on June 14, 2017, on which date the record closed.

ISSUE

Did the respondent carry its burden of proving the charges referenced above by a preponderance of the credible evidence? If so, what disciplinary action, if any, is appropriate?

TESTIMONY

The testimony of the witnesses presented is not intended to be a verbatim report. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented.

Maryann Smith

Maryann Smith, an administrator within the Hudson County Department of Family Services, testified on behalf of respondent. Smith testified to appellant's

demeanor in the workplace and specifically to the incident on July 20, 2016. Smith stated that once appellant returned from a sixty-day suspension, her demeanor changed. She stated that Alexander was irritable and contentious after her return.

With regard to the July 20, 2016 incident, Smith testified that she called a meeting in her office with appellant and Camela Nales (Nales), both HSS4 Supervisors, to discuss routine work matters. Smith asked appellant about a situation pertaining to a worker's request for more time to complete his work and whether appellant asked Nales if she could allow her worker more time. Appellant responded by loudly proclaiming that she did not need to ask for Nales' permission. Smith inquired further about the worker's caseload and appellant responded that she did not know and blamed Smith for not doing what she was supposed to and not properly staffing the department. Smith stated that she attempted to calm appellant down multiple times but she continued to escalate her tone and shout over Smith. Smith had to ask appellant multiple times to leave the room. Smith credibly testified that she felt threatened by appellant's behavior and that appellant was disrespectful. Smith agreed that at no point did appellant approach or physically threaten her. Smith memorialized the incident that day in narrative form. (R-1.)

Camela Nales

Camela Nales, HSS4 Supervisor, testified on behalf of respondent with regard to the incident on July 20, 2016. Nales testified that she was present for the entirety of the interaction between Smith and appellant, but did not say anything during the meeting. Nales stated that appellant immediately became defensive when asked about her staff's case load. She stated that Smith asked appellant about the situation surrounding one of her workers to which appellant responded by loudly accusing Smith of intentionally holding meetings when she was away. Appellant insinuated that she could not know what was going on because Smith decided not to include her in earlier discussions.

Nales stated that appellant continually shouted over Smith's attempts to explain and calm her down. She testified that appellant's behavior made her anxious and she could see it was bothering Smith as well. Nales memorialized the incident that day. (R-2.)

Sabura Alexander

Appellant testified on her own behalf. She has been an employee of Hudson County since November 5, 2007 and has been a HSS4 Supervisor since October 20, 2014. She had been disciplined twice, regarding similar circumstances, before the incident in question. The most recent prior action being a sixty-day suspension from October 8, 2015 to January 5, 2016 for insubordination towards Director Harrison from which she returned to work on or about January 5, 2016.

With regard to the incident on July 20, 2016, Alexander testified that she was called to Maryann Smith's office to discuss a routine work matter. She stated that Smith asked her about her workers' caseload but that she didn't know because she was not working on the day Smith held the meeting. She stated that she voiced her concerns with the department management but she did not raise her voice above a firm tone. Alexander claimed that Smith exaggerated her reaction and that she did not shout during the meeting. She testified that she had no intention of disrespecting or threatening Smith.

CREDIBILITY DETERMINATIONS:

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it hangs together with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself, in that it must be such as the common experience and observation of mankind can approve as

probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950). A fact finder is free to weigh the evidence and to reject the testimony of a witness when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as inherently incredible, and may also reject testimony when it is inconsistent with other testimony or with common experience or overborne by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super.282, 287 (App. Div. 1958). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable choice. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super.415, 421 (App. Div. 1981).

I **FIND** the testimony offered by respondent's witnesses to be more credible than that offered by appellant. Both witnesses offered consistent versions of the events on July 20, 2016. Their testimony was wholly consistent with the memoranda written by each of the witnesses' right after the incident of July 20, 2016. Appellant's testimony on the other hand contradicts the credible eye witness accounts as to her loud tone of voice and screaming over Smith.

FACTS

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of relevant fact, which are essentially undisputed, in this matter:

1. Appellant received a thirty-day suspension in May 2015 for violation of a cease and desist order forbidding her from having contact with a coworker with whom there had been an altercation. The suspension was amended to fifteen days.

2. Appellant received a sixty-day suspension on or about October 12, 2015. Appellant shouted at and spoke in a disrespectful and threatening manner to Director Angelica Harrison.

3. On July 20, 2016, at the request of Maryann Smith, appellant and Camela Nales met with Smith in her office to discuss a routine work matter. Appellant became defensive during the meeting and inappropriately raised her tone of voice and shouted over Smith. She loudly accused Smith of ineffective leadership.

4. Appellant inappropriately continued to loudly intensify the conversation despite Smith's attempts to calm the situation. Ultimately, Smith felt threatened and disrespected. She requested that appellant leave the room multiple times. (R-1.)

5. Camela Nales witnessed appellant disrespecting, shouting and yelling over Smith. (R-2.)

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

A civil service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to -12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See, Essex Council No. 1, N.J. Civil Ser. Ass'n. v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965).

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his employment. N.J.A.C. 4A:2-2.2(a) provides the penalties for a major discipline of removal or suspension for more than five working days at any one time. N.J.A.C. 4A:2-2.3 provides the reasons for a major disciplinary action including: neglect of duty, chronic or excessive absenteeism or lateness and other sufficient cause. N.J.S.A. 11A:2-14 requires written notice of the final disposition of an employee.

An appointing authority may discipline an employee on various grounds, including insubordination, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, 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." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

In the present matter, appellant was charged with insubordination and conduct unbecoming a public employee, violating Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6) for raising her voice to a superior and shouting over Smith's attempt to speak. "Unbecoming conduct" is broadly defined as any conduct that adversely affects the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Conduct unbecoming need not be predicated on violations of the employer's rules or policies, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Karins v. City of Atlantic City, 152 N.J. 532, 555 (1998). Appellant's inappropriate tone and attitude demonstrates offensive behavior when speaking with her supervisor, and as such deviates from the "implicit standard of good behavior" expected from a public employee.

Insubordination is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; and disrespect or use of insulting or abusive language to supervisor. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Id. at 802. Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation. Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster's II New College Dictionary (1995)

"insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002).

I **CONCLUDE** respondent has demonstrated by the preponderance of the legally competent, credible evidence that appellant committed acts of insubordination and conduct unbecoming a public employee on July 20, 2016. Her behavior towards her supervisor when raising her voice and shouting inappropriately demonstrated a lack of respect which deviates from the "implicit standard of good behavior" expected from a public employee.

Appellant was also charged with neglect of duty, violating N.J.A.C. 4A:2-2.3(a)(7). Neglect of duty can arise from an omission to perform a duty or failure to perform or discharge a duty and includes official misconduct or misdoing, as well as negligence. Steinel v. City of Jersey City, Initial decision, 7 N.J.A.R. 91, 95 (March 21, 1983), modified on other grounds, Civ. Serv. Comm'n, 7 N.J.A.R. 100 (May 12, 1983), modified on other grounds, 193 N.J. Super. 629 (App. Div. 1984), aff'd, 99 N.J. 1 (1985). Generally, the term neglect connotes a deviation from normal standards of conduct. In re Suspension or Revoc. of the License of Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977).

I **CONCLUDE** that respondent has not met its burden of proving, by a preponderance of the credible evidence, the charge of neglect of duty. There is no evidence presented that proves appellant failed to perform her job duties.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is generally defined in the charges against appellant as all other offenses caused and derived as a result of all other charges against her. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an

upholder of that which is morally and legally correct. Therefore, I also **CONCLUDE** that the respondent has met its burden of proof on this charge.

PENALTY

Factors determining the degree of discipline to be imposed include the employee's prior disciplinary record and the gravity of the misconduct in the instant case, as well as the concept of progressive discipline. W. New York v. Bock, 38 N.J. 500, 522-524 (1962). The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, supra, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, supra, 192 N.J. at 33.

Under the facts presented, a substantial penalty is appropriate. In light of appellant's aberrant conduct and behavior, the one-hundred-twenty day suspension is appropriate, and I so **CONCLUDE**.

ORDER

Based upon the aforementioned, I **ORDER** that appellant be suspended without pay for a period of one-hundred-twenty days.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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.

July 11, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: JUL 11 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For appellant:

Sabura Alexander

For respondent:

Maryann Smith

Camela Nales

EXHIBITS

For appellant:

P-1 ABD Back Log Cases

P-2 FNDA dated October 8, 2015 and PNDA dated July 20, 2015

P-3 Notice of Determination of benefits dated December 9, 2016

P-4 July 2016 Non-Client Contact List

P-5 Final Administrative Action of the Civil Service Commission issued February 10, 2017

P-6 Disciplinary Hearing Officer Gerald Drasheff's determination dated October 8, 2015

For respondent:

R-1 Maryann Smith report dated July 20, 2016

R-2 Camela Nales report dated July 20, 2016

R-3 Personnel Order Memorandum dated November 15, 2011

STATE OF NEW JERSEY

In the Matter of Victor Bermudez
Cumberland County,
Department of Corrections

CSC DKT. NO. 2014-716
OAL DKT. NO. CSV 13807-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 22, 2017 BW

The appeal of Victor Bermudez, County Correction Officer, Cumberland County, Department of Corrections, 10 working day suspension, on charges, was heard by Administrative Law Judge Bruce M. Gorman, who rendered his initial decision on June 30, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 16, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

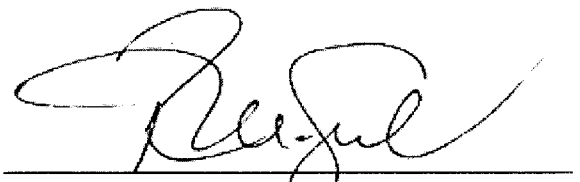
ORDER

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

Re: Victor Bermudez

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 13807-13
AGENCY DKT. NO. 2014-716

IN THE MATTER OF VICTOR BERMUDEZ, CUMBERLAND COUNTY, DEPARTMENT OF CORRECTIONS.

Stuart J. Alterman, Esq., for appellant, Victor Bermudez (Alterman and Associates, attorneys)

Theodore E. Baker, County Counsel, for respondent Cumberland County, Department of Corrections

Record Closed: May 18, 2017 Decided: June 30, 2017

BEFORE **BRUCE M. GORMAN**, ALJ t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Victor Bermudez (Bermudez) appealed the respondent's, Cumberland County, Department of Corrections (CCDOC), action imposing a ten-day suspension for violation of the County Harassment Policy.

The appellant requested a fair hearing and the matter was filed at the Office of Administrative Law (OAL) on September 25, 2013, to be heard as a contested case.

N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard over the course of three days, August 13, 2015, April 14, 2016, and March 27, 2017. The record closed after the parties filed written summations on May 18, 2017.

FACTUAL SUMMARY

This case emanates from an argument between two corrections officers employed by the CCDOC.

Officer Gregory Glenn (Glenn) testified for the CCDOC. Glenn has been employed as a Corrections Officer by the CCDOC for the past eighteen years. He has been assigned to the Transportation Unit for the past three years.

On September 7, 2012, Glenn was working in the Transportation Unit with his partner, Yolanda Crosley (Crosley). At that time, he was accosted by the appellant, who proceeded to engage in an argument.

The argument had its genesis in a prior conversation among a group of corrections officers. The officers were discussing the condition of a fellow officer, Yobani Marti (Marti). Marti was purportedly suffering from cancer at the time. Appellant expressed the opinion that she did not really have cancer. He stated that he had seen both of his grandparents suffer from cancer and Marti did now show the same symptoms. He noted that Marti liked to avoid work.

Appellant was a delegate for his union and was active in handling employee grievances. Glenn was aware that Marti intended to ask appellant to assist her in proving that she was suffering from cancer. Consequently, he told Marti what appellant had said and recommended that she use the union president to assist her instead of the appellant.

When appellant learned that Glenn had reported his comments to Marti, he was angered. On September 7, 2012, at approximately 8:15 a.m., he confronted Glenn at the rear control area at the back of the jail. According to Glenn, appellant exhibited that

anger when he approached him. Glenn testified that appellant said, "What's wrong with you, you bitch ass nigger?" "Didn't you take your hormone shots?" Glenn commented that appellant may have used the word "nigga" and not "nigger". He stated that the phrase "bitch ass nigger" was street jargon. "Bitch ass" meant coward; "nigger" or "nigga" meant punk. Consequently, when appellant called Glenn a "bitch ass nigger," he was calling him a cowardly punk.

Glenn stated that he did not feel threatened by the outburst, but he felt hurt. This statement was a recurring theme in Glenn's testimony. Glenn appeared under subpoena. He had previously attempted to avoid participation in the proceeding. He had previously asked the administration not to discipline the appellant. During his testimony, he did everything possible to mitigate the significance of appellant's outburst.

However, his conduct on the date of the incident belied his protestations that he did not feel threatened. After the argument was concluded, Glenn immediately went to the office and prepared an Incident/Offense Report. (R-1.) In that report he noted that the outburst occurred in front of Officer Crosley, a secretary named Sandy Fisher, and inmate named T. Mathis. He termed the offense "threatening behavior". He then wrote the following narrative:

> Approx. at 0815 hrs at the gun bay area, Officer Bermudez went off on me, Officer G. Glenn, #68. Bermudez said "Glenn have you took those hormone shots to get the bitch out of you, "you bitch ass nigger." Why did you tell about what I said." Bermudez had made a statement that he believed Mary was faking that she had cancer. Bermudez kept screaming out in front of inmate T. Mathis, Sandy Fisher, and Officer Crosley. He said "you bitch ass nigger this isn't the first time you told on me." When Bermudez was screaming all this, he was approaching me with his fists balled up. He kept calling me, Officer Glenn a bitch ass nigger and get the fuck out of my way! Bermudez scream also don't say another thing to me ever, you bitch ass nigger and went storm off!

Glenn admitted that he wrote this report because he was angry and upset. But he contended that once he calmed down, he realized that appellant's conduct did not make him feel threatened. Glenn stated that appellant should have confronted him in

private and not in front of three witnesses. He admitted that appellant's voice was raised but contended that he was not yelling. He characterized appellant's words as more like "harsh". When confronted with his statement in the Incident Report that appellant was "screaming," he admitted that appellant was screaming, but said he was not shouting louder than normal.

Glenn contended that appellant called him a "bitch ass nigger" only twice. When it was pointed out to him that in the report he stated that the term was used three times, he contended that he had made a mistake in the report.

Glenn admitted that he was not required to file a report. He claimed he did so because he did not want to be teamed with appellant for the next few days until he had calmed down.

Glenn contended he should have written "nigga" instead of "nigger" in his report. He asserted that there was a difference between the two words, but he was upset and angry at the time and not thinking clearly when he wrote the report. He asserted that the term "nigga" was one of endearment, that, "you are my nigga" means "you are my boy". However, he admitted that the term "nigger" could also be a term of endearment.

Glenn asserted that the matter had been blown out of proportion. He stated that appellant's use of the term "nigger" (of "nigga") was "not a racial thing". Glenn reached that conclusion because he felt appellant was also "black". When queried about the fact that appellant is in fact Latino in his heritage, Glenn stated that there are two colors, white and black. He included appellant in the black category.

Glenn stated that the terms "nigger" and "nigga" are "almost similar", but "different". Whether the terms are pejorative in nature depends upon the intent. Glenn was satisfied that appellant did not use the terms in a racial manner. Instead, appellant was attacking Glenn's manhood. Appellant's intent to attack Glenn's manhood was behind appellant's question, "Have you took those hormone shots to get the bitch out of you?"

Glenn stated that he is "from the old school". By "old school", he meant that he is now sixty-years-old and remembers the days of Dr. King and the Civil Rights Movement. In his opinion, the word "nigger" should not be used at all. He went so far as to state that he also does not like the words "negro" and "colored". He considers himself to be "black" or "African American".

Glenn stated that the word "nigger" was offensive. It was a downgrade of a black person, a belittlement, a statement that an African American was worthless trash. It reminded him of the time he could not use the same bathroom as white people. However, in 2015, whether the term was offensive depended upon the context in which it was used. If a black person used the term to him, he would automatically think he was being friendly. Glenn stated that the world is dyed into two colors, black and white. Black people were considered to be a lower form of race by white people. Accordingly, when a white person used the term, it is to discredit the black person.

Despite his antipathy toward the term "nigger", Glenn admitted it has come back into common use in the African American community. As a result, whether it is offensive now depends upon the way in which it is used. If it is used in an antagonistic way, it is offensive, but if it is used in a friendly way, then it is acceptable. He noted that even "white guys" now call each other nigger. In his view, appellant did not utilize the term in a racial manner.

Glenn stated that appellant made his statements out of emotion and did not really mean them. Appellant knew that, and the two reconciled the following day. Thereafter, another officer told him he should not have written the report and urged him to withdraw it. At a later date, he met with the Warden, and told the Warden that the report was a mistake and urged that appellant not be charged. He tried to retract the report, but the Warden advised that he could not do so.

Glenn complained that the unit's Sergeant, Robert Echevarria, (Echevarria) took pleasure in seeing appellant charged. When Glenn filed his report, Echevarria stated, "Good, burn him, burn him, burn him." However, Glenn admitted that he did not speak

with him prior to writing the Incident Report. Glenn confirmed that Echevarria did not place pressure on him to testify. Glenn stated that he had told the truth at trial.

Yolanda Crosley testified for the CCDOC. Crosley has been a Transportation Officer with the CCDOC since 1997 and has served as Glenn's partner for approximately five years. She was working as Glenn's partner on September 7, 2012.

At the outset of her testimony, Crosley claimed to remember virtually nothing about the incident. She claimed only to remember that Glenn and appellant had a discussion in her presence. Her recollection was that they "had some words" and they were done. The discussion occurred at rear control at the back of the jail. Crosley was preparing to transport Inmate T. Mathis. Glenn and the appellant were arguing.

Crosley was confronted with the Incident Report she wrote on September 7, 2012. (R-2.) She acknowledged her signature and admitted that she wrote the report on the day of the incident, but claimed it had been so long, she did not remember what happened. She admitted that the report must be accurate. However, she claimed not to remember the incident.

After reading her report, she conceded that the discussion between appellant and Glenn became loud, but continued to insist she did not know what appellant said. Finally she admitted that appellant called Glenn a "bitch ass nigger".

Crosley quickly attempted to exonerate appellant for his conduct. She testified that, in her words, black people say that to each other all the time. They think of "nigger" as a word they can use. She agreed that "nigger" is a slave word when spoken by a white person, but African Americans use it continuously. Crosley testified that she heard the word repeatedly when she grew up in the projects. She agreed that saying the word was not ok, but said that "that is how we were raised". She agreed that African Americans feel offended if a white person says the word, but if a black person says it to another black person is acceptable. She said that use of the word in the workplace was not acceptable. In fact, she stated that using the word at all was not acceptable.

Crosley contended that she only heard appellant say "bitch ass nigger" one time, but admitted that in her report, she stated that appellant used the words "bitch ass" twice.

Crosley stated that if someone used the word to her while arguing, she might have been offended. She has never heard the term used toward a black female, but if the word was used casually, she would not be offended even if the speaker was white, if the speaker was a friend. The difference was in how the word was utilized. If the word was utilized in an insulting or demeaning context, then she would be offended. If it was utilized in a friendly manner, she would not be offended.

Crosley explained that there is a difference between the terms "nigger" and "nigga". "Nigger" is a much harsher term. She noted that in her report, she stated that appellant used the term "nigga".

Crosley admitted that the confrontation between the appellant and Glenn was not a friendly exchange.

On cross-examination by appellant's counsel, Crosley's memory improved significantly. She testified that appellant called Glenn a "bitch ass nigga". She also noted that appellant asked Glenn if he had taken his female hormones. Crosley concluded that the thrust of the appellant's statement was to question Glenn's manhood. She did not think that appellant's comments were racially motivated. She stated it is not unusual for her colleagues at the jail to call each other "bitch ass niggers."

Glenn told Crosley that he was sorry he wrote the incident report. He told her he only wrote the report because appellant hollered at him in front of other people.

Crosley stated that as an African American female she did not find appellant's words to be racist in nature. Black officers use these words all the time; they even say them in front of their supervisors. Sometimes people of color use this terminology as terms of endearment.

Crosley noted that her view of appellant's words was based partly upon the fact that he is married to an African American woman. However, she agreed that it was not acceptable for appellant to use the word "nigger" just because his wife is African American. She also agreed that the word "nigger" is racist by definition.

Crosley briefly addressed the word "bitch". When asked if the word "bitch" was sexist, she stated that it depended on the intent of the speaker.

Walter T. Wroniuk, Jr. (Wroniuk) testified for the CCDOC. Wroniuk has been employed by the CCDOC for twenty-six years. At the time of his testimony, he held the rank of Lieutenant and served as Commander of the four to twelve shift. In September of 2012, he was a Sergeant assigned to the Internal Affairs (IA) Division.

Wroniuk conducted an investigation of the incident. On direct examination he described his investigation and introduced into evidence his report. (R-4.) His direct testimony concluded at the end of the day, and an additional date was scheduled for his cross examination. Wroniuk failed to appear on that date, and again on subsequent dates scheduled for that purpose. County Counsel explained that Wroniuk had retired, but Counsel believed he could be produced. Ultimately, County Counsel issued a subpoena, but Wroniuk ignored the subpoena. After nearly two years, it was apparent that, short of having him arrested on a bench warrant, a power this tribunal lacks, Wroniuk would never voluntarily appear. At that juncture, on appellant's motion, Wroniuk's testimony was stricken and his report (R-4) was returned to the CCDOC.

Appellant testified on his own behalf. He has served as a Corrections Officer with the CCDOC since 1997. During that time, he has been active in his union. He was his local's State Delegate for nine years, and presently serves as President of PBA Local 231. He has been active on numerous committees dealing with issues affecting corrections officers and has personally assisted in securing the passage of legislation addressing these issues.

Appellant described his ethnic background. Both parents came from Puerto Rico. However, his grandmother on his father's side bore African blood. Additionally, he has been married for twenty-five-years to an African American woman. Accordingly, appellant considers himself to be a "person of color", which he defined as someone descended from slaves.

Appellant has known Glenn since 1997. He had no problem with Glenn prior to the incident of September 7, 2012. At the time of the incident, they worked together as partners in the jail's Transportation Division.

Shortly before September 7, 2012, Captain Ken Lamcken advised appellant that an officer named Marti was being investigated for abuse of sick leave. Specifically, Marti claimed she suffered from stage four cancer. Appellant's grandmother had died of cancer, and he was familiar with the symptoms. Given his knowledge of the illness, petitioner expressed doubt that Marti suffered from stage four cancer. Additionally, Marti's cousin told him Marti was not telling the truth.

Appellant conveyed his belief to his transportation partner. Subsequently, appellant learned that Glenn had told Marti what he had said. Glenn's disclosure caused petitioner a problem with his union.

On September 7, 2012, Glenn was partnered with Crosley instead of appellant. According to appellant, the three met at the weapons box at the rear of the jail. At that time, he asked Glenn if he had taken his hormone pills that morning. When Glenn asked him what he meant, appellant told him he should not have repeated his words to Marti. Glenn then became very emotional and began yelling incoherently. At that juncture, appellant called Glenn a name. When he testified in court, he stated what he called Glenn, sounded like "bitch ass nigger". He quickly corrected himself and changed "nigger" to "nigga". He then insisted that he had said "nigga" in the first place.

Appellant explained that "nigger" and "nigga" were different words. "Nigger" was a racial term; "nigga" was not. To the contrary, "nigga" was a term of endearment

among people of color. Caucasians were not permitted to use either word, but African Americans were.

Appellant stated that the term "bitch ass nigga" expressed a challenge to Glenn's manhood. It suggested that he was gossiping "like a woman". He stated he told Glenn he had a lot of estrogen in him. He had no intent to attack Glenn racially, and did not think Glenn would take the statement as a racial slur.

Appellant did not remember if he wrote a report about the incident. When advised that the exchange had become a problem for him, he went to Glenn and apologized, telling Glenn that he did not mean to hurt him. He also noted that during an unrelated matter, Glenn had called Lieutenant Chareston, an African American officer, a "bitch ass nigger". After appellant apologized, Glenn wrote a letter (P-1) requesting that the charges be dropped. The County declined to drop the charges. During his testimony, appellant repeatedly attempted to deflect questions benoting that Glenn had asked that the charges be dropped.

Appellant stated he did not understand why the charges were filed against him. He was never trained in harassment. During the County's one training session on harassment, he did not attend because he was assigned to special duty away from the jail.

Appellant admitted that since the incident, he has concluded that the use of the word "nigga" is deleterious to people of color. He no longer uses the word, and encourages members of the younger generation to avoid the term.

On cross-examination, appellant argued that a double standard existed over the use of the term "nigga", and that at the time of the incident, he approved of the double standard. People of color could use the term, but Caucasian people could not. Since the incident, he has changed his views and now believes that it's wrong for either race to use the word.

Appellant was asked if he had told the IA investigator that he had used the term "nigga" when addressing Glenn. He asserted he could not remember what he had told the investigator, either about the incident generally or specifically whether he used the word "nigger" or "nigga".

On cross-examination, appellant acknowledged that he had intended to insult Glenn's manhood. He agreed that a "bitch" was a contrary woman, and his use of the term was not intended as an endearment. He conceded the same facts with regard to his use of the term "ass". But he insisted the term "nigga" was the equivalent of the term "dude".

Appellant conceded that he was upset when he approached Glenn, but denied that he had raised his fist to Glenn. He acknowledged telling Glenn never to seek his assistance if he needed help from the union. He also conceded he told Glenn never to speak to him again. He agreed that he had intended his words to be offensive. He now believes what he said to Glenn was wrong, and regrets his conduct on September 7, 2012.

LEGAL DISCUSSION

The County's Harassment Policy (R-5) provides in pertinent part:

> In addition to prohibiting sexual harassment, the county prohibits the harassment or intimidation of an individual based on his or her race, creed, color, religion, national origin, ancestry, marital status, affectional or sexual orientation, familial status, sex, age, disability, veteran status, gender identity or expression, source of lawful income used for rental or mortgage payments or any other classification protected by federal, state or local law. Harassment can be written, verbal or physical conduct – including but not limited to slurs, remarks, epithets, jokes, intimidating or hostile acts based on an employee's membership in a protected class, when such conduct has the purpose or effect of:

1. Substantially interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment;
2. Otherwise adversely affecting an individual's employment opportunities; or
3. Unreasonably interfering with an individual's work performance.

Such behavior is unacceptable in the workplace and anywhere work is conducted including but not limited to, business trips, conferences, work-related travel and business-related social events. It includes contacts over telephone, voice mail, regular mail, facsimile machine or any other electronic communication device.

The County asserts that appellant violated this policy when he confronted Glenn on September 7, 2012. Appellant denies that he engaged in harassing conduct.

Most of the facts of the case are not in dispute. Appellant conceded that he approached Glenn in a state of upset. He then asked Glenn if he had taken his female hormones that day, berated him for disclosing his comments about Marti, and called him either "bitch ass nigger" or "bitch ass nigga". The only facts in dispute are whether appellant raised his fist to Glenn, which Glenn asserted and appellant denied, and which form of the "N" word appellant utilized.

Appellant's question to Glenn about whether he had taken his hormone, and statement about Glenn's estrogen level clearly amount to slurs against Glenn's sex and gender identity. His use of the terms "bitch" and "ass" constitute epithets within the meaning of the policy. All of these words contributed to the creation of a hostile and offensive work environment, and coming from a high ranking union official, they also created an intimidating environment.

Appellant asserted that he called Glenn "nigga", which he contended was a term of endearment. In his report, R-1, Glenn stated that petitioner used the term "nigger". In her report, R-2, and her testimony, Crosley confirmed that appellant used the term "nigger" and not "nigga". It should be noted that both Glenn and Crosley testified reluctantly and tried their best to protect appellant.

The credibility issue here resolves itself based upon appellant's conduct. Regardless of whether he said "nigger" or "nigga", he clearly did not intend the word as a term of endearment. By his own admission, he was upset, and he delivered the epithet in a threatening manner. If we accept appellant's explanation, then "nigga" was less onerous than "nigger", but given the context of delivery, whatever word he used constituted a slur in violation of the policy. Whatever word he spoke was said in anger.

The appellant argued that the incident constituted no more than a quarrel between colleagues, a quarrel that was personal in nature and should be resolved between the parties. Glenn's reluctance to proceed with prosecution of the matter supports appellant's argument. The problem with appellant's argument lies with the nature of the language he used. Appellant's attack on Glenn's manhood went well beyond the context of a common quarrel. His sexually derogatory language was unacceptable in the public work place.

But worse, appellant's use of the "N" word, regardless of whether he used "nigger" or "nigga", has no place in public work place. Certain words in the English language are so vile that they cannot be countenanced. The so-called "F" word falls into that category, as does the so-called "C" word as applied to women. So too does the "N" word, regardless of the context. That word has been used for generations to degrade. In their efforts to protect appellant, both Glenn and Crosley attempted to minimize the significance of the incident, but both admitted they found the "N" word to be offensive.

The First Amendment to the United States Constitution protects free speech. That amendment affords appellant the right to use the "N" word in the privacy of his home, or elsewhere during his off duty time. But it does not afford him the right to use the "N" word in the work place. Appellant holds his job not as a right, but as a privilege. With that privilege come certain limitations. One of those limitations is that he cannot direct offensive and derogatory language at a fellow employee. The "N" word is perhaps the most extreme example of unacceptable language. His use of that word

causes what might otherwise constitute a common quarrel to rise to the level of harassment.

Accordingly, I am satisfied that appellant violated the harassment policy. The charges must be **SUSTAINED.**

There remains the issue of penalty. Progressive discipline is the law in New Jersey. See West New York v. Bock, 38 N.J. 523-24. Appellant's disciplinary record is lengthy, but remarkably minimal. He has received six letters of reprimand, but none later than 2001. He received two one-day suspensions, the later in 2000. He received a seven-day suspension for tardiness and neglect of duty in 2001, a three-day suspension for insubordination (cell phone in possession) in 2002, and a thirty-day suspension for neglect of duty (leaving his post) in 2002. But he has received no disciplinary action since 2002, a period of ten years prior to the incident in question and fifteen years prior to the time of trial.

The County now seeks to impose a ten-day suspension, which is a term less than his longest suspension. Appellant's prior thirty-day suspension could have justified the imposition of a significantly harsher penalty. The County showed restraint by only imposing a ten-day suspension.

On the other hand, aside from the incident in question, appellant has a clean disciplinary record since 2002. The victim expressed a desire that the incident be forgotten and the appellant freed of penalty. And in many respects, the matter amounted to a quarrel among colleagues, a personal matter perhaps best left to the participants.

But in the final analysis, appellant's use of the "N" word in any form was unacceptable in the work place. Appellant must be punished for his conduct, and his punishment must constitute a warning to all other public employees that the use of the "N" word in the work place will not be tolerated.

The County's action imposing a ten-day suspension must be **SUSTAINED.**

ORDER

I **ORDER** that respondent's action imposing a ten-day suspension for harassment be **SUSTAINED.**

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.

Bruce M. Gorman

June 30, 2017
DATE

BRUCE M. GORMAN, ALJ t/a

Date Received at Agency: June 30, 2017

Date Mailed to Parties: June 30, 2017

/dm

APPENDIX

WITNESSES

For Appellant:

Victor Bermudez

For Respondent:

Gregory Glenn
Yolanda Crosley
Walter T. Wroniuk, Jr.

EXHIBITS

For Appellant:

P-1 Letter to Warden from Officer G. Glenn, dated December 17, 2012

For Respondent:

R-1 Incident/Offense Report completed by Officer G. Glenn, dated September 7, 2012

R-2 Incident/Offense Report completed by Officer Yolanda Crosley, dated September 7, 2012

R-3 Cumberland County Department of Corrections Incident Report completed by Lieutenant R. Morales, dated September 7, 2012

R-4 Stricken from the Record

R-5 Cumberland County Prohibited Discrimination and Harassment Policy

R-6 Memo from Lieutenant Dale Sciore to All Correctional Personnel regarding Harassment in the Workplace, dated June 17, 2010

R-7 Memo from Administrative Lieutenant Dale Sciore to All Correctional Personnel regarding Mandatory Sexual Harassment Training, dated July 14, 2010

R-8 Officer Bermudez Disciplinary Record

8-16-17

STATE OF NEW JERSEY

In the Matter of Nashyrah Day,
New Jersey State Prison, Department of Corrections

CSC DKT. NO. 2017-207
OAL DKT. NO. CSV 11518-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11518-16

AGENCY DKT. NO. 2017-207

NASHYRAH DAY, NEW JERSEY STATE PRISON, DEPARTMENT OF CORRECTIONS.

Stuart Alterman, Esq., Nashyrah Day, appellant

Karen Campbell, Legal Assistant, appearing pursuant to N.J.A.C. 1:1-5.4(a)2 for New Jersey State Prison, Department of Corrections, respondent

Record Closed: June 23, 2017 Decided: July 13, 2017

BEFORE **CARL V. BUCK, III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on August 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Nashyrah Day from the action of the respondent, New Jersey State Prison, Department of Corrections. On June 23, 2017, the parties filed a fully executed Settlement Agreement. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 13, 2017
DATE

CARL V. BUCK, III ALJ

Date Received at Agency: 7/17/17

Date Mailed to Parties:

/lam

APPENDIX

EXHIBITS

Joint:

J-1 Settlement Agreement

For Petitioner:

None

For Respondent:

None

J-1

IN THE MATTER OF NASHYRAH DAY,

APPELLANT

AND

NEW JERSEY STATE PRISON, CORRECTIONAL FACILITY,

RESPONDENT

SETTLEMENT AGREEMENT
OAL DOCKET NO. CSV 11518-2016
AGENCY DOCKET NO. 2017-207

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated June 23, 2016, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(2) Insubordination	Thirty (30) working day suspension	TBD
2.	NJAC 4A:2-2.3(a)(6) Conduct unbecoming a public employee	same	same
3.	NJAC 4A:2-2.3(a)(7) Neglect of duty	same	same
4.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
5.	HRB 84-17, as amended B1 Neglect of duty, loafing Idleness, or willful failure to devote attention to tasks which would not result in danger to person or property	same	same
6.	HRB 84-17, as amended C9 Insubordination; Intentional disobedience or refusal to accept order,	same	same

	assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor		
7.	HRB 84-17, as amended D-21b, Failure to wear or removing protective vest while on duty	same	same
8.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

Charge	Disposition

B. The Appellant withdraws her appeal and request for a hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

1.	NJAC 4A:2-2.3(a)(2) Insubordination	Modified to B5, Failure or excessive delay in carrying out an order which would not result in danger to persons or property. Five (5) working day suspension.
2.	NJAC 4A:2-2.3(a)(6) Conduct unbecoming a public employee	Withdrawn
3.	NJAC 4A:2-2.3(a)(7) Neglect of duty	Withdrawn
4.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	Modified to D21b, Failure to wear or removing protective vest while on duty. Five (5) working day suspension
5.	HRB 84-17, as amended B1 Neglect of duty, loafing idleness, or willful failure to devote attention to tasks	Withdrawn

	which would not result in danger to person or property	
6.	HRB 84-17, as amended C9. Insubordination: Intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor	Modified to B5, Failure or excessive delay in carrying out an order which would not result in danger to persons or property. Five (5) working day suspension. This charge corresponds with NJAC 4A:2-2.3(a)(2)
7.	HRB 84-17, as amended D-21b, Failure to wear or removing protective vest while on duty	Five (5) working day suspension. This charge corresponds with NJAC 4A:2-2.3(a)(12)
8.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	Withdrawn

C. The parties have agreed to the following:

1. The Appellant has thus far served a total of ten (10) working days of a thirty (30) day suspension. The Appellant's personnel record with the Department of Corrections shall reflect that Appellant has received two (2) disciplines; one (1) for violating HRB 84-17 b(5) with a five (5) working day suspension and, 2) HRB 84-17 D-21b with a five (5) working day suspension. As a result, no further suspension is to be served. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: The Appellant will not receive back pay.

2. The personnel file for the Department of Corrections will indicate that the appellant received two five (5) working day suspensions as set forth in Paragraph 1. Any claim for back pay or attorneys' fees shall be waived by the Appellant.

3. Appellant agrees that she will be ineligible to make the rank of Sergeant at New Jersey State Prison for a two (2) year period from the date of this settlement agreement. Appellant shall not be barred from making Sergeant at another facility.

4. The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

5. As set forth in paragraph C(1), the Appellant shall not receive back pay, counsel fees, return of vacation, sick days or any other monetary relief.

D. The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph C(5).

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties acknowledge that a minor disciplinary sanction of 5 days or less may be eligible for expungement pursuant the terms of IMP PSM.002.EXP.01, providing any necessary conditions are satisfied.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: June 13. 2017

NASHYRAH DAY, Appellant

DATE: 6/13/17

STUART ALTERMAN, ESQ.
On Behalf of Appellant

DATE: 6/22/17

KAREN CAMPBELL, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, NASHYRAH DAY, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: June 13. 2017 Nashyrah Day 8/29/18

NASHYRAH DAY

STATE OF NEW JERSEY

In the Matter of Curtis Diaz
Mercer County,
Department of Public Safety

CSC DKT. NO. 2012-3507
OAL DKT. NO. CSV 08038-12

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 22, 2017 BW

The appeal of Curtis Diaz, County Correction Officer, Mercer County, Department of Public Safety, six working day suspension, on charges, was heard by Administrative Law Judge Elia A. Pelios, who rendered his initial decision on July 12, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 16, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

Re: Curtis Diaz

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 08038-12
AGENCY DKT. NO. 2012-3507

IN THE MATTER OF
CURTIS DIAZ, MERCER COUNTY
DEPARTMENT OF PUBLIC SAFETY.

Christopher A. Gray, Esq., for appellant (Alterman & Associates, LLC, attorneys)

Kristina Chubenko, Assistant County Counsel of Mercer County, for respondent

Record Closed: October 17, 2013 Decided: July 12, 2017

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Appellant Curtis Diaz (Diaz) appeals a six-day suspension imposed by Respondent Mercer County Department of Public Safety (County), for violations of N.J.A.C. 4A:2-2.3(A) 4. Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(A)6 Conduct unbecoming of public employee; and, N.J.A.C. 4A:2-2.3(A)12 Other sufficient cause, specifically, violating Section A-4 of the Mercer County Table of Offenses and Penalties—chronic or excessive absenteeism from work without pay. The matter arises from appellant allegedly calling off from work December 25, 28, and 29, 2011, without having any available sick time.

PROCEDURAL HISTORY

On January 11, 2012, the County served on appellant a Preliminary Notice of Disciplinary Action suspending him for ten working-days. On May 15, 2012, a departmental hearing was held. The County issued a Final Notice of Disciplinary Action suspending appellant for six working-days to be served July 6 through 8, and July 11 through 13, 2012. Diaz filed an appeal with the Civil Service Commission on or about June 6, 2012. The matter was filed with the Office of Administrative Law (OAL) as a contested case on June 15, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On June 25, 2013, respondent filed a summary decision motion. The appellant filed his opposition on August 23, 2013, and respondent replied to appellant's opposition to its motion on August 26, 2013. Oral argument was held on October 17, 2013.

FACTUAL DISCUSSION AND FINDINGS

Respondent, in bringing the herein motion, relying upon the certifications of Richard Beardon and Alejandra Silva, and the exhibits attached thereto, asserts the following factual basis:

Diaz is a corrections officer employed by the respondent. Appellant applied for leave pursuant to the Family Medical Leave Act (FMLA), 29 C.F.R. 825.100 et seq, through the County's personnel department and was approved for intermittent leave for the period of June 1, 2011 through December 1, 2011. On or about June 8, 2011, appellant was mailed correspondence advising him that he had been approved for intermittent leave for that specific period. The last day that appellant called off from work that was covered by the FMLA leave period was November 18, 2011. At the time that the approved FMLA period expired the appellant had forty-days of Family Leave time available to him. However, the period had expired December 1, 2011, and such leave is required to be taken during the relevant period. Appellant did not submit additional documentation seeking to extend the FMLA leave period.

Employees of the corrections department are provided fifteen sick-days per year pursuant to the terms of the collective bargaining agreement. Appellant had exhausted his sick-day allotment by June 27, 2011. On December 25, 28, and 29, 2011, appellant called out of work in accordance with the appropriate call-out procedure citing FMLA as his reason. The FMLA period had expired by this time, and appellant had no sick days remaining.

The appellant was charged by the respondent for calling off work those three days. It was noted that this was a step-three infraction, as appellant had been previously found guilty of a step-one infraction for calling off December 9 and 10, 2011, and of a step-two infraction for calling off on December 21, 2011.

The preceding statements appear to not be in dispute and are hereby **FOUND** as **FACT.**

In bringing the herein motion respondent argues that the foregoing constitutes sufficient factual basis to sustain the charges as presented, and that no issues of material fact exist and that summary motion should be granted.

Appellant does not appear to dispute the fact-pattern described above, and offers additionally that petitioner honestly thought that he had been granted a full year FMLA leave. Appellant argues that issues of material fact exist in that appellant disputes the appropriateness of the suspension, and whether his conduct supports sustaining the charges.

LEGAL DISCUSSION

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The respondent has sustained charges of violations of N.J.A.C. 4A:2-2.3(A) 4. Chronic or excessive absenteeism or lateness; N.J.A.C. 4A:2-2.3(A)6 Conduct unbecoming of public employee; and N.J.A.C. 4A:2-2.3(A)12 Other sufficient cause, specifically, violating Section A-4 of the Mercer County Table of Offenses and Penalties—chronic or excessive absenteeism from work without pay.

Respondent has brought the herein motion for summary decision. A motion for summary decision shall be granted if the papers and discovery which have been filed, 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 prevail as a matter of law. N.J.A.C. 1:1-12.5(a). If a motion for "summary decision is made and supported, an adverse party in order to prevail, must by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . . If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." Ibid. As respondent has brought multiple charges against appellant in this matter, a determination as to whether any genuine issue exists as to material fact must be made for each individual charge, as each charge may require a different set of material facts than another.

Respondent sustained charges against appellant for chronic or excessive absenteeism or lateness, N.J.A.C. 4A:2-2.3(a)(4). Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4).

"Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

"There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to

benefit errant employees." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). However, approval of an absence shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b).

In Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (App. Div. 1963), a classified employee who was granted a leave of absence was improperly denied an extension of that leave because of the appointing authority's failure to provide proper notice of the denial; the appointing authority knew she was absent, was aware that she was confined to a hospital, and had previously granted the leave.

The record reflects that appellant had exhausted his sick leave allotment as of June 27, 2011, and therefore had no sick leave available to him when he called off work on December 25, 28 and 29, 2011. It further reflects that appellant applied for, and was granted, six-months of FMLA leave, for the period of June 1, 2011 through December 1, 2011. The record also reflects that appellant was provided notice of the period of his FMLA leave in June 2011, and that the period had expired when he called off work on December 25, 28, and 29, 2011. Finally, the record reflects that appellant had not sought to extend the FMLA period, and that employees of the respondent are expected to keep track of their available leave time.

It appears that the essential facts involving the herein motion are not in dispute as to the charge of chronic or excessive absenteeism or lateness, N.J.A.C. 4A:2-2.3(a)(4). To the extent that appellant argues (through attorney assertion rather than the required responding affidavit), that appellant was under a mistaken belief that he had been granted FMLA leave for a period of one year rather than six months. I **CONCLUDE** that such assertion does not constitute a dispute as to material fact, especially in light of undisputed evidence that appellant was given notice of the specific period for which leave had been granted. Additionally, appellant's argument that issues of material fact exist in that appellant disputes the appropriateness of the suspension, and whether his conduct supports sustaining the charges do not suffice, as while resolution of those points may well be fact specific, no question of the underlying facts exist. As such, these issues are resolved by applying facts to law and are not in and of themselves a factual dispute.

Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact as to this charge, and that disposition of such is ripe for summary decision. Considering the facts as established, I **CONCLUDE** that the Appointing Authority has met its burden in demonstrating, by a preponderance of credible evidence, that petitioner is **GUILTY** of a violation of N.J.A.C. 4A:2-2.3(a)(4). The charge of chronic or excessive absenteeism or lateness is **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(11) Other sufficient cause. Specifically, appellant is charged with a step-three violation of A-4 on the Mercer County Public Safety Table of Offenses and Penalties which involves chronic or excessive absenteeism from work without pay. Item A-4 on that document appears to merely be suggested penalties for chronic or excessive absenteeism. As such, the analysis would likely be similar to that performed for the previous charge. Accordingly, I **CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(11) Other sufficient cause, is redundant and is hereby **DISMISSED.**

Respondent also sustained charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. Emmons, supra, 63 N.J. Super. at 140.

In the present matter, the essential facts involving this motion are not in dispute as to the charge of conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), I **FIND** that there are no genuine issues of material fact as to this charge and that disposition of such is ripe for summary decision. The record reflects that appellant called off from work, having exhausted all available leave time. While such behavior is not to be encouraged, as evinced by the sustaining of the charge of excessive absenteeism, it can hardly be said to "offend publicly accepted standards of decency" or to otherwise undermine public confidence in the carrying-out of the public's business, especially if done so, as appellant contends, due to honest mistake. I **CONCLUDE** that the record does not support the sustaining of a charge of Conduct Unbecoming, and that charge is hereby **DISMISSED.**

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463. Removal shall not be substituted for a lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The record reflects that appellant has had a charge of chronic or excessive absenteeism or lateness in violation of N.J.A.C. 4A:2-2.3(a)(4) sustained. A review of appellant's disciplinary history informs that this would be a third such infraction. A-4 on the Mercer County Public Safety Table of Offenses and Penalties, although not binding upon this tribunal, recommends a ten-day suspension for a step-three violation. In consideration of the foregoing, along with appellant's disciplinary records, a six-day suspension appears to be a reasonable penalty consistent with progressive discipline. Appellant's argument that appellant is being penalized three times for calling off after the same FMLA period had expired due to what he terms a singular "honest mistake," is unpersuasive. The first and second infractions occurred when appellant called off work for December 9 and 10, 2011, and December 21, 2011, respectively, and only the third infraction is at issue in the current matter) The six-day suspension is **AFFIRMED.**

ORDER

I **ORDER** that respondent's motion for summary decision is hereby **GRANTED**. I further **ORDER** that the charge of chronic or excessive absenteeism or lateness in violation

of N.J.A.C. 4A:2-2.3(a)(4) be **SUSTAINED**. I further **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(6) Conduct unbecoming, and N.J.A.C. 4A:2-2.3(a)(11) Other sufficient cause, specifically chronic or excessive absenteeism from work without pay identified as A-4 on the Mercer County Public Safety Table of Offenses and Penalties be **DISMISSED.** I finally **ORDER** that appellant's six-day suspension also be **AFFIRMED.**

This order may be reviewed by **CIVIL SERVICE COMMISSION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

July 12, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: July 14, 2017

Date Mailed to Parties: July 14, 2017

EAP/nd

8-16-17

STATE OF NEW JERSEY

In the Matter of Kenneth Goodwin-Ryals, Hudson County, Department of Health and Human Services Meadowview Psychiatric Hospital

CSC DKT. NO. 2017-1491
OAL DKT. NO. CSV 17745-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17745-16

IN THE MATTER OF KENNETH GOODWIN-RYALS, HUDSON COUNTY, DEPARTMENT OF HEALTH AND HUMAN SERVICES MEADOWVIEW PSYCHIATRIC HOSPITAL

Arnold S. Cohen, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Georgina Giordano Pallitto, Assistant County Counsel, for respondent (Donato J. Battista, County Counsel)

Record Closed: July 17, 2017 Decided: July 19, 2017

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On November 21, 2016, the Civil Service Commission transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

Before the hearing, the parties settled the case. A copy of their agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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 is authorized by law to make a final decision in this case. 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 under N.J.S.A. 52:14B-10.

7/19/17
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 7-24-17

Date Mailed to Parties: JUL 24 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

dr

Attachment

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 11th day of July, 2017 between the County of Hudson (hereinafter referred to as the "County") and Kenneth Goodwin-Ryals (hereinafter referred to as "Goodwin-Ryals" or the "Employee").

WHEREAS, the Employee was employed with the County as a Hospital Attendant at Meadowview Psychiatric Hospital;

WHEREAS, on September 26, 2016, the County issued a Preliminary Notice of Disciplinary Action charging employee with the following violations: (1) conduct unbecoming a public employee, (2) discrimination that affects equal employment opportunity, and (3) other sufficient causes;

WHEREAS, on October 19, 2016, a disciplinary hearing on the merits was held before Hearing Officer Roderick T. Baltimore; Georgina G. Pallitto appeared on behalf of the County and Hassan Malone, District 1199J, appeared on behalf of the Employee. Said hearing resulted in the immediate imposition of a consecutive forty-five (45) day suspension, ending December 21, 2016. **(Attached hereto as Exhibit A)**;

WHEREAS, on November 21, 2016, Employee filed a notice of appeal with the Office of Administrative Law under docket number CSV 177745-2016 N;

WHEREAS, on December 22, 2016, Employee called the Senior Personnel Technician to inform her that he was resigning effective today. Shortly thereafter he submitted his resignation letter. **(Attached hereto as Exhibit B)**;

WHEREAS, on April 4, 2017, a telephonic conference was held with the Honorable Barry E. Moscowitz, A.L.J. and the matter is scheduled for trial on July 20, 2017;

WHEREAS, the County and Goodwin-Ryals desire to resolve all outstanding issues with respect to the aforementioned appeal of the Preliminary Notice of Disciplinary Action (hereinafter referred to as the "Disciplinary Action Appeal"); and

NOW, THEREFORE, in consideration of the premises and conditions set forth herein, the County and Goodwin-Ryals agree as follows:

1. **DISCIPLINARY ACTION**

a. Goodwin-Ryals pleads guilty to the charges as set forth in the Disciplinary Action dated September 26, 2016 stemming from the allegations raised within, a copy of which is deemed incorporated herein as if set forth at length.

b. Goodwin-Ryals agrees to accept a disciplinary penalty of thirty (30) days suspension, reduced by fifteen (15) days from the forty-five (45) days served. Said suspension days will be without pay and shall be recorded as such with the New

Jersey Department of Personnel. The County agrees to reimburse Goodwin-Ryals for the fifteen (15) days pay.

c. In further good and sufficient legal consideration for the above, the County agrees to forebear the pending disciplinary action appeal by accepting Goodwin-Ryals' resignation submitted on or about December 22, 2016, made in violation of his responsibility to provide adequate advance notice. In addition to all of the undertakings as set forth in the following paragraphs of this agreement, Goodwin-Ryals agrees to never accept or seek employment in the future with the County of Hudson or any of its independent public agencies with the County.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE**

In further consideration of the settlement hereinabove, the Employee, his/her heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that they have not been threatened or coerced into signing this Agreement, on the terms which follow:

a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint,

or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of any matter or thing that has happened, developed or occurred prior to the date of this Agreement related to the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under federal, state or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the

Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act

of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare. The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2(a) shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any federal, state or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should he/she feel that he/she was a victim of unlawful discrimination.

c. If Releasor materially violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. **NO DISPARAGING STATEMENTS**

The parties to this settlement agree that they will not make any statement(s) relating to the instant disciplinary action that has, have, or can be expected to have the effect of disparaging any of the parties including the Releasor, the County, or any of its employees. However, this agreement shall be part of Employee's personnel file and shall be subject to disclosure for any and all lawful purposes.

4. **NON ADMISSION OF LIABILITY**

This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be

construed as an admission of any allegation or of liability by Releasor, except as expressly provided in Paragraph 1 herein, or by the County, by whom any such liability is expressly denied.

5. **INDEMNIFICATION**

If either party violates this Agreement in any way, Releasor agrees to pay, in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the opposing party as a result of such violation, including reasonable attorney's fees.

6. **CONSULTATION WITH ATTORNEY**

Releasor has consulted with his/her attorney and/or Union Representative with respect to this Agreement and has reviewed with his/her Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

7. **REASONABLE PERIOD OF TIME**

Releasor agrees that he/she has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but that Releasor may waive this twenty-one (21) day period by signing in the space provided at the end of this Agreement.

8. **COMPLETE AGREEMENT**

This Agreement contains the entire agreement between Releasor and the County, and each of them, with respect to the subject matter and supercedes all prior agreements, understandings and/or dealings whether written or otherwise with respect to the same subject matter. There is no agreement on the part of the County to do anything other than what is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of New Jersey. It is understood between and among all parties hereto that the terms of this settlement shall not have any precedential effect or constitute binding practice.

9. **MODIFICATION**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. **SEVERABILITY**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

11. **ATTESTATION**

Releasor represents and warrants that he/she has carefully read each and every provision of this Agreement and that he/she fully understands all of the terms and conditions contained in each provision of this Agreement. Releasor represents and warrants that he/she enters into this Agreement voluntarily, of his/her own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

12. **REVOCATION**

Releasor may revoke this Agreement within seven (7) days after the date this Agreement is executed by Releasor. This revocation must take the form of written notice by Releasor that Releasor intends to revoke this Agreement. This revocation must be provided directly to the County, addressed to Director Darice Toon, Hudson County Meadowview Psychiatric Hospital, 595 County Avenue, Secaucus, New Jersey 07094. This seven (7) day revocation period may not be waived by Releasor.

IN WITNESS WHEREOF, and intending to be legally bound I, Kenneth Goodwin-Ryals, hereby execute the foregoing Agreement this 11th day of July, 2017.

KENNETH GOODWIN-RYALS

ARNOLD S. COHEN
Attorney at Law
State of New Jersey

COUNTY OF HUDSON

BY: _____ DATED: 9/12/17
Darice Toon, Director

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the twenty-one (21) day period referred to in the 7th recital of this Agreement.

KENNETH GOODWIN-RYALS DATED: 7/11/17

8-16-17

STATE OF NEW JERSEY

In the Matter of Marquell Gurley, City of Newark, Department of Public Safety

CSC DKT. NO. 2017-649
OAL DKT. NO. CSV 16510-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 16510-16
AGENCY DKT. NO. 2017-649

MARQUELL GURLEY,
Petitioner,
v.
CITY OF NEWARK,
DEPARTMENT OF PUBLIC SAFETY,
Respondent.

Arnold S. Cohen, Esq., for appellant (Oxfeld Cohen, PC, attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent City of Newark (Willie L. Parker, Corporation Counsel, attorneys)

Record Closed: July 17, 2017 Decided: July 19, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

On October 28, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The parties have agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

July 19, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: 7-24-17

Date Mailed to Parties: JUL 24 2017
lr

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MARQUELL GURLEY,	**STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW**
Appellant,	
v.	**OAL DOCKET NO. CVS 16510-2016**
CITY OF NEWARK,	**SETTLEMENT AGREEMENT AND AND GENERAL RELEASE**
Respondent,	

This Settlement Agreement and General Release ("Agreement") is made and entered into by the Newark Police Communications Clerk Marquell Gurley ("Gurley" or "Appellant"), SEIU Local 617 ("Union") and the City of Newark ("City "or "Respondent") (Gurley, the Union and the City are collectively referred to hereinafter as the "Parties"). This agreement is made and entered into by the parties in full settlement of Gurley's appeal regarding the above matter.

Departmental disciplinary charges were brought against Gurley by the Newark Police Department. The Final Notice of Disciplinary Action and Specifications dated August 23, 2016. (hereafter "FNDA"), contained the following charges: Attention to Duty, in violation of Newark Police Department Rules and Regulations Chapter 18:13; Obedience to Orders, in violation of Newark Police Department Rules and Regulations Chapters 5:4.1 and New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3(a) 11 for which Gurley was suspended for Twenty-Five (25) days beginning August 23, 2016 to September 26, 2016.

It is agreed as follows:

1. The charges listed in the FNDA are upheld.
2. Gurley agrees to accept Twenty (20) suspension days. The City will amend Gurley's disciplinary record to reflect the 20 day suspension.
3. The total number of days of back pay to be paid by the Appointing Authority to the appellant is five (5).
4. The parties acknowledge Gurley will be credited with pension and seniority time for the five (5) days in which he been suspended.

5. Gurley further waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
6. Gurley and the Union each agree not to appeal the terms and conditions of this Agreement or any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/ or to any other New Jersey State Court or agency and/or to any United States Court or agency.
7. Gurley and the Union each further agree that there is no consideration due Gurley, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except otherwise provided herein.
8. Except for the assessment of Gurley's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.
9. Gurley and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in an manner grounded, based upon, or related to the FNDA.
10. Gurely is bound by this Agreement. Anyone who succeeds to Gurley's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
11. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.
12. Gurley and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
13. This Agreement contains the sole and entire agreement between Gurley, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Gurley specifically represents and acknowledges in

executing this Agreement that he is not relied upon any representatives, with regard to the subject matter in this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly state to be a modification of the Agreement.

14. Gurley agrees and acknowledges that he has been fully and fairly represented by his Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
15. Gurley agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representation and he enters into the same knowingly and voluntarily.
16. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
17. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.
18. By signing this Settlement Agreement, Gurley states that:

a) He has read it;
b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;
c) He agrees with everything in it;
d) His representative negotiated this Agreement with his knowledge and consent;
e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;
f) He has been given at least twenty-one (21) days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of seven (7) days following the execution of this Agreement he may revoke this Agreement and the Agreement shall become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

6/27/2017
Date

BY: _____
City of Newark Police Department

6/28/17
Date

BY: _____
Union Representative/Attorney

6/28/17
Date

_____
Marquell Gurley

Approved as to Form and Legality:

_____
Date

_____
Law Department

g) He understands that for a period of seven (7) days following the execution of this Agreement he may revoke this Agreement and the Agreement shall become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

6/27/2017
Date

BY: _____
City of Newark Police Department

_____
Date

BY: _____
Union Representative/Attorney

_____
Date

_____
Marquell Gurley

Approved as to Form and Legality:

6/30/17
Date

_____
Law Department
City of Newark

CERTIFICATION

I, Marquell Gurley, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement. I am satisfied with the representation and I enter this Settlement voluntarily.

I also understand that if this Settlement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7-17-2017
DATE

Marquell Gurley
NAME

STATE OF NEW JERSEY

In the Matter of Daniel Hillesheim City of Margate, Department of Public Safety	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NO. 2016-151 OAL DKT. NO. CSV 11093-15 OAL DKT. NOS. PTC 14686-15 & PTC 20648-15 **(Consolidated)**	:	

ISSUED: AUGUST 22, 2017 BW

The appeal of Daniel Hillesheim, Police Officer, City of Margate, Department of Public Safety, removal effective June 8, 2015, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on June 22, 2017. No exceptions were filed.

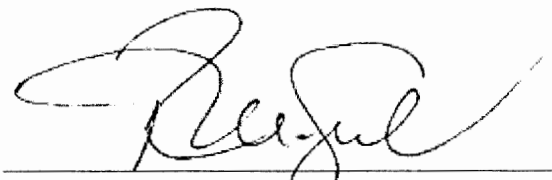
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of August 16, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Daniel Hillesheim.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11093-15
AGENCY DKT. NO. 2016-51

IN THE MATTER OF DANIEL R. HILLESHEIM, MARGATE CITY, DEPARTMENT OF PUBLIC SAFETY,
AND
DANIEL R. HILLESHEIM,
Appellant,
v.
CAMDEN COUNTY COLLEGE POLICE ACADEMY,
Respondent.

OAL DKT. NOS. PTC 14686-15
AND PTC 20648-15
AGENCY DKT. NO. N/A
(CONSOLIDATED)

Patrick C. Joyce, Esq., for appellant, Daniel R. Hillesheim (Jacobs & Barbone, PA, attorneys)

Stephen D. Barse, Esq., for respondent, Margate City Department of Public Safety (Gruccio, Pepper, DeSanto & Ruth, attorneys)

Karl N. McConnell, General Counsel, for respondent, Camden County College Police Academy

Record Closed: June 22, 2017 Decided: June 22, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Petitioner, Daniel R. Hillersheim, was dismissed from a basic training course due to a positive drug test as well as a number of violations of the Police Training Commission (PTC)/Academy Rules. As a result, he was also removed from his position as a Police Officer in the City of Margate.

PROCEDURAL HISTORY

By Notice of Dismissal dated December 4, 2014, the Camden County Police Academy (CCPA) dismissed petitioner from the CCPA. On January 12, 2015, the CCPA notified the Margate City Police Department (MCPD) that petitioner had submitted samples for urinalysis that revealed a positive indication of controlled substances. As a result petitioner was deemed "non-certified" and MCPD issued a Final Notice of Disciplinary Action (FNDA) on June 8, 2015, removing him from the position of Police Officer as of June 8, 2015. On October 29, 2015, CCPA amended the Dismissal Notice to add five additional charges and specifications. Petitioner appealed both Notices of Dismissal and his removal from MCPD. All three matters were transmitted to the Office of Administrative Law (OAL) for disposition where they were filed on July 23, 2015, (Removal), September 15, 2015, (First Notice of Dismissal) and September 15, 2016, (Amended Notice of Dismissal) as contested cases pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matters were originally assigned to the Honorable Bruce M. Gorman, Administrative Law Judge (ALJ) and later reassigned to me upon Judge Gorman's retirement. All three cases were consolidated by Order dated September 29, 2016, and the PTC was deemed to have the predominant interest.

FACTUAL DISCUSSIONS AND FINDINGS

On September 29, 2016, discovery was served upon petitioner's attorney by the CCPA with a request for reciprocal discovery. No responses have been received. This matter was the subject of several telephone conferences to discuss discovery and

scheduling of hearing dates. On more than on occasion during these telephone conferences, petitioner's attorney advised that petitioner has been unresponsive to his requests to complete responses to the discovery. During a telephone conference on March 30, 2017, I directed petitioner's attorney to respond to the propounded discovery with in thirty days. If no response was forthcoming, I directed CCPA to file a Motion to Dismiss. On May 22, 2017, CCPA filed the motion. A telephone conference call was conducted on June 13, 2017, at which time petitioner's attorney advised that petitioner has not responded to numerous attempts to complete discovery and has not corresponded with him whatsoever. On June 13, 2017, I sent a letter to petitioner and all of the attorneys involved in this matter, advising that a telephone conference was scheduled for June 20, 2017, at 3:30 p.m. That letter advised that if petitioner failed to participate in the telephone conference, the cases would be withdrawn and returned to the transmitting agencies. On June 20, 2017, a telephone conference was conducted at 3:30 p.m. All of the attorneys participated in the telephone conference. Petitioner did not. I inquired if petitioner's attorney had heard from his client or had any update as to whether petitioner intended to proceed with his appeal and was advised that the attorney had not heard from his client. The telephone conference was terminated at 3:46 p.m. without petitioner's participation. Petitioner has not contacted the OAL to date to explain his failure to appear.

Based upon the foregoing, I **FIND** as **FACT** that petitioner has failed to respond to discovery served on September 29, 2016, and has not been in contact with his attorney. I also **FIND** as **FACT** the petitioner failed to appear for the telephone conference on June 20, 2017. I also **FIND** as **FACT** that no explanation for the non-appearance of petitioner has been received.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a) "If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the non-appearance within one day, the judge shall, direct the Clerk

to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for a telephone conference on June 20, 2017. Petitioner was notified directly by this office of the date and advised that his participation was mandatory. He failed to appear or participate in the telephone conference and has not submitted any explanation as to his failure to appear.

Accordingly, I **CONCLUDE** that the petitioner has abandoned his appeals and direct the Clerk to return all three matters to the transmitting agencies.

ORDER

It is **ORDERED** that the Clerk return these matters to the Police Training Commission and Civil Service Commission for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

I hereby **FILE** this Initial Decision with **POLICE TRAINING COMMISSION**.

This recommended decision may be adopted, modified or rejected by the **POLICE TRAINING COMMISSION**, who/which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **POLICE TRAINING COMMISSION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest 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 **DEPUTY ATTORNEY GENERAL, POLICE TRAINING COMMISSION, Richard J. Hughes Justice Complex, PO Box 085, Trenton, New Jersey 08625-0085,**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision **POLICE TRAINING COMMISSION** shall forward the record, including this recommended decision and its final decision, to **CIVIL SERVICE COMMISSION** which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **POLICE TRAINING COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant agency decision. If the **CIVIL SERVICE COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

6/22/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at **POLICE TRAINING COMMISSION**: June 22, 2017

Date Mailed to Parties: June 22, 2017

JSK/dm

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CRIMINAL JUSTICE
POLICE TRAINING COMMISSION
PO BOX 085
TRENTON, NJ 08625-0085
TELEPHONE: (609) 984-0960

CHRISTOPHER S. PORRINO
Attorney General

ELIE HONIG
Director

DANIEL HILLESHEIM,

Petitioner

v.

CAMDEN COUNTY COLLEGE
POLICE ACADEMY,

Respondent

FINAL DECISION - AMENDED

OAL Docket No. PTC 14686-15
AND CSV 11093-15[1]
(CONSOLIDATED)

The Police Training Commission received an Initial Decision in this matter on June 22, 2017. This final decision was rendered within the time limits prescribed by N.J.A.C. 1:1-18.6.

Petitioner Daniel Hillesheim was enrolled in the Basic Training Course for Police Officers at the Camden County College Police Academy. On December 4, 2014, Petitioner was dismissed from the basic course for positive drug test for a controlled dangerous substance. Petitioner filed an appeal with the Police Training Commission, which was referred to the Office of Administrative Law. On October 29, 2015 an Amended Dismissal Notice was filed with the Office of Administrative Law. The Amended Dismissal Notice cited positive drug test, violation of orders, violation of candor and honesty, filing false reports, falsifying application, violation of drug regulation, and failure to report injury in violation of PTC or academy rules as the reasons for dismissal.

1 The Initial Decision lists the docket numbers as PTC 14686-15 and PTC 20648-15. After verifying with the Civil Service Commission, the docket numbers have been corrected. Thus, the Initial Decision is modified accordingly.

On September 29, 2016, a discovery request was served on the petitioner's attorney. No response was ever received. Administrative Law Judge (ALJ) John Kennedy scheduled numerous telephone conferences between March 30 and June 20, 2017, none of which the petitioner phoned in for. Petitioner's attorney also reported that his attempts to contact his client were unsuccessful.

As a result of the June 20, 2017 telephone conference and petitioner's failure to appear by telephone on that day, the ALJ concluded that the petitioner has abandoned his appeal and closed the case.

On Wednesday, August 2, 2017, at a regular meeting of the Police Training Commission, the commissioners reviewed the Initial Decision rendered by Judge Kennedy. The commissioners voted to adopt the Initial Decision as the **FINAL DECISION**.

POLICE TRAINING COMMISSION

By: _____
Joseph Walsh - Acting Chairman

8-16-17

In the Matter of Paul Horvath, County of Bergen, Department of Public Works

CSC DKT. NO. 2017-1224
OAL DKT. NO. CSV 17081-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 17081-16

AGENCY DKT. NO. 2017-1224

IN THE MATTER OF PAUL HORVATH, COUNTY OF BERGEN, DEPARTMENT OF PUBLIC WORKS.

Matthew P. Rocco, Esq., for appellant Paul Horvath (Rothman, Rocco & Laruffa, attorneys)

Eric M. Bernstein, Esq., for respondent County of Bergen (Eric M. Bernstein & Associates, attorneys)

Record Closed: July 18, 2017 Decided: July 18, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Paul Horvath filed an appeal from a Final Notice of Disciplinary Action dated October 13, 2016, issued by respondent County of Bergen, Department of Public Works. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on November 10, 2016, for determination as a contested case. Prior to the scheduled hearing, the parties engaged in discussions toward an amicable resolution of the matter. On July 18, 2017, counsel for

respondent forwarded the attached Settlement Agreement and General Release, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 18, 2017
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: July 20, 2017

Date Mailed to Parties: July 20, 2017
jb

Laura Sachs
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

PLEASE CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS THAT YOU MAY HAVE.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter referred to as the "AGREEMENT"), is made this ___ day of January, 2017 by and among the County of Bergen, a governmental entity created under the laws and Constitution of the State of New Jersey, whose principal offices are located at One Bergen County Plaza, Hackensack, New Jersey 07601 (hereinafter referred to as the "COUNTY"); Paul Horvath, an employee of the COUNTY with a mailing address of 522 Park Place, Lyndhurst, New Jersey 07071 (hereinafter referred to as "HORVATH"); and, the United Service Workers Union, Local 655, the majority representative representing the position held by HORVATH, whose address is 13850 Queens Blvd, Jamaica, New York 11435 (hereinafter referred to as the "UNION").

1. The COUNTY, as defined and used throughout this Agreement, shall at all times mean the COUNTY OF BERGEN, its divisions, subdivisions, departments, agencies, affiliates, designees, predecessors, successors and assigns of any and all of them, their past, present and future directors, officers, officials (elected and/or appointed), representatives, employees, agents, attorneys, heirs, executors and administrators, whether in their individual or official capacities, in the past, present and future.

2. HORVATH, as defined and used throughout this Agreement, shall mean PAUL HORVATH, his family (by marriage and/or blood relation), relatives, heirs, representatives, designees, privies, executors, administrators, representatives, assigns, successors-in-interest and predecessors-in-interest.

3. The UNION, as defined and used throughout this Agreement, shall at all times mean the United Service Workers Union, Local 655, its affiliates, subsidiaries, designees,

predecessors, successors and assigns of any and all of them, their past, present and future directors, officers, officials (elected and/or appointed), representatives, employees, agents, attorneys, heirs, executors and administrators, whether in their individual or official capacities, in the past, present and future.

4. The parties agree that this AGREEMENT is contingent upon and subject to execution by HORVATH and the UNION and approval and ratification by the COUNTY.

5. In consideration of the mutual promises of this AGREEMENT and for other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree to resolve all appeals of the disciplinary and administrative actions between them under the terms of this AGREEMENT.

a. HORVATH was employed by the COUNTY as a Mosquito Control Heavy Machine Operator.

b. On or about August 24, 2016, the COUNTY served HORVATH with a Preliminary Notice of Disciplinary Action (hereinafter referred to as the "PNDA") in which the COUNTY charged HORVATH with violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, inefficiency or failure to perform duties; (3) Inability to perform duties; (6) Conduct unbecoming a public employee; (7) Neglect of duty; (8) Misuse of Public Property, including automobiles; (9) Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment; and (12) Other sufficient cause. The COUNTY also charged Horvath with violations of the COUNTY E-Mail / Internet Use Agreement and violations of the COUNTY Anti-harassment Policy.

c. On or about October 13, 2016, after a hearing on the charges presented in the PNDA, the COUNTY served HORVATH with a Final Notice of Disciplinary Action

(hereinafter referred to as the "FNDA") in which the COUNTY found HORVATH guilty of all charges. The COUNTY removed HORVATH from employment with the COUNTY effective October 21, 2016 based upon its findings of guilt.

d. HORVATH appealed the suspension to the Office of Administrative Law ("OAL") in a matter entitled Horvath, Paul v. County of Bergen, Department of Public Works, OAL Docket No. CSV 17081-2016 N, which appeal remains pending.

6. In order to avoid the time and expense and uncertainty of proceeding with the outstanding disciplinary and administrative appeal action, HORVATH, the UNION and the COUNTY, through their respective attorneys and/or representatives, agree to enter into the within AGREEMENT upon the following terms and conditions, which are now to be made effective:

a. HORVATH shall dismiss his appeal entitled Horvath, Paul v. County of Bergen, Department of Public Works, OAL Docket No. CSV 17081-2016 N, with prejudice, and provide an irrevocable resignation from his employment with the COUNTY in good standing retroactive back to October 21, 2016. The County shall accept HORVATH's resignation in good standing in lieu of termination and HORVATH's personnel records shall be amended to reflect that he resigned in good standing effective October 21, 2016.

b. HORVATH and the UNION agree not to contest, in any judicial, quasi-judicial or administrative forum, any of the terms and conditions of this AGREEMENT.

c. HORVATH agrees never to seek employment with the COUNTY, in any capacity whatsoever, after his resignation from the COUNTY.

d. HORVATH waives any and all claims for back or front pay or payment for any accumulated leave time or the receipt of any benefits under any applicable collective

bargaining agreement between the UNION and the COUNTY covering HORVATH and/or any COUNTY policy/practice.

7. HORVATH releases, acquits, gives up and forever discharges any and all claims and rights that he may have against the COUNTY and any and all of its officials (elected and/or appointed), officers, employees, representatives, assigns, successors and designees, up to the time of complete execution of this AGREEMENT by all parties. This releases any and all claims, including those that HORVATH, his family, designees, representatives and assigns are not aware and those not mentioned in this Agreement. This AGREEMENT applies to claims resulting from anything that has happened from HORVATH's first (1st) date of application for employment with the COUNTY through the date of complete execution of this AGREEMENT by all parties and the receipt of the irrevocable letter of resignation from HORVATH. HORVATH specifically releases the following claims:

a. Any collective bargaining agreement with the COUNTY covering HORVATH and/or any other resolution, ordinance, policy, practice and/or procedure addressing, specifically or generally, HORVATH's employment with the COUNTY;

b. The National Labor Relations Act;

c. Title VII of the Civil Rights Act of 1964;

d. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

e. Civil Rights Act of 1991;

f. The Americans with Disabilities Act ("ADA");

g. The Rehabilitation Act of 1973;

h. The Age Discrimination in Employment Act ("ADEA");

i. The Fair Labor Standards Act ("FLSA");

j. The Occupational Safety and Health Act ("OSHA") and the New Jersey Public Employee Occupational Safety and Health Act ("NJPEOSHA");

k. The Equal Pay Act;

l. The Employee Retirement Income Security Act ("ERISA");

m. The New Jersey Law Against Discrimination ("LAD");

n. The New Jersey Conscientious Employee Protection Act ("CEPA");

o. The Family and Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

p. The Federal and New Jersey State Wage and Hour Acts;

q. The Federal and New Jersey State Equal Pay Law;

r. The New Jersey Civil Rights Act;

s. The New Jersey Employer-Employee Relations Act;

t. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

u. Any claims under public policy, contract (express, written, implied or oral), tort and/or common law;

v. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the COUNTY;

w. Any allegation for costs, fees or other expenses, including but not limited to attorneys' fees; and/or,

x. ANY AND ALL CAUSES OF ACTION, CLAIMS OR DAMAGES, WHETHER KNOWN OR UNKNOWN AS OF THE DATE OF

EXECUTION OF THIS AGREEMENT, ARISING FROM OR RELATING IN ANY WAY TO ANY AND/OR ALL PORTIONS OF HORVATH'S EMPLOYMENT WITH THE COUNTY, FROM THE FIRST (1ST) DATE OF HIS EMPLOYMENT WITH THE COUNTY THROUGH AND INCLUDING THE DATE OF COMPLETE EXECUTION OF THIS AGREEMENT BY ALL PARTIES AND THE RECEIPT OF THE IRREVOCABLE LETTER OF RESIGNATION FROM HORVATH.

This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations.

8. HORVATH agrees that the within waiver and release in favor of the COUNTY shall also include his waiver and release from joining or being included in any class or collective action litigation in which any claim is asserted against the COUNTY by Horvath, involving any event that has occurred on or before HORVATH's execution of this Agreement, unless HORVATH is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the COUNTY for its records and response.

9. The waiver by HORVATH, the UNION and the COUNTY of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

10. This AGREEMENT contains the full agreement of HORVATH, the UNION and the COUNTY and may not be modified, altered, changed or terminated, except upon the express prior written consent of HORVATH, the UNION and the COUNTY, which consent must be in writing and signed by HORVATH, the UNION and the COUNTY and/or their duly authorized agents.

11. This case is settled specifically to its facts and this AGREEMENT shall not set a precedent, standard and/or practice between any parties hereto and shall not be enforceable by any party hereto except to enforce the terms contained herein. This AGREEMENT shall not be used in any other proceeding between any of the parties to this AGREEMENT. This AGREEMENT is a self-enforcing, stand-alone document. This AGREEMENT does not modify nor otherwise affect the existing collective bargaining agreement between the UNION and the COUNTY.

12. If any term, provision or condition of this AGREEMENT is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this AGREEMENT.

13. This AGREEMENT shall be construed and interpreted in accordance with the laws of the State of New Jersey.

14. This AGREEMENT shall become effective immediately as to HORVATH and the UNION following execution by HORVATH and the UNION and the receipt of HORVATH's irrevocable letter of resignation and shall become effective upon the COUNTY after approval and signature by all applicable COUNTY officials.

15. HORVATH, the UNION and the COUNTY shall bear all costs and expenses arising from the actions of their own counsel and/or representatives in connection with this AGREEMENT.

16. This AGREEMENT contains the entire agreement between HORVATH, the UNION and the COUNTY with regard to all matters and shall be binding upon and inure to the benefit of their officials (elected and/or appointed), officers (elected and/or appointed), directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs, successors and assigns of each and all other

persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

17. All notices, demands and requests that are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

FOR THE COUNTY OF BERGEN:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

WITH A COPY TO:

Julien X. Neals, Esq., County Counsel and Acting County Administrator
One Bergen County Plaza, 5th Floor
Hackensack, New Jersey 07601

FOR THE UNITED SERVICE WORKERS UNION, LOCAL 655:

Jim Bush
Labor Relations Representative, Local 655
1 Bergen County Plaza, Room 396
Hackensack, NJ 07601

WITH A COPY TO:

Matthew Rocco, Esquire
ROTHMAN ROCCO LARUFFA, LLP
3 West Main Street, Suite 200
Elmsford, New York 10523

FOR PAUL HORVATH:

Paul Horvath
522 Park Place
Lyndhurst, New Jersey 07071

18. HORVATH understands and agrees that the COUNTY has given him twenty-one (21) calendar days from the date of his receipt of this AGREEMENT to consider and review this AGREEMENT with his attorney and/or representative. By his signature below, HORVATH agrees

to waive the twenty-one (21) calendar day provision. Following his execution of this AGREEMENT, HORVATH has a period of seven (7) calendar days to revoke this AGREEMENT. Revocation of the AGREEMENT must be undertaken in accordance with Paragraph 17 above.

19. In entering into this AGREEMENT, HORVATH has relied upon the legal advice of his attorney if he has chosen to retain one, who is the attorney and/or representative of his own choosing, as to the terms of this AGREEMENT, which have been completely read and explained by his attorney and/or representative and those terms are fully understood and voluntarily accepted by HORVATH. By executing this AGREEMENT, HORVATH also warrants and affirms that, at the time of said execution, he was not suffering from any mental or psychological disorder, nor was he under the influence of alcohol or any drug and/or medication, prescribed by a physician or otherwise, which would prevent him from understanding the terms of this AGREEMENT. Furthermore, HORVATH, by executing this AGREEMENT, warrants and affirms that he was not under any mental duress and was not coerced by any individual or other party to enter into this AGREEMENT. HORVATH expressly acknowledges, represents and warrants that: (a) he has carefully read this AGREEMENT; (b) he fully understands the terms, conditions, and significance of this AGREEMENT; (c) he has had ample time to consider and negotiate this AGREEMENT; (d) he has had a full opportunity to review this AGREEMENT; (e) he is able to make an informed decision and is not physically, medically or mentally incapacitated so that he is able to make an informed decision to accept the AGREEMENT; and, (f) he has executed this AGREEMENT voluntarily and knowingly, and with the advice of his own counsel and/or representative.

20. HORVATH agrees that he has been fully and fairly represented by his labor union, Local 655 USWU IUJAT, and its officers, employees, agents, attorneys and assigns, in all matters regarding his employment with the COUNTY and his termination therefrom, including the making and signing of this AGREEMENT.

IN WITNESS WHEREOF, PAUL HORVATH, THE UNITED SERVICE WORKERS UNION, LOCAL 655 and THE COUNTY OF BERGEN have hereunto set their hands this _____ day of _____ 2017.

Witness:

_____

Dated: _____

PAUL HORVATH

Paul Horvath

Dated: 4-10-2017

Witness:

_____

Dated: _____

UNITED SERVICE WORKERS UNION, LOCAL 655

By: _____

Dated: 4/11/17

Attest:

_____

Dated: _____

COUNTY OF BERGEN

By: _____

Dated: 4.13.17

STATE OF NEW JERSEY :
: SS.:
COUNTY OF BERGEN :

I, _____, a Notary Public, do hereby certify that Paul Horvath, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that he signed and delivered the said instrument as his free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this _____ day of _____, 2017.

_____
Notary Public

SETTLEMENT AGREEMENT AND RELEASE REGARDING RETRO PAY UNDER 2016 COLLECTIVE BARGAINING AGREEMENT

1) The parties to this agreement are Paul Horvath ("Horvath"), the County of Bergen ("County"), and United Service Workers Union Local 655 ("Union").
2) In or around November, 2016, the County and Union entered into a renewal collective bargaining agreement providing that certain pay raises, retroactive to January 1, 2016, for employees who were on the County payroll as of October 1, 2016.
3) On August 24, 2016, Horvath was served with Section 31-A charges and the County notified him of its intent to seek his removal from his job with the County.
4) On or around October 13, 2016, Horvath was served with a Section 31-B notice and officially removed from employment with the County.
5) Horvath appealed the final notice of disciplinary action to Civil Service, and the case was referred to the NJ Office of Administrative Law for adjudication.
6) In lieu of proceeding with appeal at OAL, Horvath and the County have agreed, via a separate Agreement, that Horvath will resign from his employment with the County and waive all claims/remedies, as is set forth in the particulars of that Agreement.
7) Horvath maintains he is entitled to retro pay under the CBA, irrespective of his termination or the reasons therefore. The County denies that Horvath is entitled to any retro pay.
8) The parties agree that, were Horvath entitled to any retro pay, the amount of such retro pay is $884.00.
9) Without admitting that Horvath is entitled to such retro pay, the County, as an inducement for Horvath to enter into the settlement agreement resolving the OAL appeal, shall pay Horvath $884.00 in retro pay by good check or direct deposit in the next regular payroll cycle after the County executes this Agreement.
10) Horvath warrants that he is owed no other wages, commissions, bonuses, or any other forms of compensation or reimbursements from Bergen County, from the beginning of time up to and through the making of this Agreement.
11) Horvath shall execute this Agreement, and the OAL settlement agreement simultaneously, and send them both to the County for signature.
12) This matter is settled special to its facts and shall not constitute precedent between the Employer and the Union with regard to any other matters involving retro pay under the renewal CBA.
13) Horvath and the Union agree that this Agreement is to be kept strictly confidential and may not be disclosed to any other parties.
14) The parties agree that this Agreement is supported by adequate consideration.
15) Horvath agrees that he has been fully and fairly represented by Local 655 in all matters pertaining to this Agreement and his separation from employment.

Bergen County

Paul Horvath

Local 655 4/11/17

8-16-17

STATE OF NEW JERSEY

In the Matter of Iesha Jackson, Ancora Psychiatric Hospital, Department of Human Services

CSC DKT. NO. 2016-2615
OAL DKT. NO. CSV 03552-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE CIVIL SERVICE COMMISSION ON AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries and Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03552-16

AGENCY DKT. NO. 2016-2615

IN THE MATTER OF IESHA JACKSON, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

Willian, A Nash, Esq., for petitioner, Iesha Jackson (Nash Law Firm, LLC., attorneys)

Marolhin Mendez, Deputy Attorney General, for respondent, Department of Human Services, Ancora Psychiatric Hospital (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 13, 2017 Decided: July 25, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 4, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 25, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 7.26.17

Date Mailed to Parties: 7.26.17

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

J-1

OAL DKT. CSV 03552-2016 S
and CSV 03554-2016 S
AGENCY DKT: 16-50276 and 16-50277

SETTLEMENT AGREEMENT

IN THE MATTER OF
JACKSON, IESHA
AND
ANCORA PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A.

a. The **Final Notice of Disciplinary Action** dated **January 26, 2016** contained the following charges and proposed discipline:

Charge

1. NJAC 4A2-2.3(a)6 conduct unbecoming a public employee
2. NJAC 7A:2-2.3(a)7 – Neglect of duty
3. NJAC 4A2-2.3(a)11 other sufficient cause
4. 4:08 B-2.1 Neglect of duty
5. 4:08 C5 Inappropriate physical contact/mistreatment of a patient
6. 4:08 E1 Violation of a hospital policy

b. The second **Final Notice of Disciplinary Action** dated **January 26, 2016** contained the following charges and proposed discipline:

1. NJAC 4A2-2.3(a)6 conduct unbecoming a public employee
2. NJAC 4A2-2.3(a)11 other sufficient cause
3. 4:08 C4.1 Verbal abuse

4. 4:08 C7.2 Fighting, creating a disturbance on State Property

5. 4:08 C8.1 Falsification; intentional misstatement

6. 4:08 C9 Insubordination

7. 4:08 E1.1 Violation of a rule

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the respondent has imposed on the Appellant to date is as follows: **N/A**_____

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: **No back pay**_____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows:__ **N/A**_____

C. The Appellant Iesha Jackson withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees to rescind all the charges against Appellant. **The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).**

The parties acknowledge that under N.J.A.C. 17:1-2 18(b), no pension or seniority time may be credited for period for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charged will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended April 14, 2017.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Iesha Jackson disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

05/30/17
DATE

Iesha Jackson, Appellant

5/30/17
DATE

ON BEHALF OF Appellant

5/30/17
DATE

ON BEHALF OF Respondent

DAG 5/30/16.

CERTIFICATION

I, Iesha Jackson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

05/30/17
DATE

Iesha Jackson

8-16-17

In the Matter of Iesha Jackson,
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2016-2886
OAL DKT. NO. CSV 03554-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03554-16

AGENCY DKT. NO. 2016-~~2615~~ 2886

IN THE MATTER OF IESHA JACKSON, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

Willian, A Nash, Esq., for petitioner, Iesha Jackson (Nash Law Firm, LLC., attorneys)

Marolhin Mendez, Deputy Attorney General, for respondent, Department of Human Services, Ancora Psychiatric Hospital (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 13, 2017 Decided: July 25, 2017

BEFORE **DEAN J. BUONO**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on March 4, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 25, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 7.26.17

Date Mailed to Parties: 7.26.17

/vj

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

J-1

OAL DKT. CSV 03552-2016 S
and CSV 03554-2016 S
AGENCY DKT: 16-50276 and 16-50277

SETTLEMENT AGREEMENT

IN THE MATTER OF
JACKSON, IESHA
AND
ANCORA PSYCHIATRIC HOSPITAL,
DEPARTMENT OF HUMAN
SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A.

a. The **Final Notice of Disciplinary Action** dated **January 26, 2016** contained the following charges and proposed discipline:

Charge

1. NJAC 4A2-2.3(a)6 conduct unbecoming a public employee
2. NJAC 7A:2-2.3(a)7 – Neglect of duty
3. NJAC 4A2-2.3(a)11 other sufficient cause
4. 4:08 B-2.1 Neglect of duty
5. 4:08 C5 Inappropriate physical contact/mistreatment of a patient
6. 4:08 E1 Violation of a hospital policy

b. The second **Final Notice of Disciplinary Action** dated **January 26, 2016** contained the following charges and proposed discipline:

1. NJAC 4A2-2.3(a)6 conduct unbecoming a public employee
2. NJAC 4A2-2.3(a)11 other sufficient cause
3. 4:08 C4.1 Verbal abuse

4. 4:08 C7.2 Fighting, creating a disturbance on State Property

5. 4:08 C8.1 Falsification; intentional misstatement

6. 4:08 C9 Insubordination

7. 4:08 E1.1 Violation of a rule

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the respondent has imposed on the Appellant to date is as follows: **N/A**_____

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: **No back pay**_____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows:__ **N/A**_____

C. The Appellant Iesha Jackson withdraws her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees to rescind all the charges against Appellant. **The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).**

The parties acknowledge that under N.J.A.C. 17:1-2 18(b), no pension or seniority time may be credited for period for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charged will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended April 14, 2017.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Iesha Jackson disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

05/30/17
DATE

Iesha Jackson
Iesha Jackson, Appellant

5/30/17
DATE

ON BEHALF OF Appellant

5/30/17
DATE

ON BEHALF OF Respondent

DAG
5/30/16.

CERTIFICATION

I, Iesha Jackson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

05/30/17
DATE

Iesha Jackson

8-16-17

In the Matter of Lance Jackson, City of Linden, Department of Public Property Community Services

CSC DKT. NO. 2017-523
OAL DKT. NO. CSV 12789-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 12789-16

IN THE MATTER OF LANCE JACKSON,
CITY OF LINDEN, DEPARTMENT OF
PUBLIC PROPERTY COMMUNITY SERVICES.

Randi Doner April, Esq., for appellant (Oxfeld Cohen, P.C., attorneys)

Daniel J. McCarthy, Esq., for respondent (Rogut McCarthy, LLC, attorneys)

Record Closed: July 20, 2017 Decided: July 25, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 23, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Stipulation of Settlement was submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 25, 2017
DATE

JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 8-3-17

Date Mailed to Parties: AUG 3 2017

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LANCE JACKSON	OAL DOCKET NO.: CSV 12789-16
and	AGENCY NO.:
THE CITY OF LINDEN	STIPULATION OF SETTLEMENT

It is hereby stipulated and agreed by and between the parties, Lance Jackson ("Employee") and City of Linden ("City"), hereto that the above-captioned matter be and is hereby settled upon the following terms and conditions:

1. Employee voluntarily dismiss with prejudice his appeal in the above captioned matter.

2. Employee voluntarily accepts a suspension without pay for a period of three (3) months.

3. The City agrees to provide Employee with three (3) months of back pay, less appropriate deductions.

4. Each party shall be responsible for their respective pensions payments regarding the three (3) months of back pay.

5. Employee shall be entitled to return to duty effective the execution of this Agreement. Any time beyond January 28, 2017 until the execution of this Agreement shall be considered administrative leave without pay. During any administrative leave period, Employee shall be entitled to seniority and emoluments retroactive to January 28, 2017.

6. Employee voluntarily enters into this Stipulation and Settlement.

7. Employee shall not request any other relief with respect to this matter, other than that provided for by this Agreement. Employee voluntarily and in consideration of the above,

hereby releases the City, its employees, officials, agents and assigns from all claims that he may have now or may ever have against the City, its employees, officials, agents and assigns from the date of his initial employment with the City, including but not limited to all claims, liabilities, costs, and attorney fees under the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.), the Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e) et seq.), the Americans With Disabilities Act, the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1 et seq.), the New Jersey Civil Rights Act or any other state or federal statute or the common law.

8. Employee agrees that the City has advised him to consult an attorney and/or Union Representative before accepting and executing this Agreement and that he has been afforded the opportunity to consider the terms of this Agreement with advice of counsel and has at least 21 days to consider and review this Stipulation of Settlement, unless Employee waives this 21-day period.

9. Employee understands that he may revoke this Agreement for a period of seven (7) calendar days following the day he signs this Agreement. Any revocation within this period must be submitted, in writing, to Allan C. Roth, Esq., Labor Relations Specialist, 301 N. Wood Avenue, Linden, New Jersey 07036, and state "I hereby revoke my acceptance of our negotiated settlement agreement and general release." Said revocation must be postmarked within seven (7) calendar days after Employee signs this Agreement and General Release. This seven (7) day period cannot be changed or waived by Employee or the City.

10. Each party shall bear the costs of their own legal fees.

11. Employee shall not request any other relief with respect to this matter, other than that provided for by this Agreement.

12. Employee shall not institute any appeal or any other action with respect to this matter.

13. Employee has read the above stipulation and conferred with counsel and/or his union representative and hereby agrees to abide by the terms of this settlement agreement.

14. This settlement agreement is not intended to establish precedent in any future disciplinary matters.

EMPLOYEE

DATED: 3/3/17

LANCE JACKSON

DATED: 3/6/17

RANDI APRIL, ESQ.
ATTORNEY FOR EMPLOYEE

CITY OF LINDEN

DATED: 5/9/17

DANIEL J. MCCARTHY, ESQ.
ATTORNEY FOR THE CITY

WAIVER

By signing below, the undersigned Employee hereby irrevocably elects to waive the 21-day period ~~referred to in~~ Paragraph 8, Page 2, of this Agreement.

Lance Jackson

Date 3/2/17

In the Matter of J.L.,
Kean University

CSC DKT. NO. 2016-2750
OAL DKT. NO. CSV 16884-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16884-16

AGENCY DKT. NO. 2016-2750

JOSE LARANJEIRA (J.L.),

Appellant,

vs.

KEAN UNIVERSITY,

Respondent

Joshua M. Forsman, Esq., for Appellant (Caruso, Smith, Picini, attorneys)

Jennifer L. Cavin, Deputy Attorney General, for Respondent (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: July 28, 2017 Decided: July 31, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter is on remand from the Appellate Division to the Civil Service Commission wherein the Appellate Division reversed the Final Decision of the Civil Service Commission and ordered a hearing before the Office of Administrative law (OAL).

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on October 27, 2016, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

A telephone prehearing conference was held on November 22, 2016 and a hearing was scheduled to be held on May 26, 2017. Via letter dated April 28, 2017, respondent's counsel requested an extension of the discovery end date and an adjournment of the hearing, to allow the parties additional time to work towards reaching a settlement in this matter. Thereafter, a telephone status conference was held on June 29, 2017, where the parties advised the undersigned that a settlement had been reached and requested additional time to finalize their terms of settlement. By letter dated July 28, 2017, Respondent's counsel submitted to the undersigned a Consent Agreement setting forth the terms of their agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached Consent Agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the Consent Agreement; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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.

July 31, 2017

DATE

THOMAS R. BETANCOURT, ALJ

8-2-17

Date Received at Agency:

Date Mailed to Parties: AUG 2 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Kean University
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625-0112
Jennifer.Cavin@dol.lps.state.nj.us

By: Jennifer L. Cavin
Deputy Attorney General
ID No: 011252010
(609) 292-8572

LARANJEIRA, JOSE (J.L.)	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
v.	OAL Dkt. No: CSV 16884-2016 N Agency Ref No: 2016-2750
KEAN UNIVERSITY	ADMINISTRATIVE ACTION
	CONSENT AGREEMENT

THIS CONSENT AGREEMENT is made and entered into on this 30th day of June 2017, by and between Jose Laranjeira and Kean University.

WHEREAS, Appellant, Jose Laranjeira, and Respondent, Kean University, have mutually agreed to settle the above-captioned matter, with Joshua M. Forsman, Esq. appearing on behalf of Jose Laranjeira, and with CHRISTOPHER S. PORRINO, Attorney General of New Jersey, by Jennifer L. Cavin, Deputy Attorney General, appearing on behalf of Kean University; and

WHEREAS, this matter arose from Kean University's March 28, 2013 decision that Jose Laranjeira violated the New Jersey State Policy Prohibiting Discrimination in the Workplace ("the State Policy"); and

WHEREAS, Jose Laranjeira appealed Kean University's March 28, 2013 decision to the Civil Service Commission ("Commission"), which the Commission denied on December 19, 2013; and

WHEREAS, Jose Laranjeira appealed the Commission's decision, and on February 10, 2016, the New Jersey Superior Court, Appellate Division, reversed and remanded the Commission's December 19, 2013 final agency decision for a hearing before the Office of Administrative Law ("OAL"); and

WHEREAS, on October 21, 2016 the Commission issued an Order referring this matter to the OAL for a hearing in accordance with the Appellate Division's February 10, 2016 decision; and

NOW, THEREFORE, the parties voluntarily agree to fully resolve and settle all disputed matters by entering into the following Consent Agreement, which fully disposes of all issues in controversy between Jose Laranjeira and Kean University:

1. Kean University will remove any reference to the underlying matter, including, but not limited to,

its March 28, 2013 determination letter finding that Jose Laranjeira violated the New Jersey State Policy Prohibiting Discrimination in the Workplace (the State Policy) from Jose Laranjeira's personnel file at Kean University.

2. In consideration for Kean University agreeing to remove the March 28, 2013 decision from Jose Laranjeira's personnel file at Kean University, Jose Laranjeira withdraws his OAL appeal and agrees to waive any and all hearings concerning the above-captioned matter.

3. Jose Laranjeira waives and releases all claims against Kean University with regard to the above-captioned matter, including any award of back pay, counsel fees, or any other monetary relief.

4. Kean University shall amend Jose Laranjeira's personnel records to conform to the terms of the settlement. All internal records of Kean University will be kept intact, aside from those pertaining to the underlying matter, which will be removed. Kean University shall not release information regarding Jose Laranjeira's employment

with Kean University except such information that is considered public under N.J.A.C. 4A:1-2.2. Nothing herein shall preclude Kean University from releasing information on this matter to anyone who has a release executed by Jose Laranjeira or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

5. The settlement of this matter shall not constitute precedent or be considered in other pending or future litigation.

6. The Settlement Agreement dated April 8, 2016 between Jose Laranjeira and Kean University remains in full force and effect.

7. The parties agree that this Consent Agreement fully resolves all issues between them arising from the March 28, 2013 decision that Jose Laranjeira violated the State Policy.

Jose Laranjeira

Date: 6/30/17

Joshua M. Forsman, Esq.
Attorney for Jose Laranjeira
Caruso Smith Picini
60 Route 46 East
Fairfield, NJ 07004

Date: 6/30/17

Jennifer L. Cavin
Deputy Attorney General
Attorney for Kean University
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625

Date: 6/30/17

Thomas R. Betancourt, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Date: 7/31/17

8-16-17

In the Matter of Kevin Kinckle,
William Paterson University

CSC DKT. NO. 2017-2904
OAL DKT. NO. CSV 04693-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 04693-17

IN THE MATTER OF KEVIN KINCKLE,
WILLIAM PATERSON UNIVERSITY.

John F. Gillick, Esq., for petitioner (Martin Kane Kuper, attorneys)

Andy Jong, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of the State of New Jersey, attorney)

Record Closed: July 20, 2017 Decided: July 25, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on April 3, 2017, for determination as a contested case. On July 7, 2017, the parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

July 25, 2017
DATE

JOAN BEDRIN MURRAY, ALJ

7-28-17

Date Received at Agency:

JUL 28 2017

Date Mailed to Parties:

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. 04693-2017 N

OAL DKT. NO. CSV 04693-2017 N
AGENCY DKT. NO. 2017-2904
SETTLEMENT AGREEMENT

IN THE MATTER OF
KEVIN KINCKLE
AND
WILLIAM PATERSON UNIVERSITY

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated March 1, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee-Removal effective March 1, 2017
2. N.J.A.C. 4A:2-2.3(a)8 Misuse of public property, including motor vehicles-Removal effective March 1, 2017
3. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause-Removal effective March 1, 2017

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: N/A.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.
4. Respondent William Paterson University will accept a General Resignation from Appellant Kevin Kinckle, pursuant to N.J.A.C. 4A:2-6.3 effective March 1, 2017.

Appellant Kevin Kinckle agrees not to seek or accept employment with William Paterson University at any time in the future.

C. The Appellant Kevin Kinckle withdraws his appeal and request for a hearing, and the Respondent Appointing Authority William Paterson University agrees that:
the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).
The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. William Paterson University (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of William Paterson University will be kept intact. William Paterson University shall abide by N.J.A.C. 4A:1-2.2 and may not disclose information related to the underlying disciplinary charges, including any potential future employer of Appellant Kevin Kinckle. Nothing herein shall preclude the William Paterson University from releasing information on this matter to anyone who has an executed authorization by Appellant, or as otherwise consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent William Paterson University with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Kevin Kinckle's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, William Paterson University, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

6/7/17
DATE

Kevin Kinckle, Appellant

7/10/17
DATE

ON BEHALF OF Appellant

7/12/2017
DATE

ON BEHALF OF Respondent
Stephen Bolyai
Senior Vice President for
Administration and Finance

CERTIFICATION

I, Kevin Kinckle, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/7/17
DATE

Kevin Kinckle

In the Matter of Paul Lawrence, Borough of Milltown, Department of Streets and Parks

CSC DKT. NO. 2017-884
OAL DKT. NO. CSV 14975-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 14975-16

AGENCY DKT. NO. 2017-884

IN THE MATTER OF PAUL LAWRENCE, BORO OF MILLTOWN, DEPARTMENT OF STREETS AND PARKS.

Kevin P. McGovern, Esq., for appellant (Mets, Schiro & McGovern, LLP, attorneys)

Andrea E. Wyatt, Esq., for respondent (Gilmore & Monahan, attorneys)

Record Closed: July 12, 2017 Decided: July 13, 2017

BEFORE **ELLEN S. BASS,** ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law where it was filed on September 30, 2017 for determination as a contested case.

The parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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**, who 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.

July 13, 2017
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: July 17, 2017

Date Mailed to Parties: July 17, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

SETTLEMENT AGREEMENT AND RELEASE

Paul Lawrence v. Borough of Milltown
OAL Docket No.: CSV 14975-2016N
Agency Reference No. 2017-884

This Settlement Agreement and Release ("Agreement") is made this 28 day of June 2017, by and between Appellant Paul Lawrence ("Lawrence"" or "Appellant") and Respondent, Borough of Milltown, ("Borough" or "Respondent") (collectively, the "Parties").

WHEREAS, on or about September 2, 2016, Respondent issued Preliminary Notice of Disciplinary Action to Appellant, Truck Driver, asserting a Charge of Conduct Unbecoming, and

WHEREAS, the Departmental Hearing of the above Charge took place on September 19, 2016, and

WHEREAS, on September 22, 2016 Respondent issued a Final Notice of Disciplinary Action imposing an unpaid suspension on Appellant of thirty (30) working days beginning on September 2, 2016 and concluding on October 14, 2016; and

WHEREAS, Appellant initiated the instant appeal with the Civil Service Commission ("CSC"); and

WHEREAS, without waiving their respective positions and without any admissions as to liability, the Parties wish to fully resolve the pending appeal and Administrative Law Hearing, and all related claims and defenses by and between them pursuant to the terms and conditions set forth below; and

NOW THEREFORE, the Parties hereby agree to the following terms as full and final settlement of the above matter:

1. This Agreement sets forth all of the terms and conditions of the Parties' agreement.

2. Respondent will reduce the penalty imposed upon Appellant to thirty (30) calendar days, beginning on September 2, 2016 and concluding on October 2, 2016. Appellant shall be entitled to receive ten (10) days back pay, representing the period between October 3, 2016 and October 14, 2016. As the payment represents back pay, all usual and mandatory deductions and withholdings will be made by Respondent.

3. The payment under Paragraph 2 shall represent Respondent's entire financial obligation to Appellant in connection with this action.

4. The Parties agree that Appellant is not a prevailing party and as such, Appellant expressly waives any claims for attorneys' fees incurred in connection with this action.

5. The payment under Paragraph 2 shall be made to Appellant within thirty (30) days after approval of this Agreement by the Honorable Ellen S. Bass, A.L.J.

6. Appellant agrees to voluntarily dismiss the instant Appeal with prejudice.

7. Respondent agrees to revise all relevant internal records to reflect the reduction of penalty imposed upon Appellant pursuant to Paragraph 2 hereunder. Appellant agrees that Respondent had probable cause to impose the penalty as set forth in Paragraph 2 hereunder.

8. In exchange for the consideration set forth in Paragraphs 2 and 7, the sufficiency of which is hereby acknowledged, Appellant hereby waives, releases and discharges any and all claims or rights that he has or may have against Respondent, Borough of Milltown, and any and all other officers, employees, representatives, agents, successors and assigns of Respondent (collectively, the "Released Parties"), including any claim for attorneys' fees, costs or other monetary relief, relating to the facts and circumstances of his pending appeal. This waiver, release and discharge includes, without limitation all claims which Appellant may have regarding discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of 2002; the False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, disability benefits laws, the United States Constitution, the New Jersey Constitution; and/or any other alleged violation of any federal, state or local law, regulation or ordinance; any claim based on contract, implied contract, collective bargaining agreement, tort law, personal injury, or public policy, including but not limited to any claim for wrongful discharge, back pay, vacation pay, sick pay, personal day pay, wages, attorneys' fees, costs, and/or future wage loss. Appellant does not waive or release any claim that cannot be waived or released as a matter of law.

9. To comply with the Older Workers Benefit Protection Act, if applicable, this Agreement advises Appellant of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that he: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims he may have under the Age Discrimination in Employment Act; (iv) has been given twenty-one (21) days within which to consider this Agreement; and (v) has 7 days from the date of the execution of this Agreement to revoke it. Appellant understands that he may rescind this Agreement within 7 calendar

days of signing it, and such rescission must be in writing and delivered to counsel for the Respondent either by hand or by certified mail within the 7 day period.

10. The Parties agree to keep confidential and not share any information as to the terms of the settlement agreement and release, except as required by law.

11. This Agreement is subject to the approval of the Office of Administrative Law and the Civil Service Commission.

12. This Agreement may not be modified, altered, changed, discharged, terminated or waived, except upon express written consent of the Parties.

13. This Agreement shall not serve as a precedent for any other employee or matter.

14. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Agreement shall be fully enforceable.

15. The Parties acknowledge that they have entered into this Agreement voluntarily, with the assistance of counsel, and hereby sign it without duress or coercion.

16. This Agreement shall be governed by the laws of the State of New Jersey.

17. By signing this Agreement, Appellant acknowledges that he has been fully and fairly represented in this matter by his union, OPEIU Local 32, and that he is satisfied with that representation.

The Parties hereby acknowledge their agreement to the terms and conditions set forth above by signing below.

APPELLANT

PAUL LAWRENCE

By: Paul Lawrence

Dated: 06/28/17

RESPONDENT

BOROUGH OF MILLTOWN

By:

Dated: 7/3/17

In the Matter of Lamont Loftin, Department of Human Services, Ann Klein Forensic Center

CSC DKT. NO. 2017-754
OAL DKT. NO. CSV 14108-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 14108-16
AGENCY DKT. NO. 2017-754

IN THE MATTER OF LAMONT LOFTIN,
DEPARTMENT OF HUMAN SERVICES,
ANN KLEIN FORENSIC CENTER.

Rashidah Hasan, Esq., for appellant

Christopher Weber, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 14, 2017 Decided: July 20, 2017

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to the Office of Administrative Law on September 19, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

July 20, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: 7/24/17

Date Mailed to Parties: 7/24/17

/cb

OAL DKT. NO. CSV 14108-2016S
AGENCY DKT. NO. 2017-754

SETTLEMENT AGREEMENT

IN THE MATTER OF
LAMONT LOFTIN
AND
DEPARTMENT OF HUMAN SERVICES,
ANN KLEIN FORENSIC CENTER

The parties in this appeal, Appellant Lamont Loftin (hereinafter "Appellant"), and Respondent Appointing Authority Department of Human Services (hereinafter "Respondent"), have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action, dated August 27, 2016, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming an employee)	Removal	August 2, 2016
2. Administrative Order 4:08 C.3 (physical or mental abuse of a patient, client or resident)	Removal	August 2, 2016
3. Administrative Order 4:08 C.5 (inappropriate physical contact or mistreatment of a patient, client or resident)	Removal	August 2, 2016

B. The parties have agreed to the following:

1. The total number of days of suspended pay Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by Respondent to Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

4. Respondent will accept a General Resignation from Appellant, pursuant to N.J.A.C. 4A:2-6.3, effective August 2, 2016. Appellant agrees not to seek or accept employment with Respondent, or any of its subsidiaries, at any time in the future.

C. Appellant withdraws his appeal and request for a hearing, and Respondent agrees that the following result will occur with regard to each charge:
The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that pursuant to N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Respondent shall amend Appellant's personnel records to conform to the terms of this Settlement Agreement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude Respondent from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to

the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This Settlement Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

5-22-17
DATE

Lamont Loftin
LAMONT LOFTIN

5/31/17
DATE

ON BEHALF OF APPELLANT

7/14/17
DATE

Charles Moore
ON BEHALF OF RESPONDENT

CERTIFICATION

I, Lamont Loftin, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5-22-17 Lamont Loftin

DATE LAMONT LOFTIN

8-16-17

STATE OF NEW JERSEY

In the Matter of Caroline Marte, Middlesex County, Board of Social Services

CSC DKT. NO. 2017-2782
OAL DKT. NO. CSV 3968-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 3968-17
AGENCY DKT. NO. 2017-2782

IN THE MATTER OF CAROLINE MARTE, MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES.

Julia Barocas, Union Representative, Communications Workers of America (CWA), for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Arthur R. Thibault, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: July 12, 2017 Decided: July 13, 2017

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 22, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

July 13, 2017
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 7/17/17

Date Mailed to Parties:

/cb

SETTLEMENT AGREEMENT AND RELEASE

CAROLINE MARTE, on her own behalf and on behalf of her heirs, executors, administrators, and assigns (hereinafter collectively referred to as "Caroline Marte" or "Marte"), and the **MIDDLESEX COUNTY BOARD OF SOCIAL SERVICES**, on its own behalf and on behalf of its successors, assigns, departments, elected and appointed officials, employees, agents, representatives, attorneys, and insurance carriers (hereinafter collectively referred to as "Board"), have reached the within Settlement Agreement and Release (hereinafter "Agreement") in final settlement of any and all disputes between and among them from the beginning of time until the present.

NOW THEREFORE, in consideration of the mutual covenants and undertakings set forth herein, the parties hereby agree as follows:

1. Caroline Marte, on her own behalf and on behalf of her heirs, executors, administrators, successors and assigns hereby releases and forever discharges the Board, and all related entities, its successors, assigns, departments, and its appointed officials, employees, agents, representatives, attorneys, and insurance carriers, including but not limited to their heirs, executors, administrators, successors and assigns, and the estates and/or heirs thereof from any and all claims, demands, damages, and causes of action, known and unknown, relating to or arising out of her employment or any other alleged conduct of the Board, and resulting from anything which has happened from the beginning of time up to the date Marte executes this Agreement, including claims for attorneys' fees and cost of suit.

Without limiting the foregoing provision in any way, Marte releases all claims, benefits, demands, damages, and causes of action relating to or arising out of her employment or any other conduct of the Board, including, but not limited to, all claims, benefits, demands, and damages

arising under Title VII of the Civil Rights Act of 1964 and 1991, as amended, 42 U.S.C. § 2000., et seq. and laws amended thereby; the Civil Rights Act of 1966, 42 U.S.C. § 1981, et. seq.; the Civil Rights Statutes contained in 42 U.S.C. §§ 1983, 1985, and 1986 and any related laws; the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq.; the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1, et. seq.; the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq.; 29 U.S.C. § 1001, et seq.; the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq., the Rehabilitation Act of 1973, the False Claims Act, 31 U.S.C. § 3729, et seq.; the Occupational Safety and Health Act, 29 U.S.C. §651, et seq., the False Claims Act, 31 U.S.C. §3729, et seq., and any other Federal, State or local laws, regulations, collective negotiations agreement, or ordinance; or claims of quasi-contract, tort, negligence, intentional act, civil conspiracy, harassment, fraud, defamation, intentional and/or negligent infliction of emotional distress; or any common law claim; or any claim for punitive damages, and any other duty or obligation of any kind or description to the fullest extent permissible by law. This Release waives any and all claims for discovery, whether asserted or unasserted, relating to materials or events that predate the execution of this Agreement. This Release shall apply to all known, unknown, unsuspected, and unanticipated claims, liens, injuries, and any contractual benefits and wages from the beginning of time up to and including the day of the date of this Agreement.

Caroline Marte represents that as of the date she executes this Agreement, she has not filed any charge, complaint, claim, or action with any court, organization, governmental entity, or administrative agency, or directed or authorized such charge, complaint, claim, or action to be filed on her behalf against the Board, except the appeal referred to in paragraphs 2 and 5 in this Agreement and any claim, if any, for worker's compensation benefits. Marte does not hereby

waive (1) her right to enforce the terms of this Agreement; (2) the right to file any unwaivable charge or complaint (although Marte does waive and release any right to recover damages or obtain reinstatement in connection with any such charge or complaint relating to anything which has happened up to the date she signs this Agreement); and (3) rights or claims that cannot lawfully be released.

2. In consideration of the above Release, the Board agrees to settle the Final Notice of Disciplinary Action dated February 22, 2017 as follows:

a. The Final Notice of Disciplinary Action will be amended to reflect that Marte resigned her employment with the Board effective February 23, 2017; and

b. Marte waives all other claims against the Board with regard to this matter, including any award of counsel fees or other monetary relief.

3. In consideration of the terms of this Agreement, Marte acknowledges that she is not owed any further monies or benefits from the Board, whether by way of collective bargaining agreement, Board policy, or otherwise, and that she specifically waives any claim for further benefits or monies, and agrees that the Board is not obligated to make any further payment or provide any further benefit to her

4. In further consideration of this Agreement, Marte agrees that she will not apply for or otherwise seek employment with the Board or any of its departments, affiliates or subdivisions and agrees that neither the Board nor any of its departments, affiliates or subdivisions has an obligation, whether arising under the New Jersey Civil Service Act, N.J.S.A. 11A:1-1, et seq., under contract or policy, or otherwise, to hire or employ her in the future.

5. In accepting this Settlement, Marte acknowledges that she is waiving her right to proceed to a hearing on her appeal to the New Jersey Civil Service Commission pending at the

Office of Administrative Law under Docket No. CSV 3968-2017S. Marte understands that this Agreement is contingent upon the approval of the Civil Service Commission and further understands that, once approved by the Civil Service Commission, the aforementioned appeal will be deemed resolved and the matter closed.

6. This Agreement constitutes the entire agreement with respect to the subject matter hereof and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

7. If any of the provisions, terms, clauses, or waivers or release of claims or rights contained in this Agreement are declared illegal, unenforceable, or ineffective in a legal forum such provisions, terms, clauses, or waivers or release of claims or rights shall be deemed severable, such that all other provisions, terms, clauses, and waivers and releases of claims and rights contained in this Agreement shall remain valid and binding upon all parties.

8. This Agreement shall inure to the benefit of, and may be enforced by, the parties hereto and all of their respective heirs, legal representatives, successors and assigns.

9. The parties agree that this Agreement shall be construed in accordance with the laws of the State of New Jersey, and that the laws of the State of New Jersey will apply to any dispute concerning it. The parties choose the Superior Court of New Jersey as their forum for resolving any dispute concerning this Agreement. The parties further agree that this Agreement shall not be filed with any court except in an action to enforce or challenge its terms.

10. Caroline Marte acknowledges that she has had ample time to consult with her Union, CWA Local #1082, throughout the negotiations that preceded her execution of this Agreement; that she has been represented by her Union during the entirety of this matter; that she

has carefully read and fully understands all of the provisions of this Agreement, including the Release; that she is voluntarily executing this Agreement without coercion or duress and in consultation with her Union; that she has had adequate time to review this Agreement and the release contained in this Agreement; and that she understands and acknowledges that she is waiving any right to proceed to a hearing at the Office of Administrative Law by signing this Agreement.

11. The parties acknowledge that this Agreement is a joint product and shall not be construed for or against any party on the ground of sole authorship. This Settlement may be executed in multiple originals, each of which shall be considered an original instrument, but all of which shall constitute one (1) agreement, and shall bind the parties hereto and their successors, heirs, assigns, and legal representatives.

12. CWA Local #1082 hereby expressly agrees that this settlement between the Board and Marte shall not be deemed a precedent or be considered a past practice and shall have no effect on future cases, be it through arbitration or otherwise, and that the contents of this Agreement shall be confidential and non-evidential in any future matter involving the Board and CWA Local #1082 and/or one of its bargaining unit members.

Date: 6/23/17

CAROLINE MARTE

ACKNOWLEDGEMENT

STATE OF NEW JERSEY :
ss.:
COUNTY OF Monmouth

I certify that on June 23, 2017, Caroline Marte personally came before me and acknowledged under oath to my satisfaction, that she:

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as her act and deed.

ERNESTA LEAHEY
Notary Public
State of New Jersey
My Commission Expires Mar. 30, 2022

Notary Public of the State of New Jersey

MIDDLESEX COUNTY BOARD OF SOCIAL SERVCES

By: Angela B. Mackaronis

Print Name: Angela B. Mackaronis

Title: Director

Date: July 6 - 2017

CWA LOCAL #1087
As to paragraph 12

By: Joyce M Brown

Print Name: Joyce M Brown

Title: Bargaining Unit President

Date: 6/28/17

STATE OF NEW JERSEY

In the Matter of Kellie Martin
Burlington County,
Department of Public Safety

CSC DKT. NO. 2014-243
OAL DKT. NO. CSV 11478-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: AUGUST 22, 2017 BW

The appeal of Kellie Martin, Senior Public Safety Telecommunicator, Burlington County, Department of Public Safety, demotion to Public Safety Telecommunicator, on charges, was heard by Administrative Law Judge Jeff S. Masin, who rendered his initial decision on July 6, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on August 16, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in demoting the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Kellie Martin.

Re: Kellie Martin

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11478-13
AGENCY DKT. NO. #2014-243

IN THE MATTER OF KELLIE MARTIN, BURLINGTON COUNTY DEPARTMENT OF PUBLIC SAFETY.

Kellie Martin, appellant, pro se

Laurel Peltzman, Esq., for respondent Burlington County Department of Public Safety (Capehart & Scatchard, attorneys)

Record Closed: June 30, 2017 Decided: July 6, 2017

BEFORE **JEFF S. MASIN,** ALJ t/a:

Kellie Martin was a Senior Public Safety Tele-Communicator (SPST) for the Burlington County Department of Public Safety. Her employer demoted her to Public Safety Tele-Communicator (PST), effective July 23, 2013. According to a Final Notice of Disciplinary Action issued on June 24, 2013, her demotion was the result of a determination that she was unable to perform her duties, N.J.A.C. 4A:2-2.3(3). The basis for this was that Martin suffers from limitations affecting her hearing. According to the County, her position as a SPST required that she be able to utilize both ears simultaneously, which she could not do due to these auditory limitations. Ms. Martin appealed her demotion to the Civil Service Commission, which transferred the

contested case to the Office of Administrative Law (OAL) for hearing. The case was originally assigned to Judge Robert Bingham, II. Judge Bingham issued a Letter Order on April 2, 2015, following a March 31, 2015, telephone prehearing conference. After Judge Bingham's appointment to the Superior Court, the case was transferred to this judge, serving on recall, in November 2016.

In September 2015, the respondent moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. On January 12, 2017, this judge issued an Order, granting the motion in part and denying it in part. More specifically, I found that the parties had entered into a Joint Stipulation of Facts, J-1. In granting the County's motion in part, I found, based upon elements of that Stipulation, that "Kellie Martin cannot perform duties that necessitate the ability to hear in one ear while speaking, writing and listening with her other ear. As such, she cannot fulfill the duties purportedly required of a Senior Safety Tele-Communicator." That said, the Order addressed Ms. Martin's claim, in opposition to the motion, that with regard to the County's claim regarding the required elements of the Senior PST position, "[H]er claim that these duties have not been required of others holding the position and that she has been discriminated against due to her disability will abide further discovery and motion or hearing, as warranted." Thus, the denial in part of the motion.[1] A copy of the Order is included as an exhibit with this decision for convenient reference.

Following the issuance of the Order, the parties were permitted to engage in further discovery regarding Ms. Martin's claim that, despite her admitted physical limitation and inability to perform in tasks purportedly required for the Senior PST position, others similarly situated to her had been permitted to retain their position as a Senior PST despite their inability to perform the purported mandatory requirements of that position. She thus claimed to have suffered treatment that was disparate from such

[1] Based on exhibits presented by the County as part of an evidence book offered in support of its motion for summary decision, it appears that Ms. Martin filed a Complaint on August 23, with the Equal Employment Opportunity Commission (EEOC). The EEOC dismissed the Complaint on May 12, 2015, as "unable to conclude that the information obtained establishes violations of the statutes." The notice of this dismissal also contained a "Notice of Suit Rights." See Exhibits R-3 and R-4.

similarly situated employees. As the previous order noted, "Further discovery should proceed, during which the County can, if it chooses, use interrogatories to attempt to flesh out Ms. Martin's claim that she has been the victim of discrimination. Ms. Martin must understand that she will be required to provide detailed information to support her claim that others who were unable to perform in these subdivisions were allowed to retain their senior status. If she is unable to do so, the fact, as found here, that she cannot perform in the three subdivisions will result in her demotion being upheld." An Order respecting elements of the on-going discovery was issued on May 1, 2017.

On May 30, 2017, the respondent renewed its motion for summary decision, contending that as a result of further discovery, it was clear that Ms. Martin had failed to provide any meaningful support for her claim of discrimination and that, as a matter of law, her appeal should be dismissed and her demotion upheld. On June 22, Ms. Martin responded to the renewed motion.[2] The respondent replied to her submission on June 30.

According to the respondent's renewed motion, it served interrogatories upon Ms. Martin to which she responded on February 9, 2017. In those responses Ms. Martin identified numerous employees who, according to her, were "unable to perform the tasks required for the Police, Fire/EMS and Countywide subdivisions in the public safety center while holding the title of Senior PST." However an examination of her answers shows that in almost every case the claim is that the individuals identified have not been trained to work in a particular area and/or not asked to perform in other subdivisions. After identifying a series of names, Martin writes "they were all senior PST's at one time and were not trained or required to work in all four subdivisions of the public safety Center while still holding a senior PST title." Only in regard to one named employee, Meredith Bell, does Martin say, "He also had physical limitations that kept him from working police desk or any other area and was only required to work in the call-taking the last several years of his employment."

[2] Her response is dated June 10, but was not received by the OAL until June 22, 2017.

In support of the renewed motion, and in reply to Ms. Martin's assertions in her answers to its interrogatories, the respondent has supplied a Certification from Howard Black, Deputy Director of the Burlington County Department of Public Safety, Communications Center. Mr. Black states that he is "unaware of any senior PST, other than Ms. Martin, who is/was limited or unable to perform the duties attendant to another subdivision besides call-taking." He also addresses the situation of Bonnie Taylor, a Senior PST who, according to Ms. Martin's response to the January 25, 2017, interrogatory, was employed, "[W]hen the county decided my demotion was necessary," and who "was allowed to keep her title as a Senior PST even though she was unable to work in any other division other than call-taking. She wasn't required to train or work in any other area. It was only after I decided to bring a suit against Burlington County that she was required to train on police radio, in which she was not required to work once her training was done. She remained a Senior PST and only worked in the call-taking division." However, according to Mr. Black's Certification, he reviewed Ms. Taylor's file and "to my knowledge, Ms. Taylor was never limited or unable to perform the duties attendant to the other subdivisions besides call-taking. Indeed, Bonnie Taylor was trained on Police Desk and was able to work at the Police Desk if she was called upon to do so."

In her reply to the renewed motion, Ms. Martin first complains that she did not receive "any of the discovery I have asked for that would have proven my claim," discovery which she contends would have proven "that several senior public safety telecommunicators were only assigned to one division (call-taking) for all of or the last several years of their employment as a senior public safety telecommunicator." She argues that the expectations placed on her by the County were "obvious[ly] . . . more complex than those of other SPSTs." She next seems to contend that she was somehow disadvantaged at the time of a promotional Civil Service test for Senior PST. However, it is unclear exactly how this is related to her contention concerning the validity of her demotion from SPST. As for the discovery issue, it is again noted that an

Order was issued dealing with discovery on May 1, 2007, and it has not been shown that the respondent did not adhere to that Order.

In her reply, Ms. Martin iterates her contentions in her interrogatory responses concerning Bonnie Taylor and Meredith Bell. She claims that due to Howard Black's limited period of service in his position, he "would not be aware of Mr. Bell's limitations or inability to perform in any other division during the time of Mr. Bell's employment nor would he be aware of promotional requirements prior to taking his present position."

In addition to her letter response to the motion, Ms. Martin has supplied a memo, dated December 28, 2005, from Jeffrey Johnson, Chief PST to Kellie Howe (apparently this is another name by which Ms. Martin was then known) regarding "Senior Position" and a letter, dated February 7, 2017, from Helen Rumph, each of which will be discussed later in this decision.

The County's reply dismisses Ms. Martin's arguments and contentions as either irrelevant to the current appeal or insufficient to demonstrate the existence of genuine issues of material fact that would defeat its motion. In addition, the respondent offers additional Certifications, from Kevin Briggs, Supervising Public Safety Telecommunicator/911 Coordinator, and Christian Carroll, Chief Public Safety Telecommunicator.

Summary Decision

The New Jersey Supreme Court defined the standard for determining motions for summary decision in Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case, the Court elaborated upon the standards first established in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Under the Brill standard, a motion for summary decision may only be granted where there are no "genuine disputes" of "material fact." The determination as to whether disputes of material fact exist is made after a "discriminating search" of the

record, consisting as it may of affidavits, certifications, documentary exhibits and any other evidence filed by the movant and any such evidence filed in response to the motion, with all reasonable inferences arising from the evidence being accorded to the opponent of the motion. In order to defeat the motion, the opposing party must establish the existence of "genuine" disputes of material fact. The substantive law governing a dispute determines which facts are material. Only disputes regarding "those facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 685 (D.N.J. 1996), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 211 (1986) (Anderson).

In Judson, supra, at 75, the Supreme Court stated that the material facts allegedly in dispute upon which the party opposing the motion relies to defeat the motion must be something more than "facts which are immaterial or of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy or merely suspicious, . . . ," (citations omitted). Brill focuses upon the analytical procedure for determining whether a purported dispute of material fact is "genuine" or is simply of an "insubstantial nature." Brill, supra at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve summary decision motions. "The essence of the inquiry in each is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.'" Id. at 536, quoting Anderson, supra, at 477 U.S. 251-52, 106 S. Ct 2505, 2512, 91 L.Ed 2d 214. In searching the proffered evidence to determine the motion, the judge must be guided by the applicable substantive evidentiary standard of proof, that is, the "burden of persuasion" which would apply at trial on the merits, whether that is the preponderance of the evidence or the clear and convincing evidence standard. If a careful review under this standard establishes that no reasonable fact finder could resolve the disputed material facts in favor of the party opposing the motion, then the uncontradicted facts thus established can be examined in the light of the applicable substantive law to determine whether or not the movant is clearly entitled to judgment as a matter of law. However, where the proofs in the record

are such that "reasonable minds could differ" as to the material facts, then the motion must be denied and a full evidentiary hearing held.

Discussion

Burlington County based its original motion for summary decision upon its contention that Ms. Martin is indisputably unable to perform tasks which are essential elements of the critical public-safety communicator position from which she is being demoted. The County, through the first Certification supplied by Kevin Briggs, Supervisor in the Department of Public Safety, Communications Center, supplied evidence respecting the mandatory requirement that a Senior PST must be able to perform duties in more subdivisions than solely in the call-taking division. She must be able to perform in at least one additional subdivision. The nature of the job responsibility requires her to be able to use both ears simultaneously and, according to the Joint Stipulation of Facts, Ms. Martin is unable to do so due to hearing loss, a deficiency which has been attested to by her own physician. Thus, it argued, her demotion, based upon her inability to perform, should be upheld and her appeal dismissed.

As has been stated, the evidence offered by the County as to Ms. Martin's auditory deficiency and its impact on her ability to perform her job as a SPST is now, and was previously, unopposed. Medical examination by an auditory specialist confirmed her hearing loss and noted that she herself had expressed her belief that her hearing loss hampered her ability to perform her job properly. Thus, the finding in the prior Order that the County had sustained its position that she could not perform her duties and that summary decision was warranted as to that contention. However, as also noted, Ms. Martin claims that, despite her acknowledged inability to perform and despite the supposedly mandatory requirement to be capable of performing in more than one subdivision, in fact other employees with her previous title as a SPST have not been required to perform in other divisions. Thus, she claims that while she may indeed be physically limited, she has suffered disparate treatment at the hands of the County,

as she is being discriminated against due to her disability. Given this, her demotion must be overturned.

As the County points out in its brief, to establish a prima facie case of disparate treatment, Ms. Martin must establish that (1) she belongs to a protected class; (2) she was performing her job at a level that met her employer's legitimate expectations; (3) she suffered an adverse employment action, and (4) others not within the protected class did not suffer similar adverse employment action. El-Sioufi v. St. Peter's Hosp., 382 N.J. Super. 145, 167 (App. Div. 2005). In respect to the second of these elements, while an employer is generally required "to consider all reasonable accommodations that may be made in a job requirement so as to permit a person suffering from a disability the opportunity to remain in position . . . the employer is not required to change the reasonable requirements of a position in order to allow someone to remain in that position if the reasonable accommodation cannot be made while allowing the function to be properly performed." This is especially the case where the job involves matters related to the public safety and welfare. At the same time, an employer may not require a disabled employee to perform job tasks that others holding the same position are not capable of performing and then use the disabled employee's inability to perform such task(s) as the basis for claiming that the employee is unable to perform the job.

It is important to note that the examination respecting alleged disparate treatment must be made between individuals who are similarly situated. Thus, as Ms. Martin is physically incapable of performing the required task of using both ears during elements of the required work in other divisions, the meaningful comparison in her case is not with employees who are said to be "incapable" of performance simply due to their not having received training to perform in other divisions and/or because they have not been asked to perform in other divisions, but with other employees with similarly disabling physical or mental conditions that prevent them from actually being able to perform, even if they have received, or attempted to receive, the necessary training. The factor that limits, and indeed prevents, Ms. Martin, from performing tasks that a Senior PST must be capable of performing is not a lack of training or an opportunity to

perform in other subdivisions, but an actual physical disability to engage in such performance. As a result, the information provided by Ms. Martin in her answer to the supplemental discovery, in which she lists many present and past employees who were supposedly not required to perform in other subdivisions, or who had not received training to do so, is of no consequence. Indeed, as made clear in her letter responding to the renewed motion, her claim is not that Bonnie Taylor was physically or mentally incapable of performance in other divisions, only that she lacked training to do so, and was only re-trained to be able to perform work at the police desk after Martin noted her lack of training when Martin was demoted. And as Christian Carroll certifies in his June 28, 2017, Certification, Taylor was trained on Police Desk as well as on call-taking and was "never limited or unable to perform the duties attendant to other subdivisions besides call-taking."

The only individual Ms. Martin appears to identify as having a "physical limitation" is Meredith Bell. However, Martin provides no additional information whatsoever as to the nature of this supposed physical limitation, nor any indication that she had personal knowledge of his alleged limitations or how they impacted Mr. Bell's abilities, rather than perhaps indirect awareness through others. As for the letter from Helen Rumph, which is neither in the form of an affidavit or a certification, as such supporting documentation must be under N.J.A.C. 1:1-12.5(b), Rumph identifies herself as Martin's Senior Communications Operator and/or Supervisor from 1992 to 2014. In referring to Mr. Bell, Rumpf states that he had "limited physical capacity." She does not indicate the nature of this "incapacity" or how it limited Bell from performing in other divisions than call-taking.

A mere "bald" assertion that Mr. Bell had a physical limitation, much less one affecting his ability to perform a required job responsibility, unaccompanied by any form of proof as to the existence of the limitation and how it affected Mr. Bell in his ability to perform the requirements of the Senior PST position, other than an uncertified letter containing no significant additional information on this point, is insufficient by itself to raise a genuine issue of factual dispute. While Martin offers such "gauzy" claims, on behalf of the respondent, Mr. Black specifically states that Ms. Martin is the only Senior

PST of whom he is aware "who was limited or unable to perform the duties attendant to another subdivision besides call-taking." Additionally, in reply to her letter response, Kevin Briggs certifies that he supervised both Martin and Bell and that "Bell worked in the Call Center and was trained in Police Desk. He was capable of performing the duties of Police Desk if called upon to do so." He also notes that of all the Senior PSTs of whom he was aware, only Martin was limited or unable to perform "the duties attendant to at least one other subdivision besides call-taking."

While it is recognized that Ms. Martin would be unlikely to have any significant details concerning the alleged "physical limitation" supposedly affecting Mr. Bell, it must be assumed that if she asserts the existence of such a limitation she must have some sufficient familiarity with the general nature of that limitation so as to be able to at least describe it in regard to how she understood it affected and limited Mr. Bell. Yet, in her answer to the interrogatory and in her letter response, she refers to it only in this most general and unrevealing terminology. Such a "gauzy" assertion is the very "scintilla" of evidence that cannot stand to create a genuine dispute of material fact. Judson, supra, at 75. The claim is at best, "insubstantial," Brill, supra at 530.

As Ms. Martin is the party asserting that she was the subject of disparate treatment, the burden to, at the very least, identify with some specificity the individuals who were similarly situated and yet treated differently must rest with her. Based upon the submissions made in respect to the original motion for summary decision and its renewal, I **FIND** that Ms. Martin has failed to provide sufficient evidence to support a prima facie case that she was improperly treated as opposed to other individuals similarly situated to her. While no doubt as an individual suffering from the hearing loss she is a member of a protected class and she did suffer an adverse employment action, the evidence makes clear that she was not capable of performing required elements of the significant public safety position she held. There is no assertion, or any evidence to support any suggestion that the requirement she could not fulfill was unreasonable, particularly given the nature of these critical, public safety-related communications positions. Where it is certainly possible that were she capable of performing the job

fully, she might not be asked to perform in other subdivisions, or conceivably might not even receive training to permit her to do so, she would nevertheless be either capable of receiving such training or, if trained, of stepping in to do the work in other divisions at such time as the employer found it necessary for her to do so. But with the disability which she admittedly has, she cannot actually perform in these other subdivisions, and it must be presumed, could not be properly trained to do so due to her physical limitations.

I **CONCLUDE** that Ms. Martin has failed to present evidence necessary to establish the existence of a prima facie case of disparate treatment, as she is unable to fulfill the requirement to establish that others similarly situated to herself have not suffered the same adverse employment action as she did.[3] As a result, and as she is, as stipulated, physically incapable of performing reasonable requirements of the Senior PST position, I **CONCLUDE** that there are no genuine issues of material fact in dispute and that the respondent's renewed motion for summary decision should be **GRANTED**. I **CONCLUDE** that the County has met its burden of supporting Ms. Martin's demotion, based upon N.J.A.C. 4:2-2.3(3). The appeal is therefore **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B10.

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[3] The respondent notes that if Mr. Bell actually was physically or mentally limited such that he could not perform the duties attendant to one of the divisions other than call-taking, the County did not demote him, which suggests that it did not, as she claims, discriminate against Ms. Martin due to her disability. Of course, as has been discussed, her claim that Bell was affected by any such limitation has not been sustained by any competent and substantial proof, and the record thus is that only Martin was so limited.

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.

July 6, 2017
DATE

JEFF S. MASIN, ALJ t/a

Date Received at Agency: 7/6/17

Date Mailed to Parties: 7/6/17

mph

EXHIBITS:

Joint Exhibits:

Order dated January 12, 2017

J-9 Joint Stipulation of Facts, with attached exhibits as follows:

- J-1 January 29, 2013 letter from Robert Belafsky, M.D., F.A.C.S.
- J-2 February 5, 2013 letter from George Parks, III, to Kellie Martin
- J-3 February 26, 2013 letter to George Parks, III, from Robert Belafsky, M.D., F.A.C.S.
- J-4 Preliminary Notice of Disciplinary Action
- J-5 Final Notice of Disciplinary Action, dated August 24, 2013
- J-6 Patient Instructions for Kellie Martin printed on March 5, 2014
- J-7 Public Safety Telecommunicator Expectations
- J-8 List of employees and areas of training

For appellant:

P-1 Memorandum from Jeffrey Johnson, dated December 28, 2005

P-2 Letter from Helen Rumph, dated February 7, 2017

For respondent:

C-1 Certification of Kevin Briggs, dated September 3, 2015,
Exhibit A: Letter dated February 9, 2017 from Kellie A. Martin to Laurel Peltzman, Esq.; letter dated March 6, 2017 to Kellie Martin from Laurel B. Peltzman, Esq.
Exhibit B: Certification of Howard Black

C-2 Certification of Kevin Briggs, dated June 28, 2017

C-3 Certification of Christian Carroll, dated June 28, 2017.

Exhibits presented in Burlington County Exhibit List designated as:

R-1 Burlington County Policy: Requests for Reasonable Accommodations

R-2 Kellie Martin's May 11, 2015, responses to interrogatories

R-3 Equal Employment Opportunity Commission charge

R-4 Equal Employment Opportunity Commission Dismissal and Notice of Rights

In the Matter of Sean P. McConnell,
Mercer County, Department of
Transportation and Infrastructure

CSC DKT. NO. 2017-2631
OAL DKT. NO. CSV 3168-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 3168-17
AGENCY DKT. NO. 2017-2631

IN THE MATTER OF SEAN P. MCCONNELL, MERCER COUNTY DEPARTMENT OF TRANSPORTATION AND INFRASTRUCTURE.

Debbie Parks, Union Representative, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Kristina E. Chubenko, Assistant County Counsel, for respondent (Arthur R. Sypek, Jr., Esq., County Counsel, attorney)

Record Closed: June 29, 2017 Decided: July 7, 2017

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 6, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

July 7, 2017
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 7.13.17

Date Mailed to Parties:

/cb

ARTHUR R. SYPEK, JR., MERCER COUNTY COUNSEL
BY: KRISTINA E. CHUBENKO, ASSISTANT COUNTY COUNSEL
McDADE ADMINISTRATION BUILDING, ROOM 201
640 SOUTH BROAD STREET
P.O. BOX 8068
TRENTON, NEW JERSEY 08650-0068
609-989-6511

IN THE MATTER OF SEAN P. MCCONNELL	SETTLEMENT AGREEMENT AND GENERAL RELEASE
Settled prior to Administrative Law Hearing	CSV 03168-2017S

This Settlement Agreement and General Release ("Agreement") is agreed to by the County of Mercer ("County") and Sean P. McConnell ("Employee") (collectively "parties") upon the following terms and conditions:

WHEREAS, Employee is employed as a Laborer Heavy in the County's Department of Transportation & Infrastructure/Highway Division; and

WHEREAS, a Preliminary Notice of Disciplinary Action dated November 10, 2016 was issued to Employee; and

WHEREAS, a Final Notice of Disciplinary Action dated January 19, 2017 was issued removing Employee from his employment; and

WHEREAS, Employee filed a timely appeal of the FNDA with the Civil Service Commission bearing agency reference number 2017-2631; and

WHEREAS, the matter was transferred to the Office of Administrative Law bearing docket number CSV 03168-2017S for a de novo hearing; and

WHEREAS, the parties would like to resolve the matter amicably due to the uncertainties and cost of litigation; and

WHEREAS, Employee has agreed to resign, upon and subject to the terms and conditions contained herein, which shall be considered a general resignation; and

NOW, THEREFORE, in consideration of the mutual covenants contained herein and further good and valuable consideration, the parties mutually agree as follows:

1. Employee understands and agrees that his employment with the County ended effective January 18, 2017 and will be recorded as a general resignation. Employee understands and agrees that the County is not obligated to employ him, and that he will not seek reemployment or reinstatement or accept reemployment with the County or any of its subdivisions, subsidiaries or affiliates, at any time in the future.

2. Employee agrees to withdraw with prejudice the appeal with pending at the Civil Service Commission bearing agency reference number 2017-2631 and Office of Administrative Law Docket Number CSV 03168-2017S.

3. Employee agrees that the County accepting his resignation in lieu of seeking removal constitutes consideration for his waiver of claims contained in this Agreement. Employee will be given the opportunity to obtain medical coverage through the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. § 1166(a)(4) ("COBRA") for a period of up to eighteen (18) months starting from the date of his employment end date at Employee's own expense.

4. This Agreement is not, and shall not in any way be constructed, as an admission by the County and the Employee of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to or by employee, but instead constitutes the good faith settlement of a disputed claim and the

parties specifically disclaim any liability to each other or to any other person. The parties have entered into this Agreement for the sole purpose of resolving the subject matter of this case and any related claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

5. Employee agrees that this Agreement shall operate as a complete and final disposition of this matter. As consideration for the County amending the charges in this matter and agreeing to these terms, Employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators, representatives, elected officials, departments, boards, officers and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims relating to the subject matter of this agreement that he has now to any relief of any kind from the County, whether or not he now knows about those rights, arising out of his employment with County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII of the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealings; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relation Act; New Jersey Family Leave Act, Older Workers Benefit

Protection Act of 1990, 29 U.S.C. §621 et seq., and any other claims for unlawful employment practices with regard to this matter. It is emphasized that Employee is waiving all possible claims against the County with regard to this disciplinary matter.

6. Employee represents and certifies that he has carefully read and fully understands all of the provisions of and effects of this Agreement and further, certifies that he is voluntarily entering into this Agreement and that the County has not made any representations concerning the terms of effects of this Agreement other than those contained herein.

7. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under laws of the State of New Jersey. The language of all parts of this Agreement shall, in all cases, be constructed as a whole, according to its fair meaning and not strictly for or against any of the parties.

8. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining part(s)/term(s) or provision(s) shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

9. The foregoing constitutes a full and final disposition of this matter.

10. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

11. This Agreement may not be modified, altered or changed, except upon the prior express written consent of the parties.

12. This Agreement is the result of negotiations with Employee and Employee's union representative(s) with whom Employee had an opportunity to consult prior to signing same and is satisfied with the representation.

13. Employee specifically acknowledges that he understands that this Agreement is a legally binding document, and that by signing this Agreement he is prevented from filing, commencing or maintaining any action, complaint, charge, or other proceeding against the County, except as expressly permitted by the terms of this Agreement. Employee further agrees that any fact, evidence, event or transaction currently unknown to Employee but which hereafter may become known shall not affect in any way or manner the final and unconditional nature of this Agreement. Employee acknowledges that he understands that he has the right to consult with an attorney of his choice to review this Agreement and that he is encouraged by the County to do so. Employee further acknowledges that he understands that he has twenty-one (21) days to consider and accept this Agreement from the date it was first given to Employee, although she may accept it at any time within those twenty-one (21) days. Employee further acknowledges that he understands that he has seven (7) days after signing the Agreement to revoke it by delivering to Kristina Chubenko, Assistant County Counsel, County of Mercer, McDade Administration Building, 640 S. Broad Street, Trenton, New Jersey 08650, written notification of such revocation within the seven (7) day period. If Employee does not revoke the Agreement, the Agreement will become effective and irrevocable on the eighth (8th) day after he signs it (the "Effective Date").

If Employee elects to exercise his right of revocation, this Agreement and the promises contained in it, will automatically be deemed null and void.

14. This settlement fully and finally disposes of all issues in controversy. It is reached by way of compromise.

15. This Agreement shall neither set a precedent nor constitute a past practice.

16. This Agreement shall not be considered binding and/or final until approved by and executed by the County Administrator and/or his designee. Any subsequent disapproval by the Civil Service Commission shall cause all the terms and conditions of this agreement to be null

IN WITNESS WHEREOF, and intending to be legally bound hereby, I have hereunto set my hand. WITH MY SIGNATURE HEREUNDER, I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT AND UNDERSTAND ALL OF ITS TERMS INCLUDING THE FULL AND FINAL RELEASE OF CLAIMS SET FORTH ABOVE. I FURTHER ACKNOWLEDGE THAT I HAVE VOLUNTARILY ENTERED INTO THIS AGREEMENT, THAT I HAVE NOT RELIED UPON ANY REPRESENTATION OR STATEMENT, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO HAVE THIS AGREEMENT REVIEWED BY MY ATTORNEY.

Dated: 6/20/17

ANDREW MAIR,
MERCER COUNTY ADMINISTRATOR

Dated: 6/15/17

SEAN MCCONNELL, EMPLOYEE

Dated: 6/15/17

DEBBIE PARKS, AFSCME COUNCIL

8-16-17

STATE OF NEW JERSEY

In the Matter of Cynthia Reid,
Cumberland County, Department of Corrections

CSC DKT. NO. 2017-857
OAL DKT. NO. CSV 14520-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: AUGUST 16, 2017 JM

The Civil Service Commission, at its meeting of August 16, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
AUGUST 16, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 14520-16
AGENCY DKT. NO. 2017-857

IN THE MATTER OF CYNTHIA REID, CUMBERLAND COUNTY, DEPARTMENT OF CORRECTIONS.

Arthur J. Murray, Esq., for appellant, Cynthia Reid (Alterman and Associates, LLC, attorneys)

Theodore E. Baker, Cumberland County Counsel, for respondent, Cumberland County Department of Corrections

Record Closed: June 29, 2017 Decided: July 10, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on September 26, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

7-10-17
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 7/17/17

Date Mailed to Parties:

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on June 29, 2017

J-1
6-29-17

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter sometimes referred to as the "Agreement") is entered into by and between CUMBERLAND COUNTY CORRECTIONS OFFICER CYNTHIA REID, a member of PBA Local 231, (hereinafter "REID") and the COUNTY OF CUMBERLAND, DEPARTMENT OF CORRECTIONS (hereinafter "CC DOC"); and

WHEREAS, REID filed an appeal against CC DOC in the Office of Administrative Law, entitled CYNTHIA REID v. CUMBERLAND COUNTY, bearing OAL Docket No. CSV 14520-16, Agency Docket No. 2017-857 stemming from a Final Notice of Disciplinary Action dated September 14, 2016 concerning an incident occurring on May 8, 2015; and

WHEREAS, the parties having held one day of the *de novo* hearing before the Honorable Jeffrey Wilson, A.L.J, and been scheduled for a second day of said *de novo*; and

WHEREAS, REID and CC DOC entered into global settlement negotiations; and

WHEREAS, REID and CC DOC have now settled all controversies (itemized in the preceding paragraphs) between them; and

WHEREAS, all parties acknowledge that the merits of the controversies were in dispute and were never fully adjudicated, but all have reasons to desire amicable resolution of the collective matters; and

NOW, for and in consideration of the agreements, covenants and conditions herein contained, the adequacy and sufficiency of which are hereby expressly acknowledged by the parties hereto, the parties agree as follows:

1. **The Terms of Settlement:**

   a. REID shall, with due speed withdraw her appeal against CC DOC in the Office of Administrative Law entitled CYNTHIA REID v. CUMBERLAND COUNTY DEPARTMENT OF CORRECTIONS, bearing OAL Docket No. CSV 14520-16, Agency Docket No. 2017-857 stemming from a Final Notice of Disciplinary Action stemming from a Final Notice of Disciplinary Action dated September 14, 2016 concerning an incident occurring on May 8, 2015.

   b. CC DOC shall issue an Amended Final Notices of Disciplinary Action all Dated February 27, 2017, which shall reflect a change in the "disciplinary action" taken from "Suspension for 40 Days" to "Suspension for 20 Days"; all of which has already been served. Service of the Amended Final Notices of Disciplinary Action shall be

valid by mailing copies of same by regular mail to Arthur J. Murray, Esquire, attorney for REID.

c. REID hereby irrevocably waives all back pay to which she might otherwise be entitled from reduction in suspension days set forth in Paragraph 1(b) of this Settlement Agreement.

d. REID hereby forfeits her right to file an appeal in the Office of Administrative Law as it relates to the Amended Final Notice of Disciplinary Action issued pursuant to Paragraph 1(b) of this Settlement Agreement and.

2. **Dismissal of Action**. REID understands and agrees that her attorneys and/or counsel for the CC DOC will file with the appropriate Stipulation of Dismissal with prejudice and/or Withdrawal of Appeal with prejudice with regard to effectuating the terms of this Settlement Agreement.

3. **Attorneys' Fees and Costs**; REID agrees that REID will bear her own costs and attorneys' fees through her coverage with PBA Local 231.

4. **Entire Agreement**: This Agreement contains the sole and entire agreement between the parties hereto and is intended to memorialize the settlement of discipline pending against REID and all appeals of discipline filed by REID pending as of the date of the Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

5. **Severability**: The parties agree that if any court declares any portion of this Agreement unenforceable, the remaining portions shall be fully enforceable.

6. **Applicable Law**: This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret their Agreement shall only be brought in a court of competent jurisdiction in the State of New Jersey, which the parties hereby acknowledge and agree to be the Superior Court of New Jersey in the County of Cumberland.

7. **Effective Date**: This Agreement will become effective on the date on which all parties to the Agreement have executed it.

8. **None Use**; This Settlement Agreement is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein or to enforce its terms.

9. BY SIGNING THEIR SETTLEMENT AGREEMENT, REID ACKNOWLEDGES:

A. SHE HAS READ IT;

B. SHE UNDERSTANDS IT AND KNOWS SHE IS GIVING UP IMPORTANT RIGHTS;

C. SHE AGREES WITH EVERYTHING IN IT;

D. HER ATTORNEY NEGOTIATED THIS SETTLEMENT AGREEMENT WITH HER KNOWLEDGE AND CONSENT;

E. SHE HAS BEEN ADVISED TO CONSULT WITH HER ATTORNEY AND PBA UNION PRESIDENT PRIOR TO EXECUTING THIS SETTLEMENT AGREEMENT, AND HAS IN FACT DONE SO; AND

F. SHE HAS SIGNED THIS SETTLEMENT AGREEMENT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, the parties have hereunto set their hands.

Dated: 5-25-17

CYNTHIA REID

We agree to the form and content of this Settlement Agreement.

Theodore E. Baker, Esquire (County Counsel, Cumberland County)

Dated: 6/28/17

Theodore E. Baker, Esquire

Warden

Dated: 06-27-2017

Richard Smith

PBA Local 234 President Victor Bermudez

Dated: 5/24/17

Victor Bermudez

Prepared by:

5-24-17

Arthur J. Murray, Esquire
Attorney for CYNTHIA REID

Angiulo, Nicholas

From: Theodore Baker <theodoreba@co.cumberland.nj.us>
Sent: Thursday, August 3, 2017 3:29 PM
To: Arthur J. Murray; Angiulo, Nicholas
Subject: RE: Cynthia Reid v. Cumberland County - Settlement

I agree. I think it was probably on the record, but agree with Mr. Murray that the remaining days should be treated as he indicates.

From: Arthur J. Murray [mailto:AMurray@ALTERMAN-LAW.COM]
Sent: Thursday, August 03, 2017 11:53 AM
To: Angiulo, Nicholas; Theodore Baker
Subject: RE: Cynthia Reid v. Cumberland County - Settlement

Unless Mr. Baker thinks otherwise, the other 20 days should be treated as an approved leave of absence without pay.

-Arthur Murray

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Thursday, August 03, 2017 11:51 AM
To: Arthur J. Murray <AMurray@ALTERMAN-LAW.COM>; Theodore Baker <theodoreba@co.cumberland.nj.us>
Subject: Cynthia Reid v. Cumberland County - Settlement
Importance: High

Mr. Murray and Mr. Baker:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Cynthia Reid from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Ms. Reid agrees to the modification of her 40 working day suspension to a 20 working day suspension, which has already been served. However, the record does not reflect how the remaining 20 working days should be accounted for. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An email reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

8-16-17

STATE OF NEW JERSEY

In the Matter of Marion Wilson

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2017-3166
OAL Docket No. CSR 04966-17

ISSUED: SEP 07 2017 (SLK)

The appeal of Marion Wilson, a County Correction Officer with Camden County, of her removal, on charges, was heard by Administrative Law Judge Dean J. Buono (ALJ), who rendered his initial decision on June 21, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on August 16, 2017, accepted and adopted the Findings of Fact as detailed in the initial decision. However, the Commission did not adopt the ALJ's recommendation to uphold the removal. Rather, the Commission modified the removal to a six-month suspension.

DISCUSSION

The appellant was removed, effective February 9, 2017, on charges of incompetency, inefficiency, or failure to perform duties, insubordination, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority alleged that the appellant failed to search an inmate's mail allowing contraband to enter the facility, left bay doors open causing a serious breach of security and was disrespectful to superiors. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

The ALJ set forth in his initial decision that Lieutenant Douglas Grundlock testified that mail was provided to an inmate without being searched allowing "contraband," 14 Compact Discs (CDs), to enter the facility, and it was the appellant's job to make sure that contraband did not get into the facility as she was stationed at the mail post. Further, upon being questioned by Grundlock, the appellant acknowledged that she signed for the "legal mail" and had not searched its contents. Additionally, while questioning the appellant, Grundlock saw that both bay doors to the loading dock were open in violation of the facility's rules of conduct that state that doors are to remain closed. Grundlock also indicated there were other open doors down the hallway and inmates had previously escaped, although not on the day of this incident. Therefore, he told the appellant to close the bay doors and she did. However, approximately 40 minutes later, the bay doors were open again and the appellant was removed from her post. Moreover, a video showed a civilian walking through the facility from the loading dock and proceeding through the bay doors into the facility without any impediments. Grundlock implied that the appellant should have known not to leave the bay doors open based on her 20 years of service, which included serving as a Sergeant, and previous service in the mailroom.

Captain Rebecca Franceshini testified that the 14 CDs were considered contraband because they can be broken and used as weapons. Additionally, the inmate who received the contraband indicated that the appellant gave him the mail and the appellant admitted she did not search the mail.

Captain Linda Blackwell testified that she, Lieutenant Leithead, Sergeant Arroliga, and Officer White, the appellant's union representative, met at the appellant's house to serve the disciplinary notice. She explained that the meeting was at the appellant's house because the appellant indicated that she would not be at the facility due to inclement weather. Blackwell indicated that, during the meeting, the appellant cursed at her superior officers several times and called Blackwell a "bitch." Blackwell stated that it was a violation of the facility rules to curse at superior officers and that she was approximately eight feet away from the appellant when she was called a "bitch." Blackwell indicated that she did not know why the reports from the other officers did not mention that the appellant called her a "bitch." She thought they might not have heard the derogatory term, as they were further down the driveway. Blackwell confirmed that she did not discuss being called a "bitch" with the other officers who were at the meeting.

Warden Karen Taylor testified that she recommended the appellant's termination since the appellant had a pattern of similar behavior and there were significant safety concerns for the facility. Taylor indicated that the appellant admitted she did not perform all of the duties she was supposed to perform when delivering legal mail. Taylor asserted that the appellant's conduct towards her superiors violated the facility's rules and it did not matter that the incident took

place while she was off duty at her home. Additionally, Taylor stated that bay doors should be closed unless work was being done and that even though no prisoners escaped, safety and security are the primary concern.

The appellant testified that she had been a Sergeant for 12 years, but she was demoted to County Correction Officer. She indicated that she had been assigned to the mail/delivery post for one month prior to this incident in February 2017. The appellant presented that she had never been instructed on when to open and close the bay doors and that she "understood" that if someone was on the loading dock that the bay doors were to be left open. She stated that she left the bay doors open because there were three civilians and two inmates on the loading dock. The appellant indicated that her post was not the "last line of defense" as there were gates on the loading dock that lead to the outside. She represents that Grundlock never explained why the doors were to be kept closed. The appellant denied cursing at her superior officers and calling Blackwell a "bitch," accused the officers of lying, believed that her union representative would just "side" with her superior officer so he would not be retaliated against, and asserted that "she wasn't happy but was not being disrespectful" during the meeting. She stated that Blackwell was "in the back" trailing behind the others who were "inches" ahead of her. The appellant provided that she chose the mail post because she only had two months left before her retirement and admitted that she did not check the mail. She also admitted that she was the "last officer" in that building near the loading dock. The appellant asserted that although the sign stating that the doors should be closed had been there for 20 years, it was her understanding that other officers would leave the bay doors open based on "past practices." Further, she kept the bay doors open after Grundlock left because people were coming in and out and she kept them open not "thinking anything of it."

Lieutenant Leithead and Sergeant Arroliga testified on behalf of the appellant indicating that they did not hear the appellant call Blackwell a "bitch" and never spoke with any other officer about a report.

The ALJ found the appointing authority's witnesses credible and persuasive as they clearly and concisely expressed concerns about how these incidents affected safety in the facility and the appellant's lack of respect for her superiors. Further, the ALJ found that the appellant admitted to not opening and searching legal mail for contraband and did not express remorse for her actions. Additionally, the ALJ found that it was unfathomable that the appellant did not understand the security concerns in leaving the bay doors open. Moreover, the appellant's position that she did not curse at her superior officers was not credible and it was not realistic that she would call Blackwell a "bitch" loud enough for the others to hear, which also hurt her credibility. The ALJ presented that the appellant had been fined on six occasions, reprimanded on eight occasions, suspended on seven occasions, and demoted from Sergeant to County Correction Officer for similar charges. Therefore,

the ALJ recommended sustaining the appellant's removal based on her disciplinary history, the nature of her job duties, and the nature of the charges.

In her exceptions, regarding the charges, the appellant asserts that the ALJ erred in failing to ignore her motion to sever the three charges at the hearing as she claims the charges are for three unrelated incidents occurring at different times and places. The appellant claims that the ALJ misconstrued the sign stating that the doors shall remain closed at all times as this sign is not directed at correction officers. Further, she states that it would not make sense to keep the doors closed at all times. Additionally, the appellant contends that the ALJ misconstrued the facility's rule that indicates that a failure to close and/or lock any gate or door required to be shut is a breach of security as this rule does not mean that all doors are to remain closed at all times, but only should be shut at the required times. The appellant represents that she never received training regarding the operation of the bay doors and therefore argues that it is unfair to penalize her for failing to follow any processes related to the operation of the bay doors. The appellant argues that the appointing authority's witnesses were not credible. Specifically, she believes that Blackwell's testimony that she was called a "bitch" is not credible since none of the witnesses heard the comment and she never told the other officers on the ride back about the comment, which the appellant believes is highly unusual and contradicts Warden Taylor's comment that Blackwell told her that she did speak to the other officers on the ride back. The appellant argues that her admitting that she did not inspect the mail supports her credibility. The appellant asserts that the ALJ made a mistake by equating the lack of evidence of remorse with a lack of remorse as a finding must be based on evidence and not a lack of evidence. The appellant argues that the ALJ erred as he does not explain why it is not realistic that she would call Blackwell a "bitch" loud enough for the other officers to hear. The appellant presents that there is no evidence that she disobeyed a direct order to close the bay doors as she did close the bay doors after Grundlock told her to do so. However, there is no evidence that Grundlock directed her to keep the bay doors closed at all times and therefore there is no evidence to conclude that she was insubordinate. The appellant contends that there is no evidence that she permitted people to walk freely through the institution as the ALJ states as there was never anyone on the loading dock except people who were supposed to be there. The appellant indicates that the ALJ erred by charging her with "inattentiveness to duty" as this charge was not specified for the date of the incident. The appellant asserts that the ALJ erred that she violated a facility rule regarding property of inmates or by permitting contraband to be introduced to the general prison population as she did not destroy any property and the CDs were not introduced to the general population as they were promptly discovered and removed from the inmate's possession.

Regarding the penalty, the appellant argues that her removal was not warranted since she had been employed for 20 years and all of her fines and most of

her reprimands were outside of the seven-year "look-back" period mandated by the New Jersey Supreme Court. Further, she asserts that none of her prior charges were similar, as she had never been previously disciplined for failing to inspect mail, failing to keep doors shut, or for using profanity. While the appellant acknowledged that some penalty is justified for her failure to do her job, she argues that removal is excessive under these circumstances.

In reply, the appointing authority states that all three incidents were properly considered together as they were intertwined. Specifically, initially the appellant was questioned about her failure to search an inmate's mail. During that investigation, it was discovered that the appellant failed to keep the bay doors closed, and these two events led to the charges being served to the appellant where she cursed and was disrespectful to her superior officers. It asserts that the appellant is attempting to mislead the Commission by stating that the sign instructing that doors should be closed at all times does not specifically refer to correction officers as the appellant acknowledged that the sign was there for 20 years and she chose to ignore the sign. Further, her intentional act in leaving the bay doors open was a violation of facility rules, which undermined security as she admitted she was the "last officer" in that building near the loading dock. The appointing authority presents that the appellant was trained about opening and closing doors at the Academy and it is ludicrous for a 20-year employee who was a Sergeant for 12 years to argue that she needed training on the operation of doors. It emphasizes that the appointing authority's witnesses were credible as four of them unequivocally stated that the appellant cursed at them and the ALJ found that the appellant was not credible. Further, the ALJ found Blackwell credible when she testified that the appellant called her a "bitch," that the other officers were ahead of her and may not have heard it, and she did not discuss the comment with the other officers and waited to discuss it with her superiors. It states that the appellant disobeyed Grundlock's direct order to keep the bay doors closed by opening the doors after he left which clearly demonstrates her lack of concern for safety. Moreover, there is a video showing unnamed people walking through the unsecured bay doors. Additionally, there is a video showing the appellant on her phone discussing her paycheck and therefore the ALJ did not make a mistake when he sustained the charge of "inattentiveness of duty" against her. The ALJ also properly found her to have violated a facility rule when the appellant admitted that she did not search the inmate's mail and she was aware of the dangers when contraband enters the facility. The ALJ appropriately considered the appellant's prior discipline history and the alleged "seven year look back" rule does not apply if the prior offenses and behavior were similar to the current incidents, which they were. The ALJ presented a comprehensive review of the law and facts of this case and appropriately upheld the appellant's removal.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. Clearly, the appellant's failure to search an inmate's mail

allowing contraband to enter the facility, leaving bay doors open causing a serious breach of security and being disrespectful to superiors constitutes incompetency, inefficiency, or failure to perform duties, insubordination, conduct unbecoming a public employee, neglect of duty and other sufficient cause.[1] However, as discussed further below, the Commission does not adopt the ALJ's recommendation to uphold the appellant's removal.

Initially, the Commission notes that the appellant admitted that she did not inspect an inmate's mail and her failure to perform this duty allowed contraband into the facility, which could have potentially been used as a dangerous weapon. Further, while the appellant argues that she was not given any training on the opening and closing of the bay doors, as the appellant was trained on the opening and closing of doors in the Academy, was a 20-year employee of the facility including serving 12 years as a Sergeant, was well aware of the sign that instructed that the doors remain closed, and was instructed by her superior officer to close the bay doors, the Commission finds that the appellant's leaving the bay doors open was a breach of security and the appellant's arguments in that regard are without merit. Moreover, the ALJ found that the appellant cursed and was otherwise disrespectful to her superior officers including calling Blackwell a "bitch" and there is nothing in the record to support overturning the ALJ's credibility determinations.

In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In the instant matter, the Commission is not in any way persuaded by the appellant's exceptions. However, the Commission notes that the appellant was a 20-year employee, retired on March 1, 2017 and had been suspended effective February 9, 2017 due to incidents that took place in early February 2017. In other words, the appellant's suspension was only approximately three weeks before the

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[1] This charge included a violation of the appointing authority's policy regarding "inattentiveness to duty." This charge involved the appellant's failure to secure the bay doors and was clearly listed on her Final Notice of Disciplinary Action.

effective day of her retirement after a long career as a correction officer. Therefore, in light of these circumstances, the Commission shall modify the appellant's removal to a six-month suspension. However, the Commission emphasizes that the appellant shall not have the option to rescind her retirement and return to employment as the modification of the appellant's removal to a six-month suspension is based solely on the fact that the appellant has retired and the suspension runs from February 9, 2017 to the date of her retirement with the remainder to be considered for record keeping purposes only. As such, the appellant shall not be entitled to any back pay under *N.J.A.C.* 4A:2-2.10.

N.J.A.C. 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super,* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, the conduct underlying the charges, as well as the charges, were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth in *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Commission finds that in light of the circumstances as described above, the Commission shall modify the appellant's removal to a six-month suspension.

Back pay pursuant to *N.J.A.C.* 4A:2-2.10, and counsel fees pursuant to *N.J.A.C.* 4A:2-2.12(a) are denied

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 16th DAY OF AUGUST, 2017

Dolores Gorczyca

Dolores Gorczyca
Member
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

AND ORDER

OAL DKT. NO. CSR 04966-17

AGENCY DKT. NO. N/A

IN THE MATTER OF MARION WILSON, CAMDEN COUNTY CORRECTIONAL FACILITY.

William B. Hildebrand, Esq. for appellant, Marion Wilson (Law Offices of William B. Hildebrand, LLC, attorneys)

Antonieta P. Rinaldi, Assistant County Counsel, for respondent, Camden County Department of Corrections (Christopher A. Orlando, County Counsel)

Record Closed: June 16, 2017 Decided: June 21, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

Appellant, Marion Wilson (Wilson), an employee of respondent, Camden County Correctional Facility (CCCF), appeals from the determination of respondent that she be Terminated for incidents that occurred on February 2, 2017, February 6, 2017 and February 9, 2017. Respondent argues that she violated: N.J.A.C. 4A:2-2.3(a)(1)

Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; 3.12 Property of Inmates; General Order 73; General Order 74; and Post Order 33. The appellant denies the allegations and contends that she acted appropriately.

PROCEDURAL HISTORY

On February 10, 2017, the CCCF issued a Preliminary Notice of Disciplinary Action removing her from her post as of February 9, 2017. On March 9, 2017, the CCCF issued a Final Notice of Disciplinary Action sustaining the charges and terminating her from employment as of February 9, 2017. Appellant filed a timely notice of appeal.

The Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on April 5, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on June 2, 2017. The record remained open until June 16, 2017, for the parties to submit closing summations and the record closed on that date.

FACTUAL DISCUSSION

Testimony

Respondent

Lieutenant Douglas Grundlock (Grundlock), has been employed by the Camden County Department of Corrections for twenty years. The last two years he served as a Lieutenant at the CCCF. Primarily, his job as a lieutenant is to monitor officers so that "they are doing their jobs".

In this case, he was tasked to investigate "legal mail" that had been given to an inmate. Included in the mail were fourteen Compact Discs (CDs). The mail was provided to the inmate without being searched allowing "contraband" to enter the facility. Wilson was stationed at the mail post so, he proceeded to her location. Upon his arrival, he confronted her and she was on the "cell phone and looking at her paycheck." After she finished, Wilson told him that she signed for the "legal mail" and had not searched its contents. On the exterior of the legal mail, (2NA 53) was handwritten on the envelope. Wilson acknowledged that it was her handwriting. (R-4).

While discussing the "legal mail" issue with Wilson, he saw that both doors to the loading dock area were open. There is a sign on the door that says, "All staff Doors are to remain closed at all times" plus rules of conduct 3.2 says, all doors are to remain closed.

Grundlock said two doors that were further down the hallway were also opened and inmates have escaped before, but not that day. As a result of what he saw, Grundlock told Wilson to close the doors and she did. However, approximately forty minutes later, the doors were opened again. At that point, she was removed from her post for not keeping the doors closed and disobeying an order. A video showed a civilian walking through the facility from the loading dock and proceeding through the doors into the facility without any impediments. (R-6 Video at 10:39:34). The same video at 10:40:43, showed Grundlock telling Wilson to close the doors and she did.

On cross-examination, Grundlock testified that Wilson was working her mailroom bid post and her job was to open and inspect the mail, making sure no contraband gets into the facility through the mail. She did not do her job. Also, "Wilson controls both sliding doors" shown in video. In describing the location of the security doors, Grundlock stated that there was a twenty to thirty-foot corridor, then a gate on the loading dock that is controlled by a civilian. Only "specially classified lower level" offenders are permitted on the loading dock. Grundlock reiterated that all gates are supposed to be closed, unless someone is ingress or egressing. After the person ingresses or egresses the doors were again to be closed. When one door is opened, the other one is closed to control the flow of people. (Rule 3.2). Interestingly, when

confronted with the question of what instruction or training Wilson had on the operation of doors, Grundlock replied that "she was a C.O. for twenty years" and "had been in the mail room before that day." Also, she was a "Sargent for five years." Intimating that she should have known.

Captain Rebecca Franceschini (Franceschini), has been with the CCCF for seventeen years; two and a half years as Captain. Her responsibilities are the safety and security of facility.

She recalled that on February 6, 2017, she received a telephone call from Warden Taylor (Taylor) about legal mail that had fourteen CD's enclosed inside and was disseminated into the facility. They are "contraband" because they can be broken and used as weapons. Inmate Collins was given the legal mail and told Franceschini that Wilson gave her the legal mail. When confronted about the contraband in the mail, Wilson admitted she did not search the mail.

Franceschini reported her findings to the Warden and Deputy Warden and Wilson was then removed from the mailroom bid post. A Disciplinary Complaint was generated and discipline was recommended for the incident. (R-3).

Captain Linda Blackwell (Blackwell), has spent twenty years at the CCCF, three years as Captain. Her responsibilities are to make sure all officers are doing their job.

On February 8, 2017, Taylor told her that she was going to be serving a "Laudermill letter" to Wilson. On February 9, 2017, Wilson indicated to members of the facility that due to inclement weather, she would not appear at the facility to be served and she requested to be served her at home.

As a result, Blackwell, Lieutenant Leithead (Leithead), Sergeant Arroliga (Arroliga), and Officer M. White (White) arrived at Wilson's home. White was there as her union representative. Wilson came to the door on front porch and stated, "You had to bring the whole department to my house?" Blackwell informed her that White was

there on her behalf as a union representative, and that she was going to be served with Laudermill paperwork. Wilson looked at White and said, "Thank you." She was informed that she was suspended pending termination and that she had an opportunity to explain orally to us why she should be suspended with pay, or she had twenty-four hours to write the Warden explaining why she should be suspended with pay. Then, Wilson stated, "I don't want to fucking talk to ya'll." She laughed and then stated, "I knew this was coming." Arroliga then asked Wilson for her the badge, breast badge and two identification cards. To retrieve the items, Wilson went into her house and slammed the front door with force. Upon her return, she handed the items to White. Arroliga explained to her that her insurance may be affected and gave her insurance paperwork. Arroliga then asked Wilson to sign her equipment paperwork and she stated that she could not find her Department I.D. Arroliga also explained to Wilson that she could give an oral statement or notify the department within twenty-four hours in writing of why she should not be suspended without pay. Wilson then stated, "I ain't talking to ya'll; fuck ya'll." After all the paperwork was signed Wilson stated, "Fuck ya'll; get the fuck otta here." Blackwell responded with, "my pleasure" and as she was walking away Wilson stated, "bitch." Blackwell continued to walk away and joined Leithead and Arroliga who were walking ahead. She was agitated and being disrespectful, so to diffuse the situation Blackwell replied, "my pleasure." (R-7). All individuals were instructed to write reports. (R-8, R-9, R-10).

On cross-examination, Blackwell testified that it is a violation of the rules if an officer curses at a superior officer. In this case, Wilson called her a "bitch" and she was approximately eight feet away. She also testified that she did not know why the other reports did not mention Wilson calling her a "bitch", but it may be that they were further down the driveway. Blackwell never discussed it with them. Frankly, she was not surprised that Wilson used that language because she was known to be unprofessional.

Warden Karen Taylor (Taylor), has been with CCCF for twenty-one years; seven months as a Warden. She is tasked with the care and custody of inmates and safety of all in the facility.

She learned of Wilson's incident by reading through her daily reports and saw that contraband (CDs) came in the facility through legal mail. After Franceschini reported to her on the incident, coupled with the loading dock door incident, she recommended termination. "There was a pattern of the same type of behavior." (R-15). Wilson clearly violated Rules of Conduct 1.1, 1.2, 1.3. and 3.12 Disregard for Inmate Property. (R-12). There are significant concerns for the safety of the facility. The CDs can be used as weapons and mail can contain the drug suboxone. As a result, Wilson violated Order 33 for Mail Officer/Processing and Delivery 3.2.

In Order 33, Contraband is defined as:

1. Any item, article or material found in the possession of, or under the control of, an inmate that is not authorized for retention or receipt;
2. Any item, article, or material found within the adult county correctional facility or on facility grounds that has not been issued by the facility or authorized as permissible for retention receipt;
3. Any item, article or material found in the possession of, or under the control of, staff or visitors within the adult county correctional facility or on facility grounds that is not authorized for receipt, retention or importation;
4. Any item, article or material that is authorized for receipt, retention or importation by inmates, staff or visitors but that is found in an excessive amount or that has been altered from its original form. An amount shall be considered excessive if it exceeds stated adult county correctional facility limits or exceeds reasonable safety, security, sanitary, or space considerations; and/or
5. Any article that may be harmful or presents a threat to the security and orderly operation of an adult county correctional facility.

Taylor testified that when delivering legal mail, the officer should verify that the correct inmate is receiving the mail by checking the inmate's I.D. bracelet, then open

and inspect the contents in front of the inmate. None of this was done, Wilson admitted to it.

The Insubordination was the incident at her house. When the Laudermill papers were to be delivered at her home, she was "demeaning", "insubordinate," cursed at them and was "belligerent" so she was charged with a violation of Rule 1.4. Being off duty, has nothing to do with it. Personal conduct of employees is defined as "all department employees, when on and off duty, will conduct themselves in a manner that will not bring discredit or criticism to the department. Common sense, good judgment, consistency and the department's mission will be the guiding principles for the expected employee standard of conduct." (R-13).

"If you look at the disciplinary record, they tried to correct her behavior." "It's not a case of first impressions," she has a pattern of doing this. Even though she has twenty years, the safety of the facility is paramount.

On cross-examination Taylor admitted that "it was very troubling" that Wilson did not open the legal mail but "this was how she does things". It's quite possible that "she had done it in the past".

Regarding the security door incident, Taylor testified that "all doors should be closed at all times unless there was work being done." No inmate escaped as a result of Wilson's actions, but that is not the point. Security and safety are the primary concern. No inmate was hurt either, but "how do I know she is checking anything?" "I have no confidence" in her ability.

Appellant

Marion Wilson (Wilson), twenty years with Department of Corrections, had been Sergeant for twelve years, but she was demoted to Officer.

In February 2017, she was assigned to bid post mail/delivery and had been there for a month before this incident. She had never been instructed on when to open/close doors. She "understood" that if someone was on the loading dock that the doors were to be left open. On that day, three civilians and two inmates were on the loading docks, so she left the doors open.

Wilson indicated that her post is not the, "last line of defense" and there are gates on the loading dock that lead to the outside. Grundlock never explained the reason why the doors were to be kept closed.

On February 9, 2017, when the officers came to her house, she did not swear at them at all and did not call Blackwell a "bitch." Blackwell was "in the back" trailing behind the others who were "inches" ahead of her.

On cross-examination, Wilson stated that she chose the mail bid post because she only had two months left and admitted that she did not check the mail. She understands the danger of letting contraband into the facility. She also admitted that she is the "last officer" in that building near the loading dock. Also, the sign that is on the window for the mail post "has been there twenty years because Aramark is no longer there." Other officers would leave the doors open in the past. Despite the fact that the sign reads to keep the doors closed, "past practices" was her understanding. (R-6). She explained that she opened the doors after Grundlock left because people came in/out, and kept them open not "thinking anything of it".

Regarding the incident at her house, all the officers are lying. White would just "side" with them so he is not retaliated against. She did not curse. "She wasn't happy but was not being disrespectful."

Lieutenant Leithead (Leithead), did not hear Wilson call Blackwell a "bitch" and never spoke with other officers about report.

Sergeant Arroliga (Arroliga), has spent thirteen years with CCCF; two years as Sergeant. Arroliga did not hear Wilson call Blackwell a "bitch" and never spoke with any other officer about a report.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of Warden Taylor and the respondent witnesses was especially credible and persuasive. Their testimony was clear and concise. It was obvious that they all had concerns about these incidents and the safety of inmates and individuals working in the facility. Also, they had concerns for the lack of respect for the position and her superiors.

Conversely, Wilson's testimony was not credible. Wilson's own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. Regarding the legal mail, she admitted to not opening and searching the legal mail, thereby allowing fourteen CD's to enter the facility and become potential weapons. More disturbing is the fact that the record is devoid of her expressing any remorse for her actions. That allows me to believe that she failed to understand the gravity of her action, or more appropriate, inaction.

Regarding the issue of the security doors, she explained that all corrections officers always left those doors open when people were on the loading dock and that her post is not the "last line of defense;" there are gates on the loading dock. Wilson used the excuse that Grundlock never explained the reason why the doors were to be kept closed. Despite a sign located on the window of the post indicating that the "[d]oors are to remain closed at all times" and being employed as a corrections officer for twenty years, it is unfathomable as to why Wilson could not comprehend the significant security concern of leaving security doors open. Wilson's attempt to shift the blame for this incident on her employer for failing to educate her or explain why the doors were to be closed is unavailing and deeply concerns the undersigned.

Regarding the incident at her house, Wilson testified that all the officers were lying and White would just "side" with them so he is not retaliated against. Although "she wasn't happy," she did not curse. This was Wilson's attempt to "sell" her version of the facts to the undersigned. Not only was her recitation of the positioning of the officers when they left not credible, (Blackwell was "in the back" trailing behind the others who were "inches" ahead of her), it is also not realistic to believe that Wilson would call Blackwell a "bitch" loud enough for the others to hear. These comments by Wilson detracted from any modicum of credibility.

After hearing the testimony and reviewing the evidence, I **FIND,** by a preponderance of credible evidence, that on February 2, 2017, Wilson delivered legal mail to an inmate without searching it, causing fourteen CD's (contraband) to enter the correctional facility. I **FURTHER FIND,** on February 6, 2017, while at the mail post,

Wilson failed to secure the doors and after being told to close them, she continued to leave them open. I **FURTHER FIND,** on February 9, 2017, she was not courteous and civil while dealing with superior officers at her residence and used profane language toward Blackwell.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A.11A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A.11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C.4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact

alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of: N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause; Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; 3.12 Property of Inmates; General Order 73; General Order 74; and Post Order 33.

Initially, Wilson has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties. It is uncontested that Wilson failed to search an inmate's legal mail. Also, it is uncontroverted that security doors were open when Lt. Grundlock arrived at her post. The record reflects in the testimony and video that Wilson re-opened the doors, and kept them open after being told to close them. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of Incompetency, Inefficiency, Failure to Perform Duties. Charges of violation of N.J.A.C. 4A:2-2.3(a)(1) are hereby **SUSTAINED**.

Regarding the charge of Insubordination, to the extent that appellant is charged with violation of Rule of Conduct 1.4, which addresses Insubordination and Serious Breach of Security, consideration of such violation will be addressed in concert with the current analysis. Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> 'Insubordination' is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, appellant was told to keep the security doors closed and she did not. Approximately forty minutes later, the doors once again remained open. Despite a sign on the Post indicating that the "[d]oors are to remain closed at all times" and twenty years of employment at the CCCF, she claimed that nobody trained her at the post. Her disregard of a direct order is evidence of Insubordination. Her argument to the contrary is not lucid nor comprehensible based upon her years at the facility. Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating support to sustain a charge of Insubordination. The charges of violating N.J.A.C. 4A:2-2.3(a)(2) and Rule of Conduct 1.4 are hereby **SUSTAINED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re

Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a Corrections Officer failing to search an inmate's mail and allowing contraband to enter a prison. Also, the same officer disregarding a direct order to secure security doors and allowing people in a correctional facility to walk freely through the institution. Finally, to use the type of language Wilson used toward a superior officer in public is intolerable. I **CONCLUDE** that appellant's actions constitute unbecoming conduct. The charges of violating N.J.A.C. 4A:2-2.3(a)(6) and Rules of Conduct 1.2 are hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R. 2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R. 2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of Neglect of Duty than the image of a corrections officer in a correctional facility not searching an inmate's mail and allowing contraband to enter a prison. Also, leaving secure security doors open and allowing people in a correctional facility to walk freely through the institution after being instructed to close them by a superior officer. I **CONCLUDE** that appellant's actions constitute Neglect of Duty. The charges of violating N.J.A.C. 4A:2-2.3(a)(7) and Rule of Conduct 1.3 are hereby **SUSTAINED**.

Appellant has also been charged with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, appellant is charged with violations of the Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; 3.12 Property of Inmates; General Order 73; General Order 74; and Post Order 33. It is noted that the Preliminary and Final Notices of Disciplinary Action (R-1) indicate the sustained charges. I **CONCLUDE** that consideration of the charge constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause) will be limited to the regulations, rules and general orders specifically enumerated in the Final Notice of Disciplinary Action (R-1). Additionally, Rules of Conduct 1.2, 1.3, and 1.4 have been addressed within the discussion of violations of N.J.A.C. 4A:2-2.3(a)(2), (6) and (7).

As such, appellant is charged with violating Rule of Conduct 1.1, Violations in General, which is a charge of "Failure to comply with regulations, orders, directives or practices of the department, whether verbal or written by the Warden or his designee." (R-6). The rule provides that:

> Any employee who violates any rule, regulation, procedure, order or directive, either by an act of commission or omission, whether stated in this manual or elsewhere, or who violates the standard operating procedure as dictated by departmental practice, is subject to disciplinary action in accordance with the New Jersey Department of Personnel (Civil Service) rules and regulations. Disciplinary actions shall be based on the nature of the rule, regulation, procedure, order, or directive violated, the severity and circumstances of the infraction and the individual's record of conduct.

Violation of this rule would seem to be implicated by the appointing authority's allegations of violations of General Orders 73, 74, and Post Order 33.

Post Order 33 (R-11) addresses the duties of a Mail Officer/Processing and Delivery. This order defines contraband and provides that "[w]hen delivering LEGAL MAIL, the officer will verify that the correct inmate is receiving the correspondence by checking the inmate's I.D. bracelet. The officer will then open and inspect the contents in front of the inmate...." Wilson admitted to not doing any of the above.

Accordingly, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of Post Order 33 and the charge is hereby **SUSTAINED**.

General Order 73 (R-13) addresses "Personal Conduct of Employees." There was significant testimony that the appellant violated sections 4 and 12, of this order.

Section 4 states that "Employees will comply with all departmental rules and regulations and all laws of the United States and the State of New Jersey." The record reflects above that appellant did not comply with the Post Order 33 to which she was accused of violating. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Section 12 states that, "Employees are responsible to know all departmental policies as well as county policies and act in accordance with them." Irrespective of whether the appellant was aware or unaware of the specific requirement of Post Order 33, ultimately it is her responsibility to know. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of this section and the charge is hereby **SUSTAINED**.

Based on the foregoing, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of General Order 73.

General Order 74 (R-14) addresses "Professional Code of Conduct." Testimony revealed that appellant violated sections 1, 9, 11, 12, 13, and 14 of this order.

Section 1 states that, "Sworn personnel will conduct themselves in accordance with the Constitution of the United States, the New Jersey Constitution and all applicable laws and rules enacted or established pursuant to legal authority. Sworn personnel are also obligated to follow all other departmental and county policies." The evidence in the record demonstrates that appellant not only violated Post Order 33 but also N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); N.J.A.C. 4A:2-2.3(a)(6) (Conduct Unbecoming); N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty) and therefore this supports a finding of a violation of this section. Also, she used "indecent", "profane" and "derogatory" language toward a superior officer; "ridiculing" them in public as well as not "treating fellow employees with respect." Captain Blackwell's testimony was clear, concise and believable. As stated above, Wilson's was not. I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of section 9, 11, 12, 13 and 14 and the charge is hereby **SUSTAINED**.

Based on the foregoing, I **CONCLUDE** that the appointing authority has met its burden in demonstrating a violation of General Order 74.

Having met its burden in demonstrating violations of General Orders 33, 73 and 74, I **CONCLUDE** that the appointing authority has demonstrated a violation of Rule of Conduct 1.1, 1.2 and 1.4 having already been addressed, I **FURTHER CONCLUDE** that the charge of a violation of N.J.A.C. 4A:2-2.3(a)(12), Other Sufficient Cause, is hereby **SUSTAINED**.

Finally, the respondent sustained charges of 2.10 Inattentiveness to Duty, 3.2 Security and 3.12 Property of Inmates.

2.10 Inattentiveness to Duty is defined as "Personnel shall not engage in any activities or personal business which could cause them to neglect or be inattentive to duty." There is unrebutted evidence in the record to support a claim that would substantiate this charge. Testimony from Lt. Grudlock, corroborated by Wilson, indicated that Wilson was on her cellular telephone with her paycheck in her hand when the Lt. approached. This occurred while the security doors were left open. I **CONCLUDE** that the charge of a violation of 2.10 Inattentiveness to Duty, is hereby **SUSTAINED**.

3.2 Security is defined as "[p]ersonnel shall exercise a scrupulous regard for security in their dealings with inmates and with regard to the Correctional Facility in general. Any act of commission or omission tending to undermine security shall constitute a breach of security." (R-12). I find the record to support a claim that would clearly substantiate this charge. The fact that appellant fails to acknowledge the security concern in improperly searching or failing to search an inmate's mail and leaving security doors open is troublesome. Therefore, I **CONCLUDE** that the charge of a violation of 3.2 Security, is hereby **SUSTAINED**.

3.12 Property of Inmates is defined as "Employees shall exercise scrupulous regard for the property of inmates." Here, Wilson exercised complete disregard for legal mail of an inmate and allowed it to be introduced into the general population without a search. This would compromise not only the safety of the inmate but any possible defense she may have had. Therefore, I **CONCLUDE** that the charge of a violation of 3.12 Property of Inmates, is hereby **SUSTAINED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has been fined on six occasions, reprimanded on eight occasions, suspended on seven occasions and demoted from Sargent to officer. All of the prior discipline is similar to the within charges. The disciplinary record is remarkable. It is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Considering the foregoing, the respondent seeks to terminate the appellant. Considering the record in the present matter including the appellant's disciplinary

record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action terminating appellant is hereby **SUSTAINED**.

DECISION AND ORDER

I **ORDER** that the charges of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(2) Insubordination; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty; N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause be **SUSTAINED**. I further **ORDER** that the charges of violating Camden County Correctional Facility Rules of Conduct (C.C.C.F.): 1.1 Violations in General; 1.2 Conduct Unbecoming; 1.3 Neglect of Duty; 1.4 Insubordination; 2.10 Inattentiveness to Duty; 3.2 Security; 3.12 Property of Inmates; General Order 73; General Order 74; and Post Order 33 also be **SUSTAINED**. I **FURTHER ORDER** respondent's action terminating appellant is hereby **SUSTAINED**.

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. 40A:14-204.

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.

June 21, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 6/21/17

Date Mailed to Parties: 6/21/17

/vj

APPENDIX

LIST OF WITNESSES:

For Appellant:

Marion Wilson

Lieutenant Leithead

Sergeant Arroliga

For Respondent:

Lieutenant Douglas Grudlock

Captain Rebecca Franceschini

Captain Linda Blackwell

Warden Karen Taylor

LIST OF EXHIBITS:

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action 31-A, dated February 10, 2017

R-2 General Incident Report authored by Sergeant Theron Sharper, dated February 3, 2017

R-3 Supervisor Staff Complaint authored by Franceschini, dated February 6, 2017

R-4 Pictures of the Envelope and Fourteen CDs

R-5 Supervisor Staff Complaint authored by Grundlock, dated February 6, 2017

R-6 Videos and Pictures

R-7 General Incident Report by Blackwell, dated February 9, 2017

R-8 General Incident Reported by Leithead, dated February 9, 2017

R-9 General Incident Report by Arroliga, dated February 9, 2017

R-10 General Incident Report by White, dated February 9, 2017

R-11 Camden County Department of Correction Post Order Number 33 Mail Officer/Processing and Delivery

R-12 Camden County Department of Corrections Rules of Conduct

R-13 Camden County Department of Corrections General Order Number 73 Personal Conduct of Employees

R-14 Camden County Department of Corrections General Order Number 74 Professional Code of Conduct

R-15 Wilson Chronology of Discipline

8-23 17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

November 21, 2017

Leonard C. Schiro, Esq.
Mets, Schiro, McGovern & Paris
555 U.S. Highway 1 South – Suite 240
Iselin, New Jersey 08830

Steven S. Glickman, Esq.
570 Broad Street
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Re: *Wilfredo Morales, Jr. v. City of Asbury Park* (CSC Docket No. 2015-92 and OAL Docket No. CSV 12656-14)

Dear Mr. Schiro and Mr. Glickman:

The appeal of Wilfredo Morales, Truck Driver, Heavy with the City of Asbury Park, of his 90 working day suspension on charges, was before Administrative Law Judge Jacob S. Gertsman (ALJ), who rendered his initial decision on August 23, 2017, recommending reversing the 90 working day suspension. No exceptions were filed by the parties.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on October 6, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than November 20, 2017. *See N.J.A.C.* 1:1-18.8. However, since one of the three Commission members must be recused from participating on this particular matter, there is not a quorum of members available to vote. Accordingly, the Commission sought consent from the parties, as required, to secure a second 45-day extension. However, neither party provided consent for an additional extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective November 21, 2017.

Since the appellant's suspension has been reversed, he is entitled to 90 working days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Additionally, the appellant is entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. Proof of income earned and an affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of receipt of this letter. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall make a

good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Jacob S. Gerstman, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 12656-14
AGENCY DKT. NO. 2015-92

IN THE MATTER OF
WILFREDO MORALES, JR.,
CITY OF ASBURY PARK.

Leonard C. Schiro, Esq., for appellant (Mets Schiro McGovern & Paris, LLP, attorneys)

Steven Glickman, Esq., for respondent (Lite DePalma Greenberg, LLC, attorneys)

Record Closed: July 14, 2017 Decided: August 23, 2017

BEFORE **JACOB S. GERTSMAN,** ALJ:

STATEMENT OF THE CASE

Appellant Wilfredo Morales, Jr. (Morales) appeals a ninety-day suspension imposed by Respondent City of Asbury Park (City, Asbury Park), for violations of N.J.A.C. 4A:2-2.3 including: Inability to perform duties; Chronic or excessive absenteeism or lateness; Conduct unbecoming a public employee; Neglect of duty; and Other sufficient cause.

PROCEDURAL HISTORY

On July 22, 2014, the City served on appellant a Preliminary Notice of Disciplinary Action suspending him for ninety working days. On August 18, 2014, a departmental

hearing was held. Asbury Park issued a Final Notice of Disciplinary Action on August 24, 2014, suspending appellant for ninety working days to be served starting July 24, 2014. Morales filed an appeal with the Civil Service Commission on or about September 5, 2014. The matter was filed with the Office of Administrative Law (OAL) as a contested case on September 30, 2014, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 and assigned to Administrative Law Judge Robert W. Bingham. The matter was reassigned to Administrative Law Judge Patricia M. Kerins following Judge Bingham's appointment to the Superior Court and reassigned to the undersigned due to scheduling conflicts. The matter was heard on July 14, 2017, and the record was closed.

FACTUAL DISCUSSION AND FINDINGS

Respondent's exhibits detailed appellant's attendance record from his hiring as a heavy truck driver for the City of Asbury Park in April 2008, through June 30, 2014. In 2008, he was scheduled to work 175 days (not including holidays, vacation days, and personal days) and used 3.5 of 7.5 earned sick days. (R-2, R-3.) In 2009, he was scheduled to work 227 days (not including holidays, vacation days, and personal days) and used 28.5 of 20 earned sick days. (R-2, R-4.) Appellant claimed that the first week of January 2009 should have been for injury leave, rather than sick time. In 2010, he was scheduled to work 238 days (not including holidays, vacation days, and personal days) and used 16.5 of 20 earned sick days. (R-2, R-5.) In 2011, he was scheduled to work 224.5 days (not including holidays, vacation days, and personal days) and used 23.5 of 20 earned sick days. (R-2, R-6.) In 2012, he was scheduled to work 228 days (not including holidays, vacation days, and personal days) and used 15.5 of 20 earned sick days. (R-2, R-7.) In 2013, he was scheduled to work 220.5 days (not including holidays, vacation days, and personal days) and used 16 of 20 earned sick days. (R-2, R-8.) In 2014, he was scheduled to work 123 days (not including holidays, vacation days, and personal days) through July 7, 2014, and used 16 of 20 earned sick days. (R-2, R-7.)

Robert Bianchini (Bianchini), deputy director, department of public works for the City of Asbury Park, testified on behalf of respondent. He stated that Morales' excessive absenteeism, which left the City shorthanded, led to the disciplinary proceedings. The preliminary notice of disciplinary charges also cited a pattern of absenteeism and was

prepared for Jose R. Cunha, then the Director of Public Works. (R-2.) Cunha is no longer employed by the City, and no subsequent charges were brought against appellant.

Bianchini stated that the appellant's attendance record demonstrated a pattern of sick days taken in conjunction with other days off, not including time-off for injury. (R-3 through R-9.) He detailed appellant's percentage of sick time taken in this manner from 2008 through 2014 as: 2008-57 percent; 2009-78 percent; 2010-60 percent; 2011-83 percent; 2012-48 percent; 2013-74 percent; 2014-100 percent. He admitted that these percentages were not in the charges brought against Morales. Bianchini further admitted that neither the collective bargaining agreement (A-2), nor the personnel handbook, detailed a policy regarding the percentage of time an employee may not exceed when tied to other days off.

Bianchini stated that appellant exceeded the allotted sick time in both 2009 and 2011. (R-4 and R-6.) He further cited appellant's attendance at that end of December 2009, where he was not present at work for nine consecutive days, consisting of four scheduled days off; one holiday; two sick days; and two personal days. (R-4)

Bianchini claimed that Morales and others received written reprimands with warnings from the City Manager to make them aware that continued excessive use of sick time could lead to disciplinary action. Respondent did not produce written copies of the warnings, and Bianchini was unsure of when they were sent to appellant and other employees. He stated that the letter was the result of a directive from the City Manager to reduce excessive absenteeism, and were directed at individuals with specific problems. He could not recall when they were sent, but he believed that it was on or about July 2014.

Bianchini further admitted that notwithstanding the fact that two other employees took more sick time than appellant, no others were charged with excessive absenteeism. Appellant averaged seventeen sick days per year, while one employee used thirty-one sick days in 2009, and one averaged sixteen per year. (P-1.) Bianchini stated that appellant's rank of absences in comparison to his colleagues was not in the top five, and that appellant brought in a note for the sick days and was medically excused. Morales also had various

Workers' Compensation issues leading to injury time taken, that culminated in spinal surgery, which were not contested by the respondent.

Appellant Morales testified on his own behalf. He has been employed as a heavy truck driver for Asbury Park since 2008. No disciplinary action was taken against him until the commencement of this matter, and no subsequent action has been taken.

He was first injured in 2008, in that incident, a waterlogged railroad tie washed up on the beach and came close to people, including children. When he picked it up, he felt a crack in his back. He stated that he eventually required surgery on L-4 L-5 in his spine. Morales showed the surgery scar on his lower back, and testified that he reinjured his back in 2014. Morales further stated that he produced a doctor's note for each absence, whether it was for his illness or if it was regarding an issue with one of his five children. He was also unaware of any rule regarding a percentage of absences from before or after a weekend.

Appellant recalled that the warning letters cited by Bianchini, but not entered into evidence, were sent to all employees.

Having heard the testimony of the witnesses and reviewed the documentary evidence, I make the following findings of **FACT:**

1. Appellant has been employed by the City of Asbury Park since April 2008;

2. Appellant exceeded the amount of allotted sick time in 2009 and 2011;

3. Respondent had no specified policy limiting the amount of sick time taken by employees in conjunction with other days off;

4. Appellant received no warnings or counseling regarding the alleged excessive use of sick time.

5. Appellant produced doctor's notes for the sick days taken.

LEGAL DISCUSSION

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

The respondent has alleged charges of violations of N.J.A.C. 4A:2-2.3(d) including the Inability to perform duties; Chronic or excessive absenteeism or lateness; Conduct unbecoming a public employee; Neglect of duty, and Other sufficient cause.

Respondent alleged charges against appellant for chronic or excessive absenteeism or lateness, N.J.A.C. 4A:2-2.3(a)(4). Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4).

"Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

"There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to benefit errant employees." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). However, approval of an absence shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b).

In Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (App. Div. 1963), a classified employee who was granted a leave of absence was improperly denied an extension of that leave because of the appointing authority's failure to provide proper notice of the denial; the appointing authority knew she was absent, was aware that she was confined to a hospital, and had previously granted the leave.

In this matter, respondent claims that appellant's injury time was not at issue, rather he had developed a pattern of excessive absenteeism through the use of his sick time. Specifically, respondent argued that appellant had a high percentage of sick time tied to other days off, and that irrespective of the fact that the sick days were approved, Morales was not present to do his job. Appellant countered that the alleged excessive absenteeism was never memorialized and that Morales was never warned. Respondent claimed that Morales was in fact warned, and that it takes time for a pattern to develop.

The City has not produced any memorialized warnings to Morales. It is attempting to utilize a standard that was not previously provided to any employee in the collective bargaining agreement or the employee handbook. Finally, the City initiated these proceedings in mid-2014, approximately six-years following the hiring of Morales, when it alleges the conduct began during the first year of his employment. Therefore, I **CONCLUDE** that the charge of excessive absenteeism, has not been proved by a preponderance of the credible evidence and is hereby **DISMISSED.**

Respondent has alleged charges against appellant for inability to perform duties, N.J.A.C. 4A:2-2.3(a)(1). Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties."

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for -- the proper performance of her duties as outlined by the appointing authority.

The record is devoid of any mention about appellant's ability to perform his position, only that his absence, even if approved, made him unable to perform the job. Respondent failed to demonstrate how appellant's absence affected the work that needed to be done, and failed to memorialize appellant's alleged conduct from 2008 through 2014. Therefore, I **CONCLUDE** that the charge of the inability to perform duties has not been proved by a preponderance of the credible evidence and is hereby **DISMISSED.**

Respondent also sustained charges against appellant for conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)].

Suspension or removal may be justified where the misconduct occurred while the employee was off-duty. Emmons, supra, 63 N.J. Super. at 140.

Absent respondent's argument that appellant's mere absence from work, irrespective of the fact that he was either on approved sick or injury leave, left the City shorthanded, the record does not support the charge of conduct unbecoming. Respondent has presented no credible argument that appellant's absence in itself meets the above standard. Therefore, I **CONCLUDE** that the charge of conduct unbecoming, has not been proved by a preponderance of the credible evidence and is hereby **DISMISSED.**

Respondent alleged charges against appellant for a violation of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty.

"Neglect of duty" has been interpreted to mean that "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), <http://njlaw.rutgers.edu/ collections/oal/>. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "'the legal standard of reasonable conduct in the light of the apparent risk.'" Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

Respondent made the argument that appellant's absence, even if excused, left him unable to perform the job. There is no evidence presented that proves appellant failed to perform his job duties. Therefore, I **CONCLUDE** that the charge of neglect of duty, has not been proved by a preponderance of the credible evidence and is hereby **DISMISSED.**

Finally, appellant has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is generally defined in the charges against appellant as all other offenses caused and derived as a result of all other charges against him. Other

sufficient cause is a general "catch-all" offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. Respondent has presented no evidence to support this charge and therefore, I **CONCLUDE** that the charge has not been proved by a preponderance of the credible evidence and is hereby **DISMISSED.**

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the determination to suspend the Appellant in this matter be and hereby is **REVERSED.**

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.

August 21, 2017
DATE

JACOB S. GERTSMAN, ALJ

Date Received at Agency: August 21, 2017

Date Mailed to Parties: August 21, 2017

nd

APPENDIX

WITNESSES

For Appellant:

Wilfredo Morales, Jr.

For Respondent:

Robert Bianchini

EXHIBITS

For Appellant:

A-1 Sick Day Chart

A-2 Agreement Between City of Asbury Park and City of Asbury Park Employees Union, Chapter 5, Local 196, International Federation of Professional and Technical Engineers, AFL-CIO (I.F.P.T.E.)

For Respondent:

R-1 Civil Service Commission, State of New Jersey, Final Notice of Disciplinary Action (31-B)

R-2 Civil Service Commission, State of New Jersey, Preliminary Notice of Disciplinary Action (31-A)

R-3 2008 Employee Attendance Record

R-4 2009 Employee Attendance Record

R-5 2010 Employee Attendance Record

R-6 2011 Employee Attendance Record

R-7 2012 Employee Attendance Record

R-8 2013 Employee Attendance Record

R-9 2014 Employee Attendance Record

9-6-17

STATE OF NEW JERSEY

In the Matter of Dean Edwards
City of Passaic, Department of Public Works

CSC DKT. NO. 2016-4248
OAL DKT. NO. CSV 09824-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 BW

The appeal of Dean Edwards, Tree Maintenance Supervisor, City of Passaic, Department of Public Works, removal effective March 29, 2016, on charges, was heard by Administrative Law Judge Leland S. McGee, who rendered his initial decision on July 24, 2017. No exceptions were filed.

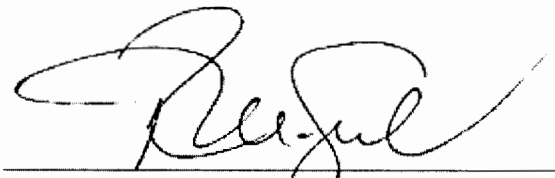
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Dean Edwards.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09824-16
AGENCY DKT. NO. 2016-4248

DEAN EDWARDS,
Petitioner,
v.
CITY OF PASSAIC DEPARTMENT OF PUBLIC WORKS,
Respondent.

Kendal Coleman, Esq., for petitioner (Kendal Coleman, attorneys)

Steven Siegler, Esq., for respondent (Eric M. Bernstein & Associates, attorneys)

Record Closed: April 27, 2017 Decided: July 24, 2017

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case arises out of an employment termination proceeding against Dean Edwards (Petitioner or Edwards) by the City of Passaic (Respondent). Edwards worked for the Passaic Department of Public Works (DPW) for over twenty-five years. He worked as a recycling driver for approximately ten years before becoming a tree cutter. He held that position until he was promoted to the position of Supervisor of Trees in 2008.

On October 14, 2015, the City of Passaic issued a Preliminary Notice Disciplinary Action (PNDA) against Petitioner alleging twenty (20) charges. Petitioner requested a hearing, which the City conducted over four (4) dates:

- November 30, 2015,
- December 21, 2015,
- January 25, 2016, and
- February 25, 2016.

On March 31, 2016, the City issued a Final Notice of Disciplinary Action (FNDA) removing Edwards from public employment. The following charges were sustained: N.J.A.C. 4A:2-2.3(a):

- (1) (Incompetency, inefficiency, or failure to perform duties);
- (2) (Insubordination);
- (6) (Conduct unbecoming of a public employee);
- (7) (Neglect of duty);
- (8) (Misuse of public property, including motor vehicles); and
- (12) (Other sufficient cause).

Petitioner then appealed to the OAL.

The allegations outlined in the FNDA relate to several incidents and altercations involving a number or Edwards's coworkers. The facts surrounding these incidents, litigants' arguments, and credibility determinations are outlined chronologically below.

There was a delay in serving the FNDA upon Petitioner, and thereafter, he requested a hearing before the Civil Service Commission, which transmitted this matter as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on July 1, 2016.

DISCUSSION OF THE FACTS

Summary of Testimony

May 15, 2015, Incident

At the time of the incidents, Anthony Gagliano (Gagliano) was the Assistant Superintendent. On May 15, 2015, Edwards requested Gagliano's approval to take a personal day on May 18, 2015. (R-9). Edwards did not inform Gagliano that he was scheduled for a mandatory defensive driving class on that day. The schedules were posted in the DPW office and employees are responsible for checking the schedule regularly. Gagliano approved the request because he did not know Edwards was scheduled for a class. (R-9.) Typically, this requires the approval of the director.

September 18, 2015, Incident

On September 18, 2015, at approximately 7:36 a.m., Miriam Perez (Perez), Administrative Assistant, parked her vehicle in the DPW parking lot. As she exited the vehicle and prepared to walk across the DPW driveway, Edwards drove past her in a large bucket loader. (P-1.) Perez was alarmed by the fact that Edwards's vehicle was passing so close to her at a high rate of speed. She felt he was traveling too fast and that she was in danger.

The video files of the incident show a first DPW vehicle (pickup/utility truck) exiting the garage and reaching the end of the driveway in approximately ten seconds. (P-1.) The video shows the second vehicle, a much larger piece of equipment, being driven by Edwards, exiting the garage and reaching the end of the driveway in approximately seven seconds. The videos also show multiple DPW employees crossing the busy driveway at that time of day.

October 1, 2015, Incident

On October 1, 2015, Kasim Washington (Washington) was working near 14 Alfred Street, a private residence belonging to a relative. He called Anthony Gagliano, Assistant DPW Superintendent at 10:04 a.m. to ask permission to use a restroom. Gagliano granted him permission to use the bathroom at 14 Alfred Street, the home of the mother of Washington's son. Edwards called Gagliano on his cell phone at 10:28 a.m. and again at 10:37 a.m. to advise him that Washington was in a private residence. Gagliano advised Edwards during the first telephone call that he had granted Washington permission to be there and that he would check into the matter himself. When Washington exited the residence, he saw DPW vehicle #107 parked head-on to his vehicle on the wrong side of the street.

Washington called Gagliano and asked whether Edwards and the Shade Tree crew were supposed to be working in that area because a similar situation occurred in May of that year when Washington was working with a crew nearby. In that instance, Washington received permission from his supervisor to use the restroom at his girlfriend's home at XX Wilcot Street but when he returned to the crew, he noticed Edwards watching him from a DPW vehicle parked up the street, with a cell phone pointed in his direction. Edwards ducked down when he recognized that Washington noticed him. In the October instance, Gagliano said they were working nearby (one block away). When Washington exited the house Edwards addressed him stating "I got you now" and instructed Washington to go to the DPW office. Washington then called his Shop Steward, Frank Gonzalez (Gonzalez), and asked him to meet him at the DPW office.

Gonzalez met Washington at the DPW office where Washington explained what happened at 14 Alfred Street. Gonzalez saw Edwards and asked to speak with him in private. They went into the "clock" room. Gonzalez tried to talk to Edwards about his concern about other employees' whereabouts. (R-5.) Edwards spoke over him and used insulting language. Edwards and Gonzalez then left the building together, walked towards the garage, and continued to address one another. In the garage, Edwards began threatening Gonzalez. (R-5.) Edwards then approached Gonzalez, put his finger

in his face, and threatened him. (R-5.) Coworkers restrained Gonzalez and urged him to back away before the incident escalated.

Washington and Gonzalez submitted reports regarding the DPW garage incident, and went to the City's Personnel Department to discuss it with Viviana Lamm (Lamm), Director of Personnel. (R-2; R-5.) Lamm advised them to return to the garage and to stay away from Edwards. She then spoke with Gagliano to advise him that Edwards was to stay away from Washington and Gonzalez for the rest of the day. Gagliano met with Edwards and gave him this directive. Lamm did not speak directly with Edwards.

Despite Gagliano's warning, Edwards approached Washington and Gonzalez while they were in the break room at the end of their shift. He entered the break room and demanded that both employees give him their daily work reports "or else [he was] going to write [them] up." (R-3; R-6.)

Both Washington and Edwards reported the day's incidents to the Passaic Police Department on the following day. (R-4; R-7.) The officer found probable cause to issue a complaint against Edwards, who was later found "not guilty" in Municipal Court.

October 6, 2015, Incident

On October 6, 2015, John Sarno, Esq. (Sarno) of the New Jersey Employers' Association led a seminar for DPW employees, on workplace harassment and discrimination. Edwards and Gregory Lawson (Lawson), a DPW employee, were in attendance. At one point during the seminar, Edwards began a lengthy admonishment about what he perceived to be a general lack of work ethic among unidentified DPW workers. Lawson took offense and responded to Edwards's statements. Edwards then engaged in a verbal confrontation with Lawson. Both employees ignored Sarno's repeated requests to stop. The argument became personal and heated. Both men rose from their seats, continued arguing, and made inflammatory statements. They were approximately eight feet apart, shouting and gesturing at each other. They closed the gap to approximately four feet. They continued to argue for short while before eventually returning to their seats.

Perez

In May 2015, Theodore Evans (Evans), Director of the DPW, asked Perez to monitor the time that Edwards spent in the office instead of out in the field supervising his crew. (R-1.) Perez recorded that on at least six occasions between May 6, 2015, and August 11, 2015, Edwards had spent over five hours in the office when he should have been in the field supervising his staff.

Edwards' Disciplinary Record

Edwards was disciplined on four prior occasions. These include:

- One-day suspension in 2002 (see Exhibit R-15, Notice of Minor Disciplinary Action, dated May 10, 2002);
- Two-day suspension in 2009 (see Exhibit R-16, Notice of Minor Disciplinary Action, October 14, 2009);
- Twenty-four-day suspension in 2014 (see Exhibit R-17, Final Notice of Disciplinary Action, dated February 13, 2014); and,
- Forty-five-day suspension in 2016 (see Exhibit R-18, Final Notice of Disciplinary Action, dated January 13, 2016).

Arguments

May 15, 2015

Petitioner argues that all employees, including supervisors, were aware of the training and had notice that it was scheduled for May 18, 2015. He argues that since Gagliano had notice of the training, he could not have been misled into granting a Personal Day.

Respondent argues that Edwards deliberately failed to mention the training to Gagliano because otherwise, he would have denied the request for a Personal Day.

September 18, 2015

Petitioner argues that the allegation that he drove recklessly through the DPW parking lot is "absurd" and that it is "obvious" from the video.

Respondent argues that Edwards drove through the parking lot too fast given the time of day and that he almost "ran over" Perez. Respondent points out that Edwards's vehicle crosses the lot in seven seconds just after another DPW vehicle crosses in ten seconds.

October 1, 2015

Petitioner argues that he followed the proper chain of command when he observed Washington's vehicle parked at a private residence and that he was never instructed "not to confront Washington." He also argues that Frank Gonzalez instigated and escalated the confrontation that occurred in the garage. Petitioner argues that at no point after the incident did anyone order him to stay away from Gonzalez and Washington.

Respondent argues that Edwards was insubordinate when he chose to confront Washington outside of 14 Alfred Street as Gagliano said he would look into the matter himself. Respondent also argues that Edwards's conduct with Frank Gonzalez was unbecoming of a public employee and violated DPW employee policies. Respondent provides testimony of Gagliano to suggest that Edwards was in fact ordered to stay away from Gonzalez and Washington.

October 6, 2015

Petitioner argues that he did not instigate a confrontation with Lawson during the training and did not engage him physically at any point.

Respondent argues that neither man listened to Sarno's request to stop and both used inflammatory statements during the confrontation.

Perez's Notes

Petitioner argues that Ms. Perez was never asked to keep track of any other employee and this action was done to single out Edwards so that he could be terminated. He also argues that he was using his time in the office to make work-related phone calls.

Respondent provides testimony that Ms. Perez has kept track of other employees in the past. Perez testified that Edwards was in the office when he should have been supervising his crew and that at one point he was observed watching a movie.

CREDIBILITY

When the testimony of witnesses is in disagreement, the trier of fact must weigh the witnesses' credibility in order to make factual findings. Credibility is the value that the fact finder gives to testimony of a witness and contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971) and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, supra, 5 N.J. at 521-22.

Regarding the incident on May 15, 2015, I **FIND** Respondent's testimony to be more credible. Therefore, I **FIND** that Edwards should have, but failed to mention the training to Gagliano when he requested a Personal Day. Edwards intentionally misled Gagliano.

Regarding the incident in the DPW parking lot on September 18, 2015, I find Petitioner's argument to be more convincing. Therefore, I **FIND** that at no point in the video did the loader appear to be moving at an excessive rate of speed, nor did it come close to "running over" Perez.

Regarding the incident involving Kasim Washington and Frank Gonzalez on October 1, 2015, I **FIND** Respondent's testimony to be more credible. Therefore, I **FIND** that Edwards did not follow orders and acted inappropriately when confronted by other DPW employees.

Regarding the incident that occurred during the workplace harassment seminar on October 6, 2015, I **FIND** Respondent's testimony to be more credible. Lawson may have instigated the confrontation; however, I **FIND** that Edwards acted inappropriately and served to escalate the conflict.

Regarding Perez's keeping track of Edwards, I **FIND** Respondent's testimony to be more credible. Therefore, I **FIND** that Edwards spent an excessive amount of time in the office, neglected work duties, and was not singled out for purposes of terminating his employment.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576, 580-81 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act states that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline and termination of public employees.

N.J.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The New Jersey Department of Human Services has a Disciplinary Action Program that sets forth the standards that all employees must meet. (R-12.) "Unbecoming conduct" is broadly defined as conduct that adversely affects the morale or efficiency of the government unit or has the tendency to destroy public respect and confidence in the delivery of government services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The physical abuse of a resident of NJDC by a staff member who was entrusted with the resident's care would be conduct unbecoming the staff member.

The Disciplinary Action Program also sets forth the penalty or range of progressive penalties for each offense of violating the Department's standards. With respect to the physical abuse of a client, the first and only disciplinary action is removal of the employee. (R-12 at C.3.) Consistent therewith, NJDC's Policy # CEO-005 regarding Suspected/Alleged Abuse or Neglect of Clients defines "abuse" as, among other things, "striking with a closed or open hand." (R-11 at 1.) NJDC has an Incident Response Unit with established protocols under Policy # CEO-005 for conducting investigations of suspected abuse or neglect. (R-11 at 4.)

On March 31, 2016, the city of Passaic issued a Final Notice of Disciplinary Action to Edwards, terminating him from employment. The following charges will be discussed.

N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency or failure to perform duties)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(1) petitioner did exhibit incompetency, inefficiency or failure to perform his duties. There is no definition in the New Jersey Administrative Code for incompetency, inefficiency or failure to perform duties. However, case law has determined incompetence is a "lack of the ability or qualifications necessary to perform the duties required of an individual [and] a consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't, CSV 9921-98, Initial Decision (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000),

http://njlaw.rutgers.edu/collections/oal/final/ (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).)

I **CONCLUDE** that Edwards ignored his duties as a Supervisor when he chose to follow Washington and threatened him with disciplinary action. Washington was not a member of Edwards's crew. Edwards ignored his job duties when he spent a total of over five hours in the DPW office instead of supervising his men out on the road. Edwards failed to perform his duties in a manner that is minimally acceptable for his position. Therefore, I **CONCLUDE** that this charge should be upheld.

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

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(2), petitioner did engage in insubordination. The New Jersey Administrative Code definitions, N.J.A.C. 4A:1-1.3, does not provide a definition for insubordination; however, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla,187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002). In In re Rudolph, CSV 5083-99 (consolidated), Initial Decision (October 23, 2000), adopted, Merit System Board (December 18, 2000), http://njlaw.rutgers.edu/collections/oal/, the Merit System Board upheld the removal of a public works repairer for refusing to respond to the reasonable orders of his supervisor to complete an assignment. The Administrative Law Judge found that appellant's employment history evidenced a pattern of refusal to accept supervision and disrespect for those who attempted to supervise him and upheld appellant's removal.

I **CONCLUDE** that Edwards disobeyed Gagliano regarding the matter of Washington's use of a private bathroom on October 1, 2015. Gagliano told Edwards he would handle the matter himself. Edwards remained on the scene, continued to monitor

Washington and confronted Washington outside the home, stating "I got you now." He should have left the scene after speaking with Gagliano.

I further **CONCLUDE** that Edwards was insubordinate when he disobeyed and disregarded the directive of Gagliano, through Lamm, to stay away from Gonzalez and Washington for the rest of the day on October 1, 2015. Edwards defied this order when he chose to confront the employees and demand to see their daily work logs even though he was not their direct supervisor. Therefore, I **CONCLUDE** that this charge should be upheld.

N.J.A.C. 4A:2-2.3(a)(6) (Conduct unbecoming a public employee)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6), petitioner did engage in conduct unbecoming a public employee. There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/.

In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys. Bd. (June 26, 2001), http://njlaw.rutgers.edu/collections/oal/, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A; see, e.g., In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an "elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services." Id. at 554.

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct need not "be predicated upon the

violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye as an upholder of that, which is morally and legally correct."

In the present case, I **CONCLUDE** that Edwards engaged in a loud verbal confrontation with the Shop Steward, Frank Gonzalez, on October 1, 2015. Edwards threatened, taunted, and bullied Gonzalez using profane and insulting language. Five days later, he engaged in a verbal confrontation with a different DPW employee during a seminar addressing the topic of workplace violence. Again, Edwards used threatening and insulting language. Therefore, I **CONCLUDE** that this charge should be upheld.

N.J.A.C. 4A:2-2.3(a)(7) (Neglect of duty)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(7) and the charge of negligence, petitioner did neglect his duties. There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

I **CONCLUDE** that Edwards failed to perform his job duties when he chose to unreasonably follow and question Washington on two occasions, engaged in two verbal altercations with two different employees, skipped a mandatory training class, and sat in the office watching movies instead of working. Therefore, I **CONCLUDE** that this charge should be upheld.

N.J.A.C. 4A:2-2.3(a)(8) (Misuse of public property, including motor vehicles)

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(8) and the charge of misuse of public property, petitioner did not neglect his duties. There is no definition in the New Jersey Administrative Code for misuse of public property, including motor vehicles, but the charge is understood to mean that an employee has used public property, in this case a vehicle, in a manner that is inconsistent with agency policy or reasonable safety standards. In In re Pressley, A-0699-13T4, A-0700-13T4 (consolidated) (App. Div. June 21, 2016), http://njlaw.rutgers.edu/collections/courts/, recurring incidents of unpermitted and erratic driving were sufficient to sustain a charge under N.J.A.C. 4A:2-2.3(a)(8).

I **CONCLUDE** that Edwards did not misuse public property as suggested by Respondent. The video evidence does not support Perez's testimony that she was almost "run over" by the loader. The loader does not appear to be moving at an excessive speed and there is a sufficiently large distance between the vehicle and where Perez was standing at the time it passed. Therefore, I **CONCLUDE** that this charge should be dismissed.

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

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(12), respondent did not provide a basis for the other sufficient cause listed on the FNDA. There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/.

The FNDA does not specify which incidents should be considered sufficient cause. Respondent argues that cumulatively, all of Edwards' actions, as detailed above, constitutes "other sufficient cause" in violation of N.J.A.C. 4A:2-2.3(a)(12). I **CONCLUDE** that this charge should not be upheld.

CONCLUSIONS

Edwards has a history of disciplinary action with the City of Passaic DPW. While it is not necessary to show progressive discipline in this case it is worth noting that the city comported with this policy. Edwards's actions, as outlined in the FNDA, are sufficiently egregious to warrant his termination from employment.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the determination to terminate Petitioner in this matter be and hereby is **AFFIRMED**.

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, P.O. 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.

July 24, 2017
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: July 24, 2017

Date Mailed to Parties: JUL 25 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

LIST OF WITNESSES

For Petitioner:

Dean Edwards, petitioner
Tim White
Arthur Smith
Jose Tapia

For Respondent:

Miriam Perez
Robert Urena
Kasim Washington
Frank Gonzalez
Anthony Gagliano
Viviana Lamm
John Sarno, Esq.

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 CD-ROM containing four videos
P-2 Diagram of Training Room

For Respondent:

R-1 Cumulative Report, Miriam Perez, various dates (1 p.)
R-2 Handwritten Report, Kasim Washington, dated October 1, 2015 (3 pp.)
R-3 Dep't of Public Works Incident Report Form, Kasim Washington, dated October 2, 2015 (1 p.)
R-4 Passaic Police Dep't Police Report, dated October 2, 2015 (1 p.)
R-5 Handwritten Letter, Frank Gonzalez, dated October 1, 2015 (3 pp.)

R-6 Dep't of Public Works Incident Report Form, Frank Gonzalez, dated October 1, 2015 (2 pp.)

R-7 Passaic Police Dep't Police Report, dated October 2, 2015 (1 p.)

R-8 Incident Report, Anthony Gagliano re: Dean Edwards, dated October 1, 2015 (2 pp.)

R-9 Memo, Anthony Gagliano re: Dean Edwards, dated May 15, 2015 (1 p.)

R-10 Memo, Anthony Gagliano re: Dean Edwards, dated May 15, 2015 (1 p.)

R-11 Email from John Sarno, Esq. to Viviana Lamm, dated October 14, 2015 (1 p.)

R-12 Excerpts from City of Passaic Employee Handbook (5 pp.)

R-13 Job Specification, Supervisor of Trees, NJ Dep't of Personnel (2 pp.)

R-14 Harassment and Ethics Training attendance certification, Dean Edwards, dated January 10, 2014

R-15 Notice of Minor Disciplinary Action, dated May 10, 2002 (1 p.)

R-16 Notice of Minor Disciplinary Action, October 14, 2009 (1 p.)

R-17 Final Notice of Disciplinary Action, dated February 13, 2014 (1 p.)

R-18 Final Notice of Disciplinary Action, dated January 13, 2016 (2 pp.)

In the Matter of Edward Gruber, Jr.
City of Newark,
Department of Engineering

CSC DKT. NO. 2016-2051
OAL DKT. NO. CSV 03551-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 6, 2017 JM

The Civil Service Commission, at its meeting of September 6, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03551-16

AGENCY DKT. NO. 2016-2051

IN THE MATTER OF EDWARD GRUBER, JR., CITY OF NEWARK, DEPARTMENT OF ENGINEERING,

---

Darryl M. Saunders, Esq. for appellant (Sanchez & Saunders, PC)

Kimberly K. Holmes , Esq., for respondent (Assistant Corporation Counsel)

Record Closed: July 31, 2017 Decided: August 1, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on March 4, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 and assigned initially to ALJ Gail Cookson. When reassigned to me, a telephone prehearing was conducted wherein the parties agreed on dates for hearing. Several hearings were scheduled and adjourned, the last one being July 31, 2017. During the pendency of the hearing, the parties resolved all issues in dispute. On July 31, 2017 the parties prepared and submitted a Settlement Agreement and General Release, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

August 1, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: AUG 3 2017

Date Mailed to Parties:
ljb

8-3-17

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EDWARD GRUBER, Appellant, -v- CITY OF NEWARK Respondent,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 03551-2016N** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Senior Building Inspector Edward Gruber ("Gruber" or "Appellant"), The AFSCME Local 2299 ("Union") and the City of Newark ("City" or "Respondent") (Gruber, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against him by the City's Preliminary Notice of Disciplinary Action dated August 27, 2015 (PNDA) and Final Notice of Disciplinary Action dated November 25, 2015 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about August 5, 2015, Senior Building Inspector Edward Gruber, attempted to conduct an unauthorized building inspection at the home of Yvette Thomas Freeman ("Ms. Thomas") located at 53 Unity Avenue, Newark, NJ.

2. When he arrived at the location, an argument occurred between Gruber and Ms. Thomas which resulted in an alleged physical altercation between the two and cross complaints were filed in the Newark Municipal Court (*See attached PNDA, FNDA and Police Report*).

3. The Newark Municipal Court charges stemming from the August 5, 2015 incident have been resolved.

4. On August 11 and 12, 2015, Ramon Lago ("Lago"), Building Sub Code Official and Gruber's immediate supervisor, submitted two reports to Phillip Scott, Director of the Department of Engineering. Both reports detailed discrepancies in Gruber's daily log sheet, insubordination instances and the circumstances involving the August 5, 2015 incident with Ms. Thomas.

5. On July 2, and June 26, 2015, Charles Diliberti ("Diliberti"), Assistant Construction Official and supervisor to Lago, issued directives for all licensed inspectors regarding office and inspection procedures.

6. On June 26, 2015, Diliberti issued Gruber a memorandum for disciplinary action based on insubordination and a failure to perform duties as outlined in both directives referenced in paragraph 5. Gruber received several corrective conferences as a way of progressive discipline.

7. As a result of the conduct outlined in paragraphs one (6) through six (6) herein, the PNDA was issued and Gruber was brought up on disciplinary charges for an immediate suspension prior to a hearing (*See attached PNDA, and Police Report*).

8. On August 14, 2015, Gruber requested a departmental hearing. The immediate suspension was upheld on September 8, 2015. On October 22, 2015, Gruber appeared with Union counsel representation but requested an adjournment to obtain another attorney. The matter was continued to November 9, 2015. Gruber, through the Union attorney,

waived his rights to any further hearings on the departmental level (*See attached FNDA*).

9. Gruber was removed from City employment on August 7, 2015. The FNDA was issued on November 25, 2015.

10. Gruber appealed the decision on the FNDA to the Office of Administrative Law.

11. The parties have agreed to resolve all issues herein and herein referenced as follows:

    1. The City agrees to Gruber's request to resign from employment as a Senior Building Inspector effective immediately.

    2. Gruber agrees not to seek any further employment with the City in any capacity.

    3. Gruber further waives any and all rights and/or claims which he has and/or may have to: (1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; (2) To challenge the PNDA, FNDA and/or this Agreement; (3) Initiate and/or partake in Grievance procedures; and/or (4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts.

    4. Gruber and the Union each further agree that there is no consideration due Gruber, his counsel (if applicable) and/or the Union, including, but not limited to, ~~any claim for back pay~~ and/or counsel fees, arising from his employment and/or the execution of this Agreement.

a. Six (6) months back pay; and
b. Six (6) months suspension is what Gruber will receive from the City only.

5. Gruber and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

6. Gruber and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

7. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Gruber's estate, and purchasers and/or assignees of Gruber's, the City's and/or the Unions interests shall also be bound.

8. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

9. Gruber and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or

currently pending disciplinary matters and/or labor negotiations.

10. Gruber and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

11. This Agreement contains the sole and entire agreement between Gruber, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Gruber specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

12. Gruber agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

13. Gruber agrees and acknowledges that he has had a full opportunity to review this Agreement with her Attorney and/or Union representative and he enters into same knowingly and voluntarily.

13. There is no admission of liability on Gruber's part or the City of Newark.

14. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

15. By signing this Settlement Agreement, Gruber states that:

a. He has read it;

b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c. He agrees with everything contained in this Agreement;

d. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;

e. He consulted with his Attorney prior to executing this Agreement;

f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

7/31/17
Date

BY: Phillip Scott
Phillip Scott, Director
Department of Engineering

7/31/17
Date

BY: Edward Gruber
Edward Gruber

7/31/17
Date

Darryl M. Saunders, Esq.
Attorney for Edward Gruber

Approved as to Form and Legality:

7/31/17
Date

Kimberly K. Holmes, Esq.
Law Department, City of Newark

CERTIFICATION

I, Edward Gruber, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

7/31/17
DATE

Edward Gruber
Edward Gruber

Angiulo, Nicholas

From: Holmes, Kimberly K. <holmesk@NEWARK.onmicrosoft.com>
Sent: Monday, August 14, 2017 9:40 AM
To: Angiulo, Nicholas; Darryl Saunders
Subject: RE: Edward Gruber, Jr. v City of Newark, Department of Engineering

Ok

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Monday, August 14, 2017 8:44 AM
To: Darryl Saunders <DSaunders@sanchezlawoffices.us>; Holmes, Kimberly K. <holmesk@NEWARK.onmicrosoft.com>
Subject: RE: Edward Gruber, Jr. v City of Newark, Department of Engineering

Either way works, if there is no objection, we will go with Mr. Saunders' clarification.

From: Darryl Saunders [mailto:DSaunders@sanchezlawoffices.us]
Sent: Saturday, August 12, 2017 5:37 PM
To: Holmes, Kimberly K. <holmesk@NEWARK.onmicrosoft.com>; Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Subject: Re: Edward Gruber, Jr. v City of Newark, Department of Engineering

Okay, I thought we should do 6 month suspension from the termination date and 6 months backpay there after with a new termination date 1 year after his original suspension, since that was his termination date.

Law Office of Sanchez and Saunders, PC
Darryl M. Saunders, Esq.
Attorney Id. No. 003841990

83 Polk Street
Newark, New Jersey 07105

(973) 643-8900
(973) 643-2221 Fax

From: Holmes, Kimberly K. <holmesk@NEWARK.onmicrosoft.com>
Sent: Friday, August 11, 2017 10:16 AM
To: Angiulo, Nicholas; Darryl Saunders
Subject: Re: Edward Gruber, Jr. v City of Newark, Department of Engineering

Hi:

From the City's perspective, it is "approved leave of absence without pay." -Thanks. Kimberly

Kimberly K. Holmes

Assistant Corporation Counsel
Department of Law, Labor Section
City of Newark
920 Broad Street, Room 316
Newark, NJ 07102
P: 973.733.3880
F: 973.353.8497
E: holmesk@ci.newark.nj.us

From: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Sent: Tuesday, August 8, 2017 9:10:49 AM
To: dsaunders@sanchezlawoffices.us; Holmes, Kimberly K.; Holmes, Kimberly K.
Subject: Edward Gruber, Jr. v City of Newark, Department of Engineering

Mr. Saunders and Ms. Holmes:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Edward Gruber, Jr. from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Gruber will resign "effective immediately" and receive a six-month suspension and six months of back pay. However, the settlement does not account for the time from the end of his period of suspension and back pay until the date of his resignation. In that regard, we need to know how that time should be reflected in his official personnel record. Should it be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An email reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

9-6-17

STATE OF NEW JERSEY

In the Matter of Wayne Hanns, Jr., City of Linden, Police Department

CSC DKT. NO. 2017-2028
OAL DKT. NO. CSV 00745-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 (BW)

The appeal of Wayne Hanns, Jr., Police Officer, City of Linden, Police Department, release at the end of the working test period, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on July 28, 2017 permitting the appellant to complete the working test period. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

DISCUSSION

Although the appellant will be permitted to complete his working test period, he has not obtained permanent status as a Police Officer. The appellant must successfully complete a working test period in order to obtain permanent status. Although the appellant has shown his release was not proper, the record does not adequately establish the appellant's satisfactory work performance. Accordingly, the appropriate remedy in this matter is to afford him the opportunity to complete the remainder of his working test period.

In non-disciplinary appeals, such as an appeal of a release at the end of the working test period, the standard for determining whether an appellant is entitled

to back pay or counsel fees is governed by *N.J.A.C.* 4A:2-4.3(c) and *N.J.A.C.* 4A:2-1.5(b). *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that back pay and counsel fees for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff "may be granted . . . where the Commission finds sufficient cause based on the particular case." In this case, it was found that the appellant is not entitled to a permanent appointment since he had not successfully completed his working test period. Therefore, sufficient cause has not been demonstrated in this matter to award back pay or counsel fees. *See e.g., In the Matter of Melvin Robinson* (MSB, decided December 21, 2005), *In the Matter of Rocky Rembert* (MSB, decided December 3, 2003).

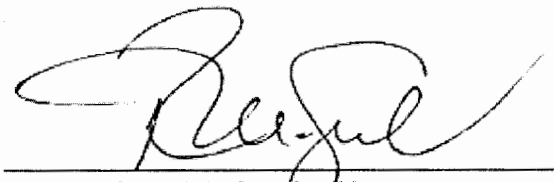
ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was not justified. The Commission therefore reverses that action and orders that Wayne Hanns, Jr., be permitted to complete the remainder of his working test period.

Back pay and counsel fees are denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
SEPTEMBER 6, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 00745-17
AGENCY DKT. NO. 2017-2028

IN THE MATTER OF WAYNE HANNS, JR., CITY OF LINDEN POLICE DEPARTMENT,

---

Wolodymyr P. Tyshchenko, Esq. (Caruso Smith Picini, P.C.)

Daniel J. McCarthy, Esq., for respondent

Record Closed: July 17, 2017 Decided: July 28, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Appellant, Wayne Hanns, (Hanns/ appellant) appeals his termination as a police officer by respondent, City of Linden Police Department (Linden/ respondent) at the end of his working test period. Linden hired appellant as a police officer trainee on July 8, 2015, and, after he successfully completed his police academy training on December 14, 2015, he began a twelve-month working test period. According to Linden, on June 4, 2016, and June 21, 2016, appellant received progress reports that "detailed his unsatisfactory performance" and "bad attitude, bad judgment and childish behaviors." On December 15, 2016, Linden terminated appellant for "unsatisfactory performance during the working test period." Appellant subsequently appealed his termination.

According to appellant, he was "involuntarily placed on administrative leave" on July 8, 2016, and remained on administrative leave until he was terminated on December 15, 2016. Appellant argues that Linden acted in bad faith by terminating him at the end of his working test period because Linden "cut off [his] chance to demonstrate that he was worthy of being a police officer by shunting him to the side for a portion of his probationary period and then terminating him at the end of that period."

Appellant filed the instant appeal in accordance with N.J.A.C. 4A:2-4.1 and N.J.A.C. 4A:4-5.4. On January 18, 2017, the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case. The parties requested that this matter be briefed rather than schedule a hearing date to address the issue of whether appellant was improperly terminated at the end of his working test period on December 15, 2016. Their respective briefs were received on April 26, 2017. On or about June 1, 2017, a telephone conference was conducted and respondent's attorney requested additional time before I issue a decision.

On July 17, 2017, appellant's counsel requested that this matter be decided by summary decision. Having received no opposition from defense counsel, that request was granted and the record closed on July 28, 2017.

Pursuant to N.J.A.C. 1:1-12.5(b), a summary decision "may be rendered if the papers and discovery which have been filed, 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 prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules, R. 4:46-2. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial'.
>
> [Brill, supra, 142 N.J. at 540 (citations omitted).]

Appellant was employed by Linden as a probationary police officer after graduating from the John H. Stamler Police Academy on or about December 15, 2015. He began a 12 month working test period. On June 4 and June 21, 2016 appellant was given feedback on an observation report from December 2015 through June 20, 2016 which detailed unsatisfactory performance. On or about July 8, 2016 appellant was placed on administrative leave by the respondent. He was thereafter terminated at the end of his twelve month working test period on December 15, 2016.

Pursuant to N.J.A.C. 4A:2-4.3(b), the appellant has the burden of establishing that the action to release him at the end of her working test period was taken in bad faith. Appellant must establish by a preponderance of the competent and credible evidence that the action terminating her at the end of his working test period was done in bad faith. Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966); Van Itallie v. Franklin Lakes, 28 N.J. 258, 269 (1958); Divine v. Plainfield, 31 N.J. Super. 300, 302-303 (App. Div. 1954); Dodd v. Van Riper, 135 N.J.L. 167 (E. & A. 1946). If bad faith is found, the employee shall be entitled to a new full or shortened working test period and other appropriate remedies. N.J.A.C. 4A:2-4.3(c); see also N.J.A.C. 4A:2-1.5.

The function of the working test period is not for the purpose of providing the employee further training to qualify him for the position. Briggs v. New Jersey Dep't of Civil Serv., 64 N.J. Super. 351, 355 (App. Div. 1960). Stated differently, during the

working test period, the appointing authority is entitled to evaluate the employee's "work performance and conduct . . . in order to determine whether he merits permanent status" and, in turn, the employee "is entitled to a fair opportunity to demonstrate his ability to fulfill the requirements of the position." Vegotsky v. Office of Admin. Law, 92 N.J.A.R.2d (CSV) 162, 167. An employee may also be terminated from service at the end of the working test period for unsatisfactory performance. See N.J.S.A. 11A:2-6(a)(4); N.J.S.A. 11A:4-15(c); N.J.A.C. 4A:2-4, et seq.; N.J.A.C. 4A:4-5.4(a).

Under the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6, "appointments shall be permanent after satisfactory completion of a working test period." N.J.S.A. 11A:4-13. The working test period "not only serves the employer who must evaluate the probationary employee's performance to make a well-founded decision as to whether to retain or release him, but also, the required performance evaluations afford the probationer guidance and an opportunity to improve specified performance deficiencies during the probationary period." In re King, CSV 8062-98, Merit Sys. Bd. (November 30, 1999) <https://njlaw.rutgers.edu/collections/oal/final/csv8062-98.pdf>; N.J.S.A. 11A:4-15. For police officers, the working test period is twelve months, and "the appointing authority shall prepare a progress report on the employee at the end of six months and a final report at the conclusion of the working test period." N.J.S.A. 11A:4-15(a); N.J.A.C. 4A:4-5.3(b). An employee who is terminated at the end of a working test period may appeal the appointing authority's decision to the Civil Service Commission. N.J.A.C. 4A:2-4.1. In such an appeal, "[t]he employee has the burden of proof to establish that the action was in bad faith." N.J.A.C. 4A:2-4.3(b). Bad Faith has been defined as:

> Generally implying . . . a design to mislead or deceive another . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Bath faith is not simply bad judgment or negligence, but implies the conscious doing of a wrong because of a dishonest purpose . . . .
>
> [Brown v. State Dep't of Educ., 97 N.J.A.R.2d (CSV) 537, 541.]

Tribunals having jurisdiction over such matters have defined a very strict standard to be applied in determining whether an appointing authority has exercised bad faith in terminating an employee at the end of the working test period. It is been held that good faith is the sole test to be applied in the circumstances; the employer has no burden to prove that the terminated employee is unfit for a job. Rather, it is the burden of the employee to show that his termination was the result of bad faith on the part of the employer. Cianciosi v. County of Passaic, CSV 3553-99, Initial Decision (July 26, 1999), adopted, Merit System Board (September 17, 1999), <htt://lawlibrary.rutgers.edu/collections/oal/search.html>; Jenkins v Housing Auth. of Atl. City, CSV 841-01, Initial Decision (February 5, 2002), adopted, Merit System Board (April 10, 2002), <htt://lawlibrary.rutgers.edu/collections/oal/search.html>. "Bad Faith" is defined by Black's Law Dictionary (5th ed. at 127) as follows:

> The opposite of "good faith," generally implying or involving actual or constructive fraud, or designed to mislead or deceive another, or a negligent or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. The term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purposes or moral obliquity. It is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

See, e.g., Stath v. Williams, 367 N.E. 2d, 1120, 1124 (1977); see also Memmott v. Dep't of Health, Twp. of Freehold, 95 N.J.A.R.2d (CSV) 118.

If the appointing authority acted in bad faith, "the employee shall be entitled to a new full or shortened working test period and other appropriate remedies." N.J.A.C. 4A:2-4.3(c).

This appears to be a case of first impression insofar as there are no reported decisions in which a probationary employee was involuntarily placed on administrative leave for nearly half of his working test period for purported disciplinary reasons, but

without any formal disciplinary action against him. Nonetheless, there are a few cases that offer guidance in this matter. For example, in In re Bernal, CSV 3154-07, Initial Decision (September 12, 2008), adopted in part, rejected in part, Civil Serv. Comm'n (November 7, 2008) <https://njlaw.rutgers.edu/collections/oal>, a probationary employee was given a new working test period in part because his three-month working test period was supposed to last from May 22, 2006 to August 22, 2006, but was interrupted when he was placed on involuntary leave with pay for non-disciplinary reasons from July 1, 2006, to September 11, 2006, and he was only further evaluated from September 11, 2006, until his termination on November 3, 2006. In concluding that the appointing authority acted in bad faith and ordering a new working test period, the ALJ noted that the appointing authority "failed to follow its own procedures, beginning with placing him on a paid involuntary leave, a status for which there is no provision" and that "[h]is WTP was interrupted for a period almost lasting as long as the WTP itself, and instead of starting fresh, [the appointing authority] truncated his WTP, a violation of the fair and full opportunity that should have been afforded to him."

In contrast, in In re Guevara, CSV 9238-14, Initial Decision (June 2, 2015) (no reported final decision) <https://njlaw.rutgers.edu/collections/oal>, an appointing authority acted in good faith in terminating a police officer at the end of his working test period "because he completed only two months of his working test period as a consequence of being disarmed and placed on modified duty because of a domestic violence charge." According to the ALJ in that case, the appointing authority's "decision to allow [appellant] to perform modified duty so that he could continue to receive a paycheck rather than suspend him because of an inability to perform his regular duties hardly demonstrates bad faith" and the "opportunity to observe [appellant] performing his regular duties existed for only a very small portion of the working test period through no fault of the [appointing authority]."

Here, Linden acted in bad faith by essentially removing appellant from his position for the last five months of his twelve-month working test period without taking any formal disciplinary action against him. An appointing authority may discipline a

probationary employee during the working test period, but in doing so the appointing authority must follow civil service rules for major discipline and local rules for minor discipline. N.J.A.C. 4A:4-5.4(b). In effect, Linden removed appellant from his position – which constitutes major discipline – without instituting formal disciplinary action against him or affording him a chance to appeal. As a result, Linden deprived appellant of an opportunity to correct any deficiencies in his performance prior to the end of his working test period. Unlike in Guevera, in which the appointing authority had no choice but to place the police officer on modified duty due to the fact he could not carry a weapon, Linden could have taken formal disciplinary action against appellant or allowed him to complete his working test period before terminating him.

I am not satisfied that appellant's working test period was conducted in compliance with the Civil Service rules and regulations. He was not given an opportunity to complete his full working test period. Appellant has not been given an opportunity to receive the benefit of continued progress reports so that he may improve on specified performance deficiencies.

Further, I am not persuaded that respondent has established, by a preponderance of the competent and credible evidence, its position to terminate appellant without giving him an opportunity to improve his performance. Hence, respondent acted in bad faith when determining that appellant's services were unsatisfactory.

I, therefore, **CONCLUDE** that respondent's determination to release appellant at the end of his working test period was not warranted and inappropriate.

ORDER

Based upon the foregoing, appellant's motion for Summary Decision is hereby **GRANTED**. It is hereby **ORDERED** that the appeal filed by appellant be and is hereby **GRANTED** and he will be permitted to complete his working test period.

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.

July 28, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: July 28, 2017

Date Mailed to Parties: JUL 31 2017

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

ljb

EXHIBITS

For Appellant:

None

For Respondent:

R-1 Certification of Daniel J. McCarthy, Esq.

R-2 Daily Observation Reports from December 19, 2015 through July 7, 2016

R-3 Daily Observation Reports dated March 30, 31, April 13, 14, June 12, 23 and July 6, 2016

R-4 Notice of Separation from Employment

9-6-17

STATE OF NEW JERSEY

In the Matter of Sara Lloyd
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NO. 2016-4181
OAL DKT. NO. CSV 08397-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 BW

The appeal of Sara Lloyd, Senior Laundry Worker, Woodbine Developmental Center, Department of Human Services, removal effective October 27, 2011, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on August 3, 2017. No exceptions were filed.

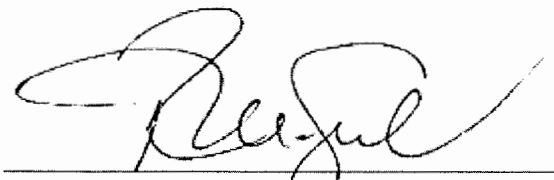
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Sara Lloyd.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08397-16
AGENCY DKT. 2016-4181

IN THE MATTER OF SARA LLOYD,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL
CENTER,

Lee J. Hughes, Esq., for appellant, Sara Lloyd (Gruccio, Pepper, Desanto & Ruth, P.A., attorneys)

Patrick Jhoo, Deputy Attorney General, for respondent, Department of Human Services, Woodbine Developmental Center (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: June 20, 2017 Decided: August 3, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

The appellant, Sara Lloyd (Lloyd), challenges her removal from the Woodbine Developmental Center (Woodbine). Woodbine removed her due to theft charges having been issued against her as well as Lloyd's consent to Civil Judgment by Confession (Civil Judgement).

PROCEDURAL HISTORY

On May 18, 2016, Woodbine issued a Final Notice of Disciplinary Action (FDNA) removing Lloyd effective October 27, 2011. Lloyd appealed her removal and the matter was transmitted to the Office of Administrative Law, where it was filed on June 6, 2016, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. A hearing was conducted in this matter on May 17, 2017. The record closed on June 20, 2017, after the parties submitted written closing briefs.

FACTUAL DISCUSSION

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

Appellant was employed by Woodbine as a Senior Laundry Worker from June 2004, until her removal effective October 27 2011. In September 2011, Lloyd was charged in a series of criminal complaints stemming from her use of her elderly neighbor's ATM card. After learning of the pending criminal complaints, Woodbine suspended Lloyd indefinitely. On June 2, 2014, the criminal complaints were dismissed pending Lloyd's completion of a Pretrial Intervention Program (PTI). Lloyd consented to a Civil Judgment as a condition of PTI. On May 18, 2016, Woodbine issued a FDNA removing Lloyd effective October 27, 2011, on the basis of the underlying theft charges as well as Lloyd's consent to the Civil Judgement.

Testimony

Detective Charles Tortella (Tortella) of the New Jersey State Police testified on behalf of Woodbine. Tortella became involved in this matter when J.D., Jr., reported that his father, J.D., Sr., who was suffering from the early stages of dementia, had considerably less money in his bank account than normal. Tortella testified that during the investigation he was unable to interview J.D., Sr., because he was unable to remember the answers and seemed confused by the questions. Tortella was made aware of a suspicious check made out to cash for $9,000 and that appellant had been

acting as caretaker to his father and he suspected that she might be the person responsible for taking the money. During his conversation with J.D., Jr., and his father, he found that J.D., Sr., was missing his USAA credit card and Tortella advised J.D. Jr., to check the USAA credit card statements to determine whether it had been used without authorization.

Tortella interviewed a representative from Millville Savings Bank and was able to obtain still images from video surveillance footage from the transaction cashing the $9,000 check. He was able to identify Lloyd as the person withdrawing the $9,000 check for cash. Tortella later questioned Lloyd at the State Police Station in Port Norris. Lloyd told him that she had always been afraid that someone would accuse her of stealing from J.D., Sr. She admitted that on several occasions she had used J.D., Sr.'s ATM card without his authorization. She also admitted that on other occasions she would withdraw more money than J.D., Sr., had asked for so that she could keep the extra money for herself. Through the course of his investigation, Tortella found that J.D., Sr.'s Millville Savings Account Statement from June 15, 2011, reflects twelve $500 withdrawals. (R-4.) On June 6, two $500 withdrawals were made at different ATMs. On several other dates, multiple $500 withdrawals were made. The pattern of near daily $500 withdrawals continued through July 14, 2011. (R-4.) J.D., Sr.'s USAA credit card statements reflect a similar trend of large withdrawals of cash advances. (R-6.)

Tortella noted that there was a series of checks written out to cash and to Lloyd. (R-7.) These checks were presumably signed by J.D., Sr.; however the other information, including who the check is made out to and amount, was completed in another's handwriting. These checks range from $100 to $9000. (R-7.) Criminal charges were made against Lloyd. (R-3.) Lloyd entered into a Civil Judgment in the amount of $49,164 as a condition to her entry into PTI. (See PTA Order attached to petitioner's closing brief.)

Edith Cerracchio, (Cerracchio) Quality Assurance Coordinator at Woodbine testified next. Woodbine's clientele are intellectually disabled and mostly lower functioning. Woodbine has staff on a twenty-four-hour basis to assist the residents. Lloyd is a service worker and interacts with the residents by washing and putting away

laundry in their rooms. She has access to the living quarters where residents keep money and other valuables. In 2011, Cerracchio was a program assistant and would have no knowledge if any complaints where ever filed against the appellant.

Steven Katz, (Katz) Employee Relations Coordinator testified that Woodbine does not consider bringing back any employee charged with a crime until PTI is completed and all payments, if any are made. After that is completed the facility makes a determination whether to proceed with discipline. The criminal disposition is considered but does not control the determination if an employee will be disciplined. Based on appellant's conduct, it was determined that she should not return as Woodbine must look out for the best interest of the residents, some of which, have similar vulnerabilities and J.D., Sr.

Sara Lloyd testified on her own behalf and asserted that the terms and conditions of her suspension were that upon completion of her pending criminal matter, without conviction, she would be reinstated. Lloyd contends that she and her husband took care of the elderly neighbor and used the ATM card with his consent. They never charged him for their help and he was appreciative and generous. She did not deny confessing to unauthorized use of J.D., Sr.'s accounts, but claimed that her confession was coerced by Detective Tortella. She never questioned J.D., Sr.'s dramatically increasing spending in spite of the fact that she had access to his bank records. J.D., Sr., did not have any lavish possessions and lived modestly. She accepted PTI because she thought she would get her job back by completing the program. A Union representative advised her that she would be able to keep her job if she took PTI. She also agreed to repay the money because it was a condition of PTI and she thought it would get her job back.

When assessing credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness' interest in the outcome, motive or bias should be considered. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and

manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In this case, I do not deem appellant's testimony to be credible. It is clear based upon a review of the evidence that appellant took advantage of her elderly neighbor for financial gain. She admitted using his ATM and writing checks from his account. He did not have any lavish possessions and lived modestly and appellant could not account for the daily cash withdrawals, nor did she question him regarding his finances despite having access to his bank accounts and considering herself his care giver. I do not find it credible that she would agree to repay in excess of $49,000 if she did not take the money.

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** as **FACT** that appellant took advantage of her elderly neighbor for financial gain. I further **FIND** as **FACT** that she admitted using J.D., Sr.'s ATM card without his authorization and that she would withdraw more money than J.D., Sr., had asked for so that she could keep the extra money for herself.

LEGAL ANALYSIS AND CONCLUSION

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable

probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was the underlying theft charges as well as Lloyd's consent to the Civil Judgement. Appellant's conduct clearly compromises her ability to be trusted in the context of a facility serving developmentally disabled residents. Appellant took advantage of her position as a caretaker for her neighbor and her conduct serves as a breach of the trust and faith of the public.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. I **CONCLUDE** that the

Appointing Authority has met its burden of proof that appellant violated N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Her conduct violated the implicit standard of good behavior and demonstrates that she cannot be trusted in a facility serving patients with similar needs and vulnerabilities.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when

> the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

In this case, the egregious nature of appellant's conduct justifies her removal. Allowing Lloyd to remain at Woodbine would have the potential to destroy public confidence in Woodbine and similar facilities serving those with developmental disabilities across the state. Her removal is the appropriate penalty in light of the public interest in the well-being of Woodbine's clients and the interest in maintaining public confidence in the New Jersey Department of Human Services.

After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**, as set forth above.

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.

8/3/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: August 3, 2017

Date Mailed to Parties: August 3, 2017

JSK/dm

WITNESSES

For Petitioner:

Sara Lloyd, petitioner

For Respondent:

Detective Charles Tortella, New Jersey State Police

Edith Cerracchio, Quality Assurance Coordinator, Woodbine

Steven Katz, Employee Relations Coordinator, Woodbine

EXHIBITS

For Petitioner:

P-1 Letter to petitioner, dated March 2, 2012
P-2 Letter, dated September 9, 2014, forwarding Consolidation Order
P-3 Letter, dated January 15, 2015, regarding petitioner's return to work
P-4 Letter, dated October 29, 2015, regarding pending criminal charges
P-5 Letter, dated March 24, 2016, from petitioner's attorney
P-6 Order of Dismissal

For Respondent:

R-1 State Police Investigation Report
R-2 State Police Supplemental Investigation Report
R-3 Criminal Complaints filed against petitioner
R-4 Bank Records of J.D., Sr.
R-5 Additional Bank Records of J.D., Sr.
R-6 USAA Credit Card Statement of J.D., Sr.
R-7 Canceled Checks

R-8 Surveillance video Photos

R-9 Petitioner's Disciplinary Record

R-10 Notice and Decision of Informal Pre-Termination Hearing

R-11 FNDA and addendum

In the Matter of Robert Murie, III
Atlantic County,
Department of Public Safety

CSC DKT. NO. 2017-984
OAL DKT. NO. CSV 15262-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 6, 2017 JM

The Civil Service Commission, at its meeting of September 6, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15262-16

AGENCY DKT. NO. 2017-984

IN THE MATTER OF ROBERT MURIE, III, ATLANTIC COUNTY, DEPARTMENT OF PUBLIC SAFETY.

Keith Waldman, Esq., for appellant, Robert Murie, III (Selikoff & Cohen, PA, attorneys)

Alan J. Cohen, Assistant County Counsel, for respondent, Atlantic County Department of Public Safety (James F. Ferguson, County Counsel, attorney)

Record Closed: August 15, 2017 Decided: August 16, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on October 6, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

8-16-17
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 8 21 17

Date Mailed to Parties: 8 21 17

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on August 11, 2017

Miranda, Denise

From: Cohen_Alan J. <Cohen_Alan@aclink.org>
Sent: Friday, August 11, 2017 3:10 PM
To: Miranda, Denise
Cc: Keith Waldman (KWaldman@SelikoffCohen.com); Cohen_Geraldine; Wilson, Jeffrey R.
Subject: Murie - 20 Day Suspension and 40 Day Suspension Settlement Agreement
Attachments: Murie Signed Settlement Agreement.pdf

Importance: High
Sensitivity: Confidential

Dear Ms. Miranda,

Attached hereto please find the Settlement Agreement and Release negotiated by Judge Wilson and agreed to by the parties. It is signed.

Would the Judge and then Civil Service review the agreement to determine if it meets with their satisfaction and to let Mr. Waldman and I know so the terms of the settlement can be implemented.

Thank you.

Yours,

Alan J. Cohen

Alan J. Cohen, Esq.
Assistant County Counsel
Atlantic County Counsel Office-Dept. of Law
1333 Atlantic Avenue
Atlantic City, N.J. 08401
P. (609) 343-2279
F. (609) 343-2373
Cohen_Alan@aclink.org

SETTLEMENT AGREEMENT AND RELEASE

IN THE MATTER OF ROBERT MURIE AND ATLANTIC COUNTY DEPARTMENT OF PUBLIC SAFETY

This Settlement Agreement and General Release is made by and between Atlantic County Corrections Officer Robert Murie, hereinafter referred to as "Employee", and Atlantic County Department of Public Safety, hereinafter referred to as "Employer".

WHEREAS, Employee was served with two Final Notices of Disciplinary Action (FNDAs), both dated September 15, 2016, which were subject to appeals:

> OAL Dkt. No. CSV 15268-2016, Agency Ref. No. CSC Dkt. No. 2017-990, a 20-day suspension, and
>
> OAL Dkt. No. CSV 15262-2016, Agency Ref. No. CSC Dkt. No. 2017-984, a 40-day suspension, and

Copies of the FNDAs are attached; and

WHEREAS, the parties to this Agreement have decided to resolve the FNDAs and appeals in a summary fashion in order to avoid the uncertainty, expense and burden of litigation, and of any and all other matters and proceedings that might arise between Employee and Employer as a result of the aforesaid FNDAs and appeals.

NOW, THEREFORE, Employee and Employer agree as follows:

1. Employer withdraws the FNDA for the 20-day suspension, giving rise to the appeal docketed as OAL Dkt. No. CSV 15268-2016, Agency Ref. No. CSC Dkt. No. 2017-990.

2. Employer and Employee consent to a reduction of the FNDA for the 40-day suspension, giving rise to the appeal docketed as OAL Dkt. No. CSV 15262-2016, Agency Ref. No. CSC Dkt. No. 2017-984. The penalty on that FNDA is reduced from a 40-day suspension to a 20-day suspension, with the 20-day suspension already having been served, and the Employer will issue an amended FNDA.

3. Employer will reinstate the 40 days' pay as comp time to be paid in full at the hourly rate in effect at the time of Employee's retirement. Employee will pay these days at the full rate of pay even if the collectively negotiated agreement provides for a lower pay rate for days cashed in at retirement.

4. The Employee agrees to withdraw the above appeals presently pending in the Office of Administrative Law, with prejudice and without costs.

5. Employee releases and forever discharges for himself, his heirs, executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, arising from the filing of these FNDAs, including, but not limited to, any alleged violation of:

- The National Labor Relations Act;
- Family Medical Leave Act (Federal and State);
- Title VII of the Civil Rights Act of 1964;
- The Employee Retirement Income Security Act of 1974;
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- New Jersey State Wage and Hour Law;
- The New Jersey Law Against Discrimination;
- The New Jersey Workers' Compensation laws;
- New Jersey Civil Service Statutes;

- any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;
- any public policy contract (whether oral or written, expressed or implied), tort or common law;
- any allegation for costs, fees or other expenses including attorney's fees incurred in these matters.

This release does not extend to and does not preclude any claims arising under the New Jersey Conscientious Employee Protection Act or under 42 U.S.C. § 1983. Such claims were neither raised, adjudicated, nor settled in this proceeding.

6. Without in any way limiting the scope or effect of the preceding paragraphs:

A. Employee represents that he is able to read the English language and understands the meaning and effect of this Agreement.

B. Employee understands that the above paragraph includes a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Employee may have as a result of any act that has occurred arising out of the filing of the attached FNDAs.

C. Employee understands that if this Agreement were not signed, the Employee would have the right to submit information on appeal to the New Jersey Civil Service Commission and to a hearing by Administrative Law Judge assigned to hear the appeal, and further understands that upon receipt of any unfavorable ruling by an Administrative Law Judge, would have the right to make submissions to the Civil Service Commission, and thereafter, if unsatisfied with the final decision of the Civil Service Commission, would have the right to take an appeal to the New Jersey Superior Court, Appellate Division, together with any further rights to file appeals, either by right or by grace in the New Jersey State Court or Federal Court system.

D. The Employee has been represented by the firm of Selikoff and Cohen in the person of Keith Waldman, Esquire, and acknowledges that the Employee has in fact discussed the form and content of this document with his attorney, having sufficient time to review the document prior to agreeing to it.

7. All parties of this Agreement agree that the terms of this Agreement and the circumstances surrounding same, are not to be divulged to any outside sources, either directly or indirectly. Outside sources do not include various agents for the County of Atlantic, namely the County Counsel's Office, Treasurer's Office, Freeholder's Office, or employees of the Atlantic County Department of Public Safety. The provisions of this paragraph are binding only on the Employee and Employer. The Employer makes no representation and takes no responsibility for any unofficial actions of other employees who are not parties to this Agreement.

8. This Agreement shall be governed and conformed in accordance with the laws of the State of New Jersey. Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, including the general release language, then this Agreement shall immediately become null void.

9. This Agreement contains the entire agreement between Employer and Employee. No changes to this Agreement shall be effective unless made in writing and signed by the parties thereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names:

8-7-17
Date

Robert Murie
Atlantic County Corrections Officer

08-04-2017
Date

Geraldine Cohen, Division Director/Warden
Atlantic County Dept. of Public Safety

In the Matter of Robert Murie, III
Atlantic County,
Department of Public Safety

CSC DKT. NO. 2017-990
OAL DKT. NO. CSV 15268-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 6, 2017 JM

The Civil Service Commission, at its meeting of September 6, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15268-16
AGENCY DKT. NO. 2017-990

IN THE MATTER OF ROBERT MURIE, III, ATLANTIC COUNTY, DEPARTMENT OF PUBLIC SAFETY.

Keith Waldman, Esq., for appellant, Robert Murie, III (Selikoff & Cohen, PA, attorneys)

Alan J. Cohen, Assistant County Counsel, for respondent, Atlantic County Department of Public Safety (James F. Ferguson, County Counsel, attorney)

Record Closed: August 15, 2017 Decided: August 16, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on October 6, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

8-16-17
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 8.21.17

Date Mailed to Parties: 8.21.17

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on August 11, 2017

Miranda, Denise

From: Cohen_Alan J. <Cohen_Alan@aclink.org>
Sent: Friday, August 11, 2017 3:10 PM
To: Miranda, Denise
Cc: Keith Waldman (KWaldman@SelikoffCohen.com); Cohen_Geraldine; Wilson, Jeffrey R.
Subject: Murie - 20 Day Suspension and 40 Day Suspension Settlement Agreement
Attachments: Murie Signed Settlement Agreement.pdf

Importance: High
Sensitivity: Confidential

Dear Ms. Miranda,

Attached hereto please find the Settlement Agreement and Release negotiated by Judge Wilson and agreed to by the parties. It is signed.

Would the Judge and then Civil Service review the agreement to determine if it meets with their satisfaction and to let Mr. Waldman and I know so the terms of the settlement can be implemented.

Thank you.

Yours,
Alan J. Cohen

Alan J. Cohen, Esq.
Assistant County Counsel
Atlantic County Counsel Office-Dept. of Law
1333 Atlantic Avenue
Atlantic City, N.J. 08401
P. (609) 343-2279
F. (609) 343-2373
Cohen_Alan@aclink.org

SETTLEMENT AGREEMENT AND RELEASE

IN THE MATTER OF ROBERT MURIE AND ATLANTIC COUNTY DEPARTMENT OF PUBLIC SAFETY

This Settlement Agreement and General Release is made by and between Atlantic County Corrections Officer Robert Murie, hereinafter referred to as "Employee", and Atlantic County Department of Public Safety, hereinafter referred to as "Employer".

WHEREAS, Employee was served with two Final Notices of Disciplinary Action (FNDAs), both dated September 15, 2016, which were subject to appeals:

> OAL Dkt. No. CSV 15268-2016, Agency Ref. No. CSC Dkt. No. 2017-990, a 20-day suspension, and
>
> OAL Dkt. No. CSV 15262-2016, Agency Ref. No. CSC Dkt. No. 2017-984, a 40-day suspension, and

Copies of the FNDAs are attached; and

WHEREAS, the parties to this Agreement have decided to resolve the FNDAs and appeals in a summary fashion in order to avoid the uncertainty, expense and burden of litigation, and of any and all other matters and proceedings that might arise between Employee and Employer as a result of the aforesaid FNDAs and appeals.

NOW, THEREFORE, Employee and Employer agree as follows:

1. Employer withdraws the FNDA for the 20-day suspension, giving rise to the appeal docketed as OAL Dkt. No. CSV 15268-2016, Agency Ref. No. CSC Dkt. No. 2017-990.

2. Employer and Employee consent to a reduction of the FNDA for the 40-day suspension, giving rise to the appeal docketed as OAL Dkt. No. CSV 15262-2016, Agency Ref. No. CSC Dkt. No. 2017-984. The penalty on that FNDA is reduced from a 40-day suspension to a 20-day suspension, with the 20-day suspension already having been served, and the Employer will issue an amended FNDA.

3. Employer will reinstate the 40 days' pay as comp time to be paid in full at the hourly rate in effect at the time of Employee's retirement. Employee will pay these days at the full rate of pay even if the collectively negotiated agreement provides for a lower pay rate for days cashed in at retirement.

4. The Employee agrees to withdraw the above appeals presently pending in the Office of Administrative Law, with prejudice and without costs.

5. Employee releases and forever discharges for himself, his heirs, executors, and administrators, the Employer and any employees and agents of the Employer, of and from all demands, complaints, causes of action, claims and charges whatsoever, arising from the filing of these FNDAs, including, but not limited to, any alleged violation of:

- The National Labor Relations Act;
- Family Medical Leave Act (Federal and State);
- Title VII of the Civil Rights Act of 1964;
- The Employee Retirement Income Security Act of 1974;
- The Immigration Reform and Control Act;
- The Americans with Disabilities Act of 1990;
- The Age Discrimination in Employment Act of 1967;
- The Fair Labor Standards Act;
- The Occupational Safety and Health Act;
- New Jersey State Wage and Hour Law;
- The New Jersey Law Against Discrimination;
- The New Jersey Workers' Compensation laws;
- New Jersey Civil Service Statutes;

- any other federal, state or local civil or human rights law or any other alleged violation of any local, state or federal law, executive order, regulation or ordinance;
- any public policy contract (whether oral or written, expressed or implied), tort or common law;
- any allegation for costs, fees or other expenses including attorney's fees incurred in these matters.

This release does not extend to and does not preclude any claims arising under the New Jersey Conscientious Employee Protection Act or under 42 U.S.C. § 1983. Such claims were neither raised, adjudicated, nor settled in this proceeding.

6. Without in any way limiting the scope or effect of the preceding paragraphs:

A. Employee represents that he is able to read the English language and understands the meaning and effect of this Agreement.

B. Employee understands that the above paragraph includes a waiver of all demands, complaints, causes of action, claims and charges against the Employer and the Employer's current and former employees and agents, whether known or unknown, asserted or unasserted, suspected or unsuspected, which Employee may have as a result of any act that has occurred arising out of the filing of the attached FNDAs.

C. Employee understands that if this Agreement were not signed, the Employee would have the right to submit information on appeal to the New Jersey Civil Service Commission and to a hearing by Administrative Law Judge assigned to hear the appeal, and further understands that upon receipt of any unfavorable ruling by an Administrative Law Judge, would have the right to make submissions to the Civil Service Commission, and thereafter, if unsatisfied with the final decision of the Civil Service Commission, would have the right to take an appeal to the New Jersey Superior Court, Appellate Division, together with any further rights to file appeals, either by right or by grace in the New Jersey State Court or Federal Court system.

D. The Employee has been represented by the firm of Selikoff and Cohen in the person of Keith Waldman, Esquire, and acknowledges that the Employee has in fact discussed the form and content of this document with his attorney, having sufficient time to review the document prior to agreeing to it.

7. All parties of this Agreement agree that the terms of this Agreement and the circumstances surrounding same, are not to be divulged to any outside sources, either directly or indirectly. Outside sources do not include various agents for the County of Atlantic, namely the County Counsel's Office, Treasurer's Office, Freeholder's Office, or employees of the Atlantic County Department of Public Safety. The provisions of this paragraph are binding only on the Employee and Employer. The Employer makes no representation and takes no responsibility for any unofficial actions of other employees who are not parties to this Agreement.

8. This Agreement shall be governed and conformed in accordance with the laws of the State of New Jersey. Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, including the general release language, then this Agreement shall immediately become null void.

9. This Agreement contains the entire agreement between Employer and Employee. No changes to this Agreement shall be effective unless made in writing and signed by the parties thereto.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names:

8-7-17
Date

01650
Robert Murie
Atlantic County Corrections Officer

08-04-2017
Date

Geraldine D. Cohen
Geraldine Cohen, Division Director/Warden
Atlantic County Dept. of Public Safety

9-6-17

STATE OF NEW JERSEY

In the Matter of William Pierce
City of Hackensack
Police Department

CSC DKT. NO. 2015-1891
OAL DKT. NO. CSV 01242-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 (BW)

The appeal of William Pierce, Police Sergeant, City of Hackensack, Police Department, return to prior permanent title at the end of the working test period, was heard by Administrative Law Judge Caridad F. Rigo, who rendered her initial decision on July 24, 2017 granting a new working test period. Exceptions were filed on behalf of the appellant, a reply to exceptions was filed on behalf of the appointing authority and a cross reply was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

DISCUSSION

Although the appellant will be permitted to complete a new working test period, he has not obtained permanent status as a Police Sergeant. The appellant must successfully complete a working test period in order to obtain permanent status. Although the appellant has shown his release was not proper, the record does not adequately establish the appellant's satisfactory work performance. Accordingly, the appropriate remedy in this matter is to afford him a new working test period.

In non-disciplinary appeals, such as an appeal of a release at the end of the working test period, the standard for determining whether an appellant is entitled to back pay or counsel fees is governed by *N.J.A.C.* 4A:2-4.3(c) and *N.J.A.C.* 4A:2-1.5(b). *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that back pay and counsel fees for appeals that are not based on disciplinary action or the challenge of the good faith of a layoff "may be granted . . . where the Commission finds sufficient cause based on the particular case." In this case, it was found that the appellant is not entitled to a permanent appointment since he had not successfully completed his working test period. Therefore, sufficient cause has not been demonstrated in this matter to award back pay or counsel fees. *See e.g., In the Matter of Melvin Robinson* (MSB, decided December 21, 2005), *In the Matter of Rocky Rembert* (MSB, decided December 3, 2003).

ORDER

The Civil Service Commission finds that the action of the appointing authority in returning the appellant to his prior permanent title at the end of the working test period was not justified. The Commission therefore reverses that action and grants a new working test period for William Pierce.

Back pay and counsel fees are denied.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01242-15
AGENCY DKT. NO. 2015-1891

WILLIAM PIERCE,

Petitioner,

v.

CITY OF HACKENSACK POLICE DEPARTMENT,

Respondent.

Maurice W. McLaughlin, Esq., for petitioner (McLaughlin & Nardi, attorneys)

Raymond R. Wiss, Esq., for respondent (Wiss & Bouregy, attorneys)

Record Closed: February 8, 2017 Decided: July 24, 2017

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals his demotion from sergeant to patrolman because he allegedly failed to successfully complete a ninety-day working test period (WTP).

On December 18, 2014, petitioner was advised that he failed to successfully complete his working test period and was reassigned to the rank of patrolman. On December 31, 2014, he sent a notice of appeal to the Civil Service Commission appealing

the demotion from sergeant. On January 23, 2015, the matter was transmitted to the Offices of Administrative Law (OAL) for a hearing as a contested case. Hearings were held on June 1, 2, 15 and 30, 2016, and July 1 and 22, 2016. Written summations were submitted on September 27, 2016, however the record remained open until February 8, 2017, when a list of the exhibits was finalized.

ISSUES

1. Did petitioner receive his written evaluations or progress reports within sufficient time so he could improve any of his alleged deficiencies?
2. Was respondent's evaluations and decisions made on objective measures of performance?
3. Did the respondent act in bad faith?

FACTUAL BACKGROUND

Petitioner, William A. Pierce, is a police officer with the Hackensack Police Department (HPD) and has been for approximately nineteen years. After being a patrol officer for thirteen years he took the sergeant's exam, passed it, and became eligible to be a sergeant. He was originally promoted to sergeant in February 2013, as a sergeant he was given a working test period (WTP) which he failed; this was his first sergeant's WTP. Petitioner appealed the HPD's decision and the matter was settled. The settlement included that petitioner was re-promoted and given a second chance at a new WTP. It is this second WTP that is the subject of the instant matter. This WTP occurred from September 2014 to December 2014.

SUMMARY OF TESTIMONY

The following is a summary of the relevant testimony of the witnesses.

Captain Patrick Coffey

Captain Patrick Coffey is employed by the HPD and has been since February 2000. He was assigned to the Detective Bureau in 2003, he made sergeant in 2008, he was assigned to Internal Affairs in 2010, in February 2013 he was a lieutenant assigned as shift commander, and in March of 2016 became captain. His role as a lieutenant is that of a shift commander overseeing sergeants. He explained that sergeants are viewed as street supervisors or first-line supervisors: a patrol officer goes to a sergeant for assistance and direction. He further explained that the HPD has 115 employees and eighty of them are patrol officers.

Captain Coffey had nothing to do with petitioner's first WTP. He was assigned to assist in the oversight of petitioner's second WTP. Coffey was petitioner's immediate supervisor during the second WTP. He was personally involved in overseeing all of the police officer and sergeant's work. He was able to make personal observations of the petitioner. He documented his observations in a memo dated November 18, 2014, exhibit R-14. The memo did not say anything negative about petitioner's performance other than that petitioner took a little longer to complete certain paperwork.

Coffey testified that a few of the patrol officers working with petitioner complained about how at times petitioner spoke to them in a condescending manner. Coffey testified that he told petitioner about these complaints and petitioner acknowledged that he needed to improve in that area.

Coffey next prepared exhibit R-18, a memo dated December 4, 2014. This memo noted that petitioner had made improvements in his processing of paperwork but not on his demeanor when dealing with subordinate police officers. Coffey related that he listened to a phone conversation Pierce had with a subordinate officer and that Pierce was abrasive and demanding. Coffey testified that he spoke to Pierce about it.

Coffey next identified Exhibit R-20 as a memo he wrote on December 13, 2014, this was his summation of Pierce's performance over the WTP. As to Pierce's administrative abilities Coffey said that Pierce was not good. In his opinion, Pierce took too long in processing the necessary paperwork and he could not multitask. He said that

Pierce's inability to multitask could present a danger to the public and fellow police officers.

In the same Exhibit R-20, and in his testimony Coffey expressed his concern over Pierce's lack of communication, leadership, and supervisory skills. Coffey based this opinion on the reports and complaints he received from other officers and his observations of Pierce when relating to the officers.

Coffey acknowledged that he did not give his evaluation reports to Pierce but he reiterated that he spoke to Pierce directly several times about his concerns and observations.

Under cross-examination Coffey related that the shifts were eleven hours. He supervised petitioner about four to five weeks, which turned out to be about eight days out of the ninety days.

There were no written protocols to be applied during a WTP either by the Civil Service Commission or the HPD.

The witness acknowledged to this ALJ's direct question that he did not keep petitioner abreast of his progress or lack of progress and that he did not give petitioner any copies of the memos.

Captain Timothy Lloyd

Captain Timothy Lloyd was hired in August 1993 as a patrolman, he went through the ranks until achieving the office of captain. He has been a captain with the HPD since June 2014, his entire law enforcement career has been with the HPD. He is now one of six captains in the HPD. He is in charge of the patrol division directly overseeing Pierce—he is Pierce's top supervisor.

Captain Lloyd provided a brief history of his dealings with Pierce. He said Pierce was out on medical leave for ten to eleven months before his first WTP. Pierce also

sustained an injury in the interim so he was out of work in total about twenty months. In the interim, he stated that the HPD underwent a tremendous amount of changes so he made a unilateral decision to work with Pierce to bring him up to speed.

Lloyd further explained that sergeants are the first line of field supervisors and are responsible for the day-to-day functions of officers under their command, and are responsible for making sure that such officers are current on their training and getting the best training they can. To assist Pierce on his return to active duty he assigned two patrol officers to bring Pierce up to speed on the many departmental changes that occurred during his absence. Ultimately, Pierce was deemed ready to perform his duties as a patrol officer again. Within thirty days following his return to patrol duty Pierce was promoted to the rank of sergeant but subject to completion of a WTP. This WTP took place February to March 2013 and was the first WTP.

Lloyd testified that after Pierce's first WTP his supervisors concluded that Pierce was unfit for the position of sergeant because he lacked the skills sets required. Captain Lloyd then testified that Pierce appealed the department's decision not to permanently promote him to sergeant and as a result of that appeal a settlement agreement was entered into. The terms of the settlement were that Pierce would return to the rank of a patrolman for one year and then he would be re-evaluated for the rank of sergeant and given a second WTP.

Lloyd said he was not involved in petitioner's first WTP.

Lloyd next testified that on September 22, 2014, he met with then-Lieutenant Coffey, Lieutenant Busciglio, Sergeant Peterson, and Pierce and he explained to them his new plan of action for the second WTP for Pierce. He stated that this new plan for the conduct of WTPs was to be utilized not just on Pierce but it was to be applied to all sergeants in a WTP. Sergeant Peterson was to be Pierce's main instructor or supervisor. Peterson was to ride with Pierce in the first thirty days of the ninety-day WTP. Lieutenants Busciglio and Coffey were to oversee Pierce and Peterson. Lloyd said that all efforts were made to make sure Pierce passed his second WTP.

According to Llyod's testimony all of the reports he received from Pierce's supervisors/instructors showed one theme about Pierce's performance: that Pierce had trouble handling several matters at one time (he could not multitask); took too long to make decisions; he needed better computer skills; and his communication with his subordinates lacked tact (he had a poor demeanor speaking to subordinates). Lloyd furthered that Pierce should have known certain things, common knowledge in policing, especially after having been on the force for eleven-plus years and having gone through a WTP before.

Lloyd testified that Pierce had fairly good evaluations while he was a patrol officer.

Lloyd stated that during the subject WTP Sergeant Peterson provided approximately nine reports/evaluations/memos to him. Lieutenant Busciglio gave him one report/evaluation/memo for one work cycle, which is eight days but he only observed Pierce for one day out of that eight-day cycle. Busciglio also gave him one report which was his final summative evaluation. Then Lieutenant Coffey gave him two observations reports and one summary report. Lloyd said he did not check what he was told verbally against what they wrote.

Under cross-examination Lloyd could not provide specific details as to exactly what Pierce could and could not do. He explained that he was not concerned about the absence of any formal feedback or progress reports to Pierce because he had instructed Pierce's instructors to give him real time input directly and personally to Pierce as it was happening. Pierce was not evaluated on any objective standard of performance. Lloyd was never present when Peterson, Coffey, or Busciglio were with Pierce.

Lloyd stated that Pierce never received a copy of these reports as they were submitted because Pierce never asked for them. He furthered that he gave Pierce the reports at the end of the WTP when Pierce asked for them. Lloyd clearly stated that Peterson, Coffey, and Busciglio did not give Pierce any of their written reports or evaluations because they gave them to him directly. Lloyd said Peterson, Coffey, and Busciglio told him that they told Pierce what they wrote on the reports/evaluations. So as far as he was concerned Pierce was on notice because he had been told of his progress

or lack of progress. Lloyd stated he was not present at any time that Peterson, Coffey, or Busciglio were training, evaluating or meeting with Pierce.

Lloyd furthered that this WTP was newly designed by him and that the new WTP program was a new system for Pierce as well as for Peterson, Coffey, and Busciglio.

Under questioning by this ALJ, Lloyd said his decision to not retain Pierce at the rank of sergeant had mostly to do with the written reports he had received as well as the verbal representations made to him by the officers working with him.

Sergeant Walter Peterson III

Sergeant Walter Peterson has been with the HPD since February 1998. As an officer with the HPD he has served in the housing police department, detective investigating major crimes, he has supervised five to ten patrol officers.

In the Fall of 2014 he supervised the WTP for Pierce. He was told by Lloyd to ride with Pierce and report to him every four days (end of a tour). Lloyd told him to write what he saw, what went well and what went bad. Lloyd also told him to meet with him and discuss what was going on. He was also told that Busciglio and Coffey would meet with Pierce at the end of each four-day work cycle. He rode with Pierce approximately the first thirty days; however, in total he rode with petitioner sixty days.

Peterson stated that his daily routine was to review emails, review duty rolls, attend line up, go with patrol officers on calls, and assist with typing up of the paper work. The writing up requires proficiency with the computer. Multitasking is a must.

Peterson said in the first four days of the WTP he showed Pierce all of the paper work and administrative functions that a sergeant needs to do on a daily basis. He made sure Pierce go onto emails, making sure he had an email account. Pierce received all his computer codes and once Pierce grasped that he simply stood over him making sure all was done correctly. Pierce always had questions and if the question could not be answered right away Pierce always made sure that he asked the question the next day.

Peterson testified that he had a fairly good relationship with Pierce, they would ride together for nearly eleven hours a day. During the WTP there were no major incidents so they would discuss hypothetical situations so he would have an opportunity to assess Pierce's thought processing. Peterson said Pierce would hit all of the points and it would be good except that he thought Pierce took too long and wished Pierce was a little faster. Peterson felt that Pierce had sufficient time and knowledge of police work to have been able to make most decisions faster and easier. Peterson said line-ups went longer than they should have. He said petitioner was always asking questions about things he should know. And, the patrol officers that Pierce supervised complained that Pierce spoke to them as if they were children. He heard complaints from the patrol officers that Pierce was unable to make timely decisions and they had no confidence in him. Pierce was unable to interact with people. Peterson said by October Pierce had improved his performance during the lineups, Pierce knew what the assignments were, where the guys were going and in what cars, the lineups went very smooth.

Peterson denies that Lloyd told him anything about Pierce.

Peterson acknowledged writing Exhibit R-7 and that it was his first observation report after his first week with Pierce. He said the reports he wrote were for Captain Lloyd and as far as he was concerned the reports were interoffice memos to Lloyd. Peterson told Pierce to ask Lloyd for copies of his reports.

Peterson said that by the second week of November Pierce continued to improve in the performance of his administrative duties and during the line-ups but he was concerned that in a major incident Pierce would not be able to make proper decisions in a timely manner, Pierce might freeze in a life-or-death situation.

Because there were no major incidents on which he could evaluate Pierce's performance Peterson said he posed numerous hypotheticals to Pierce to see how he would handle a major incident. Peterson opined that Pierce would not be able to handle a major incident. In total he said he evaluated Pierce on his ability to lead, discharge his responsibilities, give advice, and supervise and opined that Pierce was not capable.

Peterson observed Pierce for sixteen and one-half days out of the forty-five days; he said a ninety-day WTP turns out to be forty-five days because they don't work a full week.

Under cross-examination Peterson acknowledged that he worked with Pierce four days on and four days off and that he was to do a report after each four-day tour and that either Busciglio or Coffey were supposed to do one as well. Peterson was supposed to meet with Pierce after each tour to go over the reports. He stated that Pierce was not given a copy of the reports/evaluations. Peterson did not remember if Pierce was shown the reports.

After asking Pierce a series of hypothetical questions, that he answered correctly, but because Pierce did not answer them fast enough, Peterson thought Pierce would freeze in a major incident and would therefore be unfit to assume the responsibilities of a sergeant.

I **FOUND** Peterson honest and credible. However, I note he was uncomfortable testifying.

William A. Pierce

William A. Pierce has been a Hackensack police officer for thirteen years and in law enforcement for nineteen years. Prior to the HPD he was a correction officer with the Bergen County Sheriff's Department. In thirteen years with the HPD he has not had any disciplinary actions. He has gone through two police academies; one for corrections and the other for the HPD. He has thirty college credits from Bergen County College in criminal justice. He passed the initial test to be hired as a HPD police officer. However, he was not hired until he appealed his not being hired. Pierce feels that he was disciplined for appealing and was put on a walking post for fourteen months, when new hires generally do three to four months on a walking post.

Pierce furthered that in 2008 he applied to take the sergeant's test and he passed it. He was # 15 on the list and they went to # 22 and promoted that officer skipping him. He said all twenty-two eligible officers were promoted and received a badge but he did not. He said the list came out in 2009 and the HPD slowly made promotions. He was promoted on February 27, 2013, to the position of sergeant. At this promotion he started his first WTP and was failed and demoted. He appealed and they settled, a term of that settlement was that he would do another WTP, hence, the current matter. He was promoted to sergeant again on September 22, 2014.

His first WTP began on February 25, 2013, and ended on May 25, 2013. He received one discipline during his first WTP, it was received on May 24, 2013, and his first WTP was ended the next day. (See Exhibit P-31.)

Pierce testified that no one gave him suggestions as to ways he could improve. No one gave him feedback as to his improvement or lack thereof. He said that when he asked for feedback everyone told him he did not need to be concerned. He testified that Captain Lloyd never told him what he was to improve. Pierce said he did not understand what it was that he needed to improve.

Pierce said that he saw his first evaluation during his second WTP on December 9, nine days before the end of that WTP. In the interim he said he was told not to be concerned.

Pierce counters to the HPD's allegation that it was difficult to evaluate him during the second WTP because nothing major happened by bringing attention to several major incidents. For example, the incident that occurred on November 9, 2014, at 2130 hours when he assisted the Hasbrouck Heights P.D. in locating a suspect involved in a stolen car. On November 14, 2014, when an individual drove a vehicle into a building. Pierce said he handled a suicide, a burglary, a pedestrian being struck by a train, an attempted robbery with a knife, a fire at a church, a fire with possible arson, a motor vehicle fatality, a robbery, a bar fight, and a call from a bar stating that a customer was in the bar and he had a gun. In total Pierce testified he handled about fifteen major incidents during his WTP.

Pierce received commendations but none during his WTP.

Pierce believes Captain Lloyd is predisposed against him.

During cross-examination Pierce stated that between December 2010 and January 7, 2013, (sixteen months) he was out ill and when he returned he started his first WTP. He furthered that on promotion day six officers were promoted to sergeant and five got their badges he was the only one that did not get his badge—he said it was humiliating.

Pierce said he asked Peterson multiple times for his written reports but Peterson never gave them to him. He was told verbally on December 18 that he had failed this WTP.

On December 8 when he was given Peterson's negative report, he requested a meeting on December 9, and he received all of the reports on December 9. He only requested the reports from Peterson.

Pierce admitted that he never complained about the fact that the procedures outlined in the memo dated November 3, 2014, and the meeting of September 22, 2014, were not followed because he did not want to make waves.

Pierce reiterated numerous times throughout his testimony that he was told by his supervisors not to worry about his performance that it was no big deal and he was doing fine.

FINDINGS OF FACT

Having heard the testimony of the witnesses and reviewed the documentary evidence I make the following findings of **FACT**:

1. Appellant did not get copies of his written evaluation reports until December 9, 2014, approximately one week before the end of his ninety-day WTP.
2. Captain Coffey was assigned to work and meet with Pierce during his second WTP to monitor his progress or lack thereof and to otherwise oversee and supervise Pierce during the WTP.
3. Captain Coffey completed three evaluations on the appellant when he should have done twelve. And, Coffey observed appellant eight days out of the ninety days.
4. Peterson's written evaluations/progress reports and his testimony are not consistent with his opinion and conclusions about Pierce's abilities. Peterson criticizes Pierce for taking too long to make decisions; however, at no time does he define what too long is and under what circumstances. According to Peterson because no major incidents occurred while he was supervising Pierce he was forced to pose hypothetical scenarios to assess Pierce's abilities. However, Peterson failed to provide the details of the hypothetical scenarios he posed to Pierce neither in writing or through his testimony.
5. Appellant should have received copies of the written evaluations/reports as they were completed during his ninety-day WTP.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

In an appeal from an employee's termination at the conclusion of a working test period, the employee shoulders the burden of proving that the appointing authority's "action was in bad faith." N.J.A.C. 4A:2-4.3(b). If bad faith is found, the employee is entitled to a new full or shortened working test period and, if appropriate, other remedies. N.J.A.C. 4A:2-4.3(c). The basic test is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of the position. See Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351, 356 (App. Div. 1960); Devine v. Plainfield, 31 N.J. Super. 300, 303-04 (App. Div. 1954); Lingrell v. New Jersey Civil Serv. Comm'n, 131 N.J.L. 461 462 (1944). In general, good faith has been defined as meaning "honesty of purpose and integrity of conduct with respect to a given subject." Smith v. Whitman, 39 N.J. 397, 405 (1963). As stated in Schopf v. New Jersey Department of Labor, 96 N.J.A.R.2d (CSV) 853, 857:

> No set rule may be formulated when attempting to determine whether an employee's termination at the end of the working test period was based on opinions of the appointing authority formed in good or bad faith. If the opinion is formed based upon actual observations of the employee's performance of the duties of the position, and is an honest assessment as to whether the employee will be able to satisfactorily and efficiently perform those duties if the appointment becomes permanent, it must be considered to have been made in good faith. If, on the other hand, the decision to terminate is not based upon actual observations of performance, or if it is made based upon dishonest motives, is based on bias, prejudice or self-interest, or is made with ill will toward the employee or because of some furtive design, it must be set aside. The use of the good faith standard also implies that if the employer's decision to terminate is made in good faith, the fact that the Merit System Board may not have decided the question in the same way is of no import. It is only required that the opinion be based on actual observations and that those observations form a rational basis for the opinion.

In addition, "[a] fair evaluation period is further evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky v. Twp. of Freehold, 92 N.J.A.R.2d (CSV) 155, 157; Davis v. Newark Public Library, 9 N.J.A.R. 84, 87-88. In this regard, the Merit System Board has consistently emphasized the necessity on the part of an appointing authority to comply with the regulatory requirements governing the provision of progress reports. The progress reports required by N.J.A.C. 4A:4-5.3 are a means of notice to an employee in the working test period that his performance is unsatisfactory so that the employee has an opportunity to improve specified performance deficiencies toward completing a successful working test period and attaining permanent appointment. The termination of an employee in situations in which the appointing authority has failed to provide that mandated notice has been found to be demonstrative of a lack of good faith and a denial of a fair evaluation of the employee's work performance.

In Sokolowsky, the Merit System Board concurred with the ALJ's conclusion that the employee should be afforded a new working test period where the appointing authority failed to fulfill the evaluation requirements. Although the employee had received verbal criticism from his supervisor during his working test period, the employee never had the

impression that his supervisor was unsatisfied with his work. While the employee's supervisor had prepared an interoffice memorandum stating that he was dissatisfied with the appellant's work approximately two months into the employee's working test period, the supervisor did not discuss the contents of this memorandum with the appellant and the evidence did not establish that the appellant received it. In concluding that the appellant was entitled to a new full working test period, the ALJ noted that a "fair evaluation period" is "evidenced by the giving of guidance and advice due to a probationer, as well as a notification of any deficiencies in performance." Sokolowsky, supra, 92 N.J.A.R.2d (CSV) at 157. The ALJ held that "the appointing authority failed to fulfill the . . . requirements for a fair evaluation period." Ibid. Specifically, although the appellant "was verbally advised concerning deficiencies in his performance," "he received no written report concerning his progress," and "[t]he consequence of the appointing authority's failure to provide the appellant with timely written notification of deficiencies was denial of a fair evaluation of his work performance." Ibid.

In the case of Niosi v. Department of Public Works, 95 N.J.A.R. (CSV) 238, 240, the appointing authority's failure to issue the required two-month and final progress reports "in and of itself constitutes bad faith, the requirement that the employee must have an opportunity to correct any deficits," warranting a new working test period). Smith v. N. State Prison, 92 N.J.A.R.2d (CSV) 342 (ordering an extended working test period where employee did not receive progress reports); Richardson v. Dep't of Corr., 92 N.J.A.R.2d (CSV) 63 (concluding the employee demonstrated that the appointing authority reached its determination that his performance was unsatisfactory is bad faith where the employee did not receive the required progress reports on his performance, warranting a new four-month working test period).

The irregularities in the procedures regarding Pierce's working test period cannot be ignored. Peterson, Coffey, Busciglio, and Lloyd were charged with preparing Pierce's evaluations/progress reports yet they all admitted that they did not give Pierce their reports; and Lloyd said he gave the reports to Pierce on December 9, one week before the end of his WTP. The fact that the HPD did not have a set procedure that it was an *ad hoc* program put together by Lloyd shows that the WTP was also being tested and there were no objective guidelines in place.

Peterson's testimony is void of the specifics of the numerous hypotheticals he posed to Pierce to see how Pierce would handle a major incident. And, as per Captain Lloyd, Pierce was not evaluated on any objective tests. Peterson, who was Pierce's immediate supervisor during the second WTP, acknowledged that he did not give Pierce the written progress reports. On its face, the failure to offer adequate time to remediate deficiencies in job performance during a WTP constitutes bad faith on the part of the HPD, a week if that, is insufficient time to correct deficiencies

CONCLUSION

Therefore, having considered all of the above I **CONCLUDE** that the HPD failed to provide Pierce with adequate notice of his work performance during his ninety-day WTP and therefore did not exercise good faith during the WTP. I recommend that Pierce be given another WTP so that a true evaluation of his abilities can be made.

ORDER

I hereby **ORDER** that the Hackensack Police Department's demotion of William Pierce be **REVERSED**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

July 24, 2017
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: July 24, 2017

Date Mailed to Parties: JUL 25 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

LIST OF WITNESSES

For Appellant:

William A. Pierce

For Respondent:

Cpt. Patrick Coffey

Cpt. Timothy Lloyd

Lt. Walter Peterson

Cpt. Peter Busciglio

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

Policies, Handbooks, Etc.

P-1 Hackensack PD: Harassment in the Workplace 7/22/11

P-2 City of Hackensack Employee Handbook 11/8/12

P-3 Agreement between Hackensack and PBA, From 1/ 1/13-12-31-15

P-4 Hackensack PD: Promotional Process 4/19/13

P-5 Hackensack PD: Training 4/24/13

P-6 Hackensack PD: Performance Evaluation 4/24/13

P-7 Hackensack PD: Disciplinary Act

P-8 Arrest Step by Step

Before Training Period

P-9 Letter from Chief Zisa 1/28/03

P-10 Internal Affairs Complaint Notification from Captain Salcedo 11/1/09

P-11 Notice of Minor Disciplinary Action Hearing from Chief Zisa 12/18/09

P-12 Employee Evaluation Report from Sergeant Capone 12/27/11

Field Training Period

P-13 Daily Observation Report from PO Kiselow 1/12/13

P-14 Daily Observation Report from PO Kiselow 1/13/13

P-15 Daily Observation Report from PO Kiselow 1/19/13

P-16 Daily Observation Report from PO Kiselow 1/21/13

P-17 Daily Observation Report from PO Kiselow 1/27/13

P-18 Report Sheet from PO Kiselow 2/14/13

P-19 Report Sheet from PO Lopez Arenas 2/14/13

P-20 Report Sheet from PO Pierce 2/14/13

First Working Test Period

P-21 Interoffice communication from Lo Iacono 2/14/13

P-22 Hackensack PD Personnel Order 2/15/13

P-23 Interoffice communication from Lieutenant Corcoran 3/31/13

P-24 Interoffice communication from Captain Foley 4/9/13

P-25 Interoffice communication from Lieutenant DeWitt 4/24/13

P-26 Interoffice communication from Lieutenant DeWitt 5/17/13

P-27 Incident Report from Lieutenant DeWitt 5/17/13

P-28 Counseling/Training from DeWitt 5/17/13

P-29 Interoffice communication from Captain Salcedo 5/22/13

P-30 Interoffice communication from Mordaga 5/23/13

P-31 Incident Report from Lieutenant DeWitt 5/25/13

P-32 Performance Notice from Lieutenant DeWitt 5/25/13

P-33 Interoffice communication from Mordaga 5/26/13

P-34 Letter from PBA 5/30/13

Appeal of Demotion

P-35 Formal Appeal of Pierce's Demotion 6/11/13

P-36 Letter from William Smith to CSC 6/13/13

P-37 Notice of Settlement Conference 6/21/13

P-38 Reprimand/Performance Notice from Sergeant Marino 12/6/13

P-39 Letter from William Smith 1/28/14

P-40 Interoffice communication from Mordaga 4/14/14

P-41 Letter from William Smith to Hackensack 4/22/14

P-42 Initial Decision Dismissal 6/17/14

P-43 Letter from William Smith to CSC 6/26/14

P-44 Agreement of Settlement 7/14/14

P-45 Letter from Bernstein to Smith 7/24/14

P-46 Letter from William Smith to Pierce 7/25/14

P-47 Decision of the CSC 8/13/14

P-48 Letter from Smith to OAL 10/15/14

Second Working Test Period

P-49 Interoffice communication from Sergeant Peterson 9/30/14

P-50 Interoffice communication from Lieutenant Busciglio 9/30/14

P-51 Interoffice communication from Sergeant Peterson 10/8/14

P-52 Interoffice communication from Lieutenant Busciglio 10/9/14

P-53 Interoffice communication from Mordaga 10/31/14

P-54 Interoffice communication from Sergeant Peterson 10/29/14

P-55 Interoffice communication from Captain Lloyd 11/3/14

P-56 Interoffice communication from Sergeant Peterson 11/6/14

P-57 Interoffice communication from Sergeant Peterson 11/17/14

P-58 Interoffice communication from Lieutenant Coffey 11/18/14

P-59 Interoffice communication from Captain Lloyd 11/20/14

P-60 Interoffice communication from Lieutenant Coffey 11/25/14

P-61 Interoffice communication from Sergeant Peterson 12/1/14

P-62 Interoffice communication from Lieutenant Coffey 12/4/14

P-63 Interoffice communication from Sergeant Peterson 12/4/14

P-64 Interoffice communication from Sergeant Peterson 12/11/14

P-65 Interoffice communication from Lieutenant Coffey 12/13/14

P-66 Interoffice communication from Sergeant Peterson 12/16/14

P-67 Interoffice communication from Lieutenant Busciglio 12/16/14

P-68 Interoffice communication from Sergeant de la Bruyere 12/16/14

P-69 Interoffice communication from Sergeant Cappadonna 12/16/14

P-70 Interoffice communication from Captain Lloyd 12/18/14

P-71 Interoffice communication from Mordaga 12/18/14

P-72 Interoffice communication from Mordaga 12/18/14

P-73 Interoffice communication from Mordaga 1/6/15

Since Demotion

P-74 Employee Evaluation Report from Lieutenant Busciglio 2/18/15

P-75 Employee Evaluation Report from Lieutenant Busciglio 2/22/15

P-76 Report Sheet from Pierce 8/22/15

P-77 Interoffice communication from Sergeant Natale 12/8/15

P-78 Interoffice communication from Sergeant Capone 12/1/02

P-79 Certificate in Cultural Diversity 2/5/03

P-80 Certificate in Ethical Issues in Community Policing 2/6/03

P-81 Certificate in Strategic Planning 2/11/03

P-82 Certificate in Conflict Resolution 2/11/13

P-83 Certificate in Problem Solving Strategies 2/12/03

P-84 Certificate in Community Organization 2/12/03

P-85 Certificate in Crime Prevention 2/13/03

P-86 ASP Tactical Baton Certificate 4/23/03

P-87 Certificate of Basic Course for Police Officers 6/27/03

P-88 Certificate for Basic Police Training 6/27/03

P-89 Certificate of Commendation 6/27/03

P-90 Certificate of Commendation 6/30/03

P-91 Certificate of Crime Scene Preservation 4/20/04

P-92 Certificate of Appreciation 11/17/04

P-93 Certificate in Hazmat Awareness 11/30/05

P-94 Certificate in Report Writing 5/12/06

P-95 Report Sheet from Sergeant Lopez 7/21/10

P-96 Report Sheet from Sergeant Corcoran 8/6/10

P-97 Certificate of Commendation 8/18/10

P-98 Law Enforcement Distinguished Service Award 6/14/12

P-99 Public Safety Telecommunicator Training 9/20/1

P-100 Emergency Medical Dispatch Training 10/17/13

P-101 AHA Cognitive and Skills Evaluation 10/18/13

P-102 Certificate in Motor Vehicle Stops 2/27/14

P-103 Certificate in Proactive Police Supervision 1/16/14

P-104 Certificate in SERVE Intersection Analysis 3/18/15

P-105 Report Sheet from PO Pierce 9/7/15

<u>Second Appeal of Demotion</u>

P-106 Formal Appeal of Pierce's Second Demotion 12/31/14

P-107 Pierce's Interrogatories to Hackensack PD

P-108 Pierce's Document Demands to Hackensack PD

P-109 Hackensack PD's Answers to Interrogatories

P-110 Hackensack PD's Response to Document Demands

P-111 NJ Civil Service Commission Job Description

Daily Activity Sheets

P-112 Daily Activity Sheet 9/27/14

P-113 Daily Activity Sheet 9/28/14

P-114 Daily Activity Sheet 10/5/14

P-115 Daily Activity Sheet 10/8/14

P-116 Daily Activity Sheet 10/13/14

P-117 Daily Activity Sheet 10/21/14

P-118 Daily Activity Sheet 10/22/14

P-119 Daily Activity Sheet 10/24/14

P-120 Daily Activity Sheet 10/31/14

P-121 Daily Activity Sheet 11/1/14

P-122 Daily Activity Sheet 11/6/14

P-123 Daily Activity Sheet 11/8/14

P-124 Daily Activity Sheet 11/9/14

P-125 Daily Activity Sheet 11/14/14

P-126 Daily Activity Sheet 11/17/14

P-127 Daily Activity Sheet 11/24/14

P-128 Daily Activity Sheet 12/1/14

P-129 Daily Activity Sheet 12/2/14

P-130 Daily Activity Sheet 12/3/14

P-131 Daily Activity Sheet 12/7/14

P-132 Daily Activity Sheet 12/8/14

P-133 Daily Activity Sheet 12/14/14

P-134 Employee Evaluation Report from Sergeant de la Bruyere 2/8/16

P-135 Recognition of PO Pierce from Sergeant de la Bruyere 3/11/16

P-136 Tour Commander Report 12/10/14

P-137 Interoffice communication from Chief Padilla 1/2/13

For Respondent:

R-1 February 2013 Report Sheets from Police Officers Kiselow, Lopez-Arenas, and Pierce Relating to PO Pierce Returning to Patrol duties following extended leave

R-2 2013 Working Test Period Evaluations by Captain Salcedo, Captain Foley, Lieutenant Corcoran and Lieutenant DeWitt

R-3 Order of Settlement Relating to Initial Working Test Period

R-4 New Jersey Civil Service Commission

R-5 September 30, 2014, Memo from Lieutenant Busciglio to Captain Lloyd re: Providing docs to Pierce on 9/11/14 re: working at desk and re: progress report for 9/27/14 to 9/30/14

R-6 November 3, 2014, Memo from Captain Lloyd to Director Mordaga re: September 22, 2014, meeting with Pierce, Busciglio, and Peterson to discuss process of Pierce's promotion and ninety-day working test period

R-7 September 30, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation for September 22, 29 and 30, 2014

R-8 October 9, 2014, Memo from Lieutenant Busciglio to Captain Lloyd re: Evaluation Pierce for October 5-8, 2014

R-9 October 8, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation of Pierce for October 6-8, 2014

R-10 October 29, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation of Pierce for October 21, 22 and 23, 2014

R-11 October 31, 2014, Memo from Director Mordaga to Captain Lloyd requesting progress reports from Pierce's supervisors

R-12 November 6, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation of Pierce for October 29, 30 and 31, 2014

R-13 November 17, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation of Pierce for November 6-9, 2014

R-14 November 18, 2014, Memo from Lieutenant Coffey to Captain Lloyd re: Evaluation of Pierce for 4 days in November 2014

R-15 November 25, 2014, Memo from Lieutenant Coffey to Captain Lloyd re: Evaluation of Pierce on November 22, 2014

R-16 December 1, 2014, Memo from Sgt. Peterson to Captain Lloyd re: Evaluation of Pierce for November 22-25, 2014

R-17 December 4, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation of Pierce for December 1-2, 2014

R-18 December 4, 2014, Memo from Lieutenant Coffey to Captain Lloyd re: Evaluation of Pierce for three days in first week of December 2014

R-19 December 11, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Evaluation of Pierce for December 8, 9, and 10, 2014

R-20 December 13, 2014, Memo from Lieutenant Coffey to Captain Lloyd re: Lieutenant Coffey's Working Test Period Review of Pierce

R-21 December 16, 2014, Memo from Sergeant Peterson to Captain Lloyd re: Sergeant Peterson's evaluation of Pierce during Working Test Period Review

R-22 December 16, 2014, Memo from Lieutenant Busciglio to Captain Lloyd re: Lieutenant Busciglio's Ninety-Day Working Test Period Review of Pierce

R-23 December 16, 2014, Memo from Sergeant de la Bruyere to Captain Pierce re: Evaluation of Pierce during Working Test Period

R-24 December 16, 2014, Memo from Sergeant Cappadonna to Captain Lloyd re: Evaluation of Pierce during Working Test Period (with attached marked-up N.J.-Civil Service Commission job specs for Police Sergeant)

R-25 December 18, 2014, Memo from Captain Lloyd to Director Mordaga re: Recommendation to demote Pierce

R-26 December 18, 2014, Memo from Director Mordaga to Pierce re: Failure of working test period and reassignment to rank of Police Officer

R-27 December 18, 2014, Memo from Director Mordaga to Art Koster re: Pierce's failure of working test period and reassignment to rank of Police Officer

R-28 January 6, 2015, Memo from Director Mordaga to Art Koster re: Demotion of Pierce

R-29 February 22, 2015, Employee Evaluation Report prepared by Sergeant Busciglio re: Pierce for September 2014 to December 2014 Evaluation Period

R-30 February 21, 2015, Report Sheet prepared by Pierce and sent to Director Mordaga setting forth Pierce's comments of disagreement with February 22, 2015, Employee Evaluation Report

R-31 Volume 2, Chapter 18 of HPD Rules and Regulations entitled "Promotional Process," effective April 19, 2013

R-32 Volume 5, Chapter 3 of HPD Rules and Regulations entitled "Performance Evaluation," effective April 24, 2013

9-6-17

STATE OF NEW JERSEY

In the Matter of Geraldine Taylor
Essex County,
Department of Health and
Rehabilitation

CSC DKT. NO. 2017-1731
OAL DKT. NO. CSV 18432-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 6, 2017 JM

The Civil Service Commission, at its meeting of September 6, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. CSV 18432-16
AGENCY REF. NO. 2017-1731

IN THE MATTER OF GERALDINE TAYLOR,
ESSEX COUNTY DEPARTMENT
OF HEALTH AND REHABILITATION.

Marc Serra, Esq., for appellant Geraldine Taylor (Law Office of Marc Serra, attorneys)

Sylvia Hall, Esq., appearing for respondent Essex County (Courtney M. Gaccione, County Counsel, attorneys)

Record Closed: August 1, 2017 Decided: August 8, 2017

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

By Final Notice of Disciplinary Action dated October 19, 2016, and made effective October 20, 2016, Essex County Department of Health and Rehabilitation removed appellant Geraldine Taylor (appellant) from her civil service position as a Registered Nurse for abandonment, excessive absenteeism, and other sufficient cause, namely that she failed to return to work after an extended period of Family Medical Leave. Appellant filed a request for a hearing appealing her removal, which appeal was

filed with the Office of Administrative Law by the Civil Service Commission for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 on December 7, 2016.

The matter was assigned to me on December 9, 2016. On January 4, 2017, I convened a telephonic case management conference. Among other issues discussed, a hearing date for May 26, 2017, was scheduled. The matter was adjourned on appellant's request, together with acknowledgement of a waiver of back pay for the period of the adjournment, until July 26, 2017.

At the scheduled plenary hearing, the parties set forth the outline of a settlement on the record and the hearing was adjourned. The parties were given the opportunity to reduce the settlement to writing. Under cover of July 28, 2017, the parties submitted to the undersigned a fully executed Settlement Agreement. On the basis of the written agreement submitted, I **FIND** that all parties in this matter are satisfied with the terms and conditions of that agreement. I have reviewed the record and terms of the Settlement Agreement, made a part hereof, and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the applicable law.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and therefore, it is **ORDERED** that the parties comply with the settlement terms and that these proceedings be and are hereby concluded.

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.

August 8, 2017 — Gail M. Cookson

DATE — **GAIL M. COOKSON**, ALJ

Date Received at Agency: _____

Mailed to Parties: _____

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COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
BY: SYLVIA HALL, ASSISTANT COUNTY COUNSEL
HALL OF RECORDS - ROOM 535
NEWARK, NEW JERSEY 07102
Telephone: (973) 621-2701
Fax: (973) 621-4599
Attorney for the Essex County Department of Health and Rehabilitation

		OFFICE OF ADMINISTRATIVE LAW
GERALDINE TAYLOR,	:	
	:	**OAL DKT. NO. CSV-18432-2016 N**
v.	:	**AGENCY REF. NO. CSC DKT. NO. 2017-1731**
	:	
ESSEX COUNTY DEPARTMENT OF HEALTH AND REHABILITATION.	:	**STIPULATION OF SETTLEMENT AND GENERAL RELEASE**

It is hereby stipulated and agreed to by and between the parties hereto that the above-captioned matter be and same is hereby settled upon the following terms and conditions:

1. The Employee, Geraldine Taylor, acknowledges all charges (N.J.A.C. 4A:2-2.2; 4A:2-2.3(a)(1); 4A:2-2.3(a)(3); 4A:2-2.3(a)(4); 4A:2-2.3(a)(6); 4A:2-2.3(a)(7); 4A:2-2.6.2(b) and 4A:2-2.6.2(c)) as outlined in the Preliminary Notice of Disciplinary Action dated August 26, 2016 and Final Notice of Disciplinary Action dated October 19, 2016, which resulted in this employee's termination from employment with the County of Essex, effective October 20, 2016.

1(a). The parties agree that this Stipulation of Settlement and General

Release pertains to all charges as indicated in the Preliminary Notice of Disciplinary Action dated August 26, 2016.

2. The employee agrees to withdraw her case in this matter and request for a hearing.

3. This employee hereby resigns in good standing in lieu of termination from the County of Essex, effective October 20, 2016.

4. In consideration for employee's resignation in good standing, the County of Essex will pay to the employee a lump sum payment of ~~Two Thousand Five Hundred Dollars ($2,500.00)~~ Three Thousand Seven Hundred Dollars ($3,700). The net amount referred to in this paragraph is before deduction of standard payroll deductions. Employee shall be responsible for all applicable State and Federal tax deductions. No pension contributions will be deducted from this amount. Employee agrees to execute all forms and vouchers reasonably required by the County to process the foregoing payment.

7/26/17 FJD GMOS GET SH In court

5. Employee agrees she shall not seek future employment with the County of Essex.

6. Employee hereby agrees to waive any and all claims to back wages and Attorney's fees. Employee also agrees to waive any right to be reinstated as an employee of the County of Essex.

7. The County of Essex agrees not to contest unemployment benefits received by the employee, if applicable. The employee acknowledges that the State of New Jersey retains the sole discretion to make the ultimate decision as to unemployment

benefits for this employee.

8. The employee and the County agree that the terms and conditions of this Stipulation of Settlement and General Release and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public unless compelled to do so by judicial process. However, the employee may make disclosures to the members of her immediate family, attorney, union representative and as may be required by her accountant in connection with the discharge of the latter's duties in preparation of tax returns or financial statements. Employee's failure to comply with the confidentiality provisions of this Stipulation of Settlement and General Release may result in the dissolution of the within Stipulation of Settlement and General Release.

9. In the event that an action is brought for the employee's breach of the confidentiality conditions set forth in paragraph 8 hereof, in addition as to such other relief as is appropriate, the County shall be entitled to reasonable attorney's fees and costs.

10. The County agrees that it will provided the employee's date of hire, salary and job title only in response to inquiries by future employers or other third parties.

11. This Stipulation of Settlement and General Release is not, and shall not in any way be construed, as an admission by the County of any violation of any federal or state constitutional prohibition, or any federal, state, local law, ordinance or regulation, or

any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person.

12. The parties have entered into this Stipulation of Settlement and General Release for the sole purpose of resolving employee's claims concerning her employment with the County, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any Court and employee does not purport to be the prevailing party in any threatened or pending litigation.

13. Employee agrees that this Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration for the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officials, officers, agents, employees, attorneys, administrators, directors, representatives, elected officials, departments, boards, and all persons acting by, through, under or in concert with, both in their official and individual capacities, from any and all claims employee has now to any relief of any kind from the County, whether or not employee now knows about those rights, arising out of employee's employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; Family Medical

Leave Act, the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law Against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all possible claims against the County from the beginning of employee's employment with the County to the date this Stipulation of Settlement and General Release is executed by employee.

14. Employee represents and certifies that she has carefully read and fully understands all of the provisions of and effects of this Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with employee's attorney. Further, the employee certifies that she voluntarily entered into this Stipulation of Settlement and General Release and that the County has not made any representations concerning the terms of effects of this Stipulation of Settlement and General Release other than those contained herein.

15. Employee agrees that any and all legal costs and expenses including, but not limited to, attorney's fees, she has incurred or may incur in connection with this matter or any claim(s) that arise from the facts underlying this matter are solely her responsibility.

16. This Stipulation of Settlement and General Release shall neither set a

precedent nor constitute a past practice.

17. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Stipulation of Settlement and General Release shall, in all cases, be construed as a whole, according to its fair meaning and not strictly for or against any of the parties.

18. Should any provision of this Stipulation of Settlement and General Release be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

19. This Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by the County Administrator. This Stipulation of Settlement shall be binding upon the County and the employee and their successors.

20. The foregoing constitutes a full and final disposition of this matter.

21. Employee shall not institute an Appeal in this matter.

22. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

23. This Stipulation of Settlement and General Release may not be modified, altered or changed, except upon the prior express written consent of the parties.

24. Settlement and General Release is the result of negotiations with employee

and employee's attorney with whom employee had an opportunity to consult prior to signing the same.

Dated: 7/28/17

SYLVIA HALL
ASSISTANT COUNTY COUNSEL

Dated: 7/26/17

Julius N Cabbell for R.J.

ROBERT JACKSON
ESSEX COUNTY ADMINISTRATOR/
DIRECTOR OF HUMAN RESOURCES

Dated: 07-26-17

FRANK J. DEL GAUDIO, SASHE
DIRECTOR OF ESSEX COUNTY
HOSPITAL CENTER

Dated: 7/26/17

MARC SERRA
ATTORNEY FOR EMPLOYEE

Dated: 7-26-2017

GERALDINE TAYLOR
EMPLOYEE

9-6-17

STATE OF NEW JERSEY

In the Matter of Claudio Tundo

CSC Docket Nos. 2015-3158, 2016-3249 and 2016-3197
OAL Docket Nos. CSV 09642-15, CSV 04671-16 and CSV 04387-16
(Consolidated)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEP 25 2017 (ABR)

The appeals of Claudio Tundo, a Laborer 1 with the Borough of Ringwood (Ringwood), Department of Public Works (DPW), of his seven working day and 15 working day suspensions[1] and his removal, effective February 26, 2016, on charges, was heard by Administrative Law Judge Richard McGill (ALJ), who rendered his initial decision on July 31, 2017. Exceptions were filed on behalf of the appointing authority and the appellant and replies to the exceptions were filed on behalf of the appellant and the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 6, 2017, did not adopt the ALJ's recommendation to modify the appellant's removal to a three-month suspension. Rather, the Commission upheld the appellant's removal.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), removing him on charges of insubordination, inability to perform duties, chronic or excessive absenteeism, neglect of duty, abuse of sick time, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that the appellant declined to come

[1] The Commission notes the appellant's withdrawal of his appeals of the seven working day and 15 working day suspensions.

into work on February 15, 2016 to plow snow and he did not report on February 16, 2016 due to ice. It also alleged that he had a long history of abuse of sick and personal leave time dating back to November 2014. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In his initial decision, the ALJ found that the events in this matter were essentially undisputed. As a result, the ALJ observed that the Collective Negotiations Agreement (CNA) in effect during the relevant period provided employees with 15 sick days per year, five of which could be utilized as personal days each year.[2] The CNA also provided that the appointing authority could require a doctor's note for sick leave of any duration. The ALJ noted that the appellant finished 2013 with a balance of 0.64 sick days and no personal days; had deficits of 3.50 sick days and one personal day at the end of 2014; had year-end balances of 0.50 sick days and 0.50 personal days in 2015;[3] and used 5.00 sick days and 0.50 personal days in January 2016.[4]

With regard to February 15, 2016, the ALJ noted that Gregory Cook, Supervisor, Public Works, spoke with the appellant at 4:43 a.m. on February 15, 2016, a holiday (Presidents' Day), and told the appellant that he needed to report to work that morning. However, the appellant declined to report to work. The ALJ found that the CNA permitted him to decline to work on that day, as it was a holiday that fell on a week where he was not on the snow emergency standby schedule. The appellant testified that the road conditions on the morning of February 16, 2016 prevented him from traveling to work and he stated that he called a supervisor to advise him accordingly. Although the ALJ found that the local roads were icy on February 16, 2016, he did not find the appellant's testimony that the icy conditions prevented him from traveling to work to be credible, since all other Ringwood DPW employees were able to make it to work on that day.

The ALJ also observed that the appellant's disciplinary record included the following: a written warning in 2015; a four working day suspension in 2015 on charges primarily related to his attendance record; a seven working day suspension in May 2015 due to his failure to report to work on March 2, 2015 after an absence; and a 15 working day suspension in 2016 due to his attendance. The ALJ further

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[2] In *In re Woodbridge Fire District #1 Sick Leave Policy* (CSC, decided January 13, 2010), the Commission held that pursuant to *N.J.A.C.* 4A:6-1.3, collective bargaining agreements may not permit sick days to be used to conduct personal business.

[3] The appellant's 9.50 sick days in 2015 were dispersed as follows: 2.00 on Mondays, 2.00 on Tuesdays, 1.00 on a Wednesday, 2.00 on Thursdays, and 2.50 on Fridays. None of the appellant's 2015 sick days occurred before or after a holiday.

[4] The appellant's 5.00 sick days in 2016 were dispersed as follows: 2.00 on Mondays, 0.50 on a Tuesday, 1.00 on a Wednesday, 0.50 on a Thursday, and 1.00 on a Friday. Additionally, the ALJ found that 3.50 of the 5.00 sick days the appellant used in 2016 corresponded to snow events and the appellant's use of a 0.50 sick leave day on February 16, 2016 fell on the day after a holiday.

noted that the appellant was "docked" one day's pay in January 2016 for failing to provide a required doctor's note after a December 22, 2015 absence. The ALJ also recognized that the appellant, during the course of his employment, performed 37.09 hours of overtime, compared to another employee who had 304.76 hours of overtime.

Based upon the foregoing, the ALJ sustained the charges of insubordination, abuse of sick time, neglect of duty and conduct unbecoming a public employee. The ALJ found that the appellant's failure to provide documentation for absences on July 21, 2015 and July 24, 2015, as ordered to in two memos, supported the charge of insubordination. The ALJ also cited the appellant's failure to furnish documentation for other sick days in further support of the insubordination charge. As to the abuse of sick time charge, the ALJ found that the appellant's use of sick time on Mondays and Fridays, as well as on dates corresponding to snow events in 2015 and 2016, including his absence on February 16, 2016, demonstrated a pattern of abuse, particularly as he failed to provide doctor's notes for many of his absences. The ALJ indicated that the appellant's use of sick days in November 2014, after producing a doctor's note which merely restricted him to light duty, also constituted abuse of sick leave. The ALJ found that the appellant's extensive use of sick days corresponding with snow events without producing doctor's notes supported the charges of neglect of duty and conduct unbecoming a public employee, as it forced the appointing authority to assign his duties to other employees and negatively impacted the morale and efficiency of Ringwood DPW. The ALJ dismissed the charges of chronic absenteeism, inability to perform duties, and other sufficient cause. In dismissing the charge of chronic or excessive absenteeism, the ALJ cited the appellant's improved attendance after his May 2015 suspension and the fact that he remained within his annual allotment of sick and personal days in 2015 and 2016. The ALJ found that the appellant's improved attendance record after 2014 and his limited overtime compared to other Ringwood DPW employees did not support the charge of inability to perform duties. In weighing the appropriate penalty, the ALJ observed that the appellant "did not have the opportunity to improve his conduct" after the February 2016 suspension that the appellant was serving at the time the instant FNDA was issued. The ALJ noted that the appellant's misconduct in support of the removal after the February 2016 suspension involved only two additional days, of which he only sustained the charges based on the February 16, 2016 absence. Accordingly, the ALJ found that "[w]hether one day or two, the additional misconduct d[id] not warrant a leap from a 15-day suspension to a removal." Therefore, in view of the sustained charges and the appellant's past record, the ALJ recommended that the appellant's removal be modified to a three-month suspension.

In its exceptions, the appointing authority maintains that the ALJ should have sustained the charges of chronic or excessive absenteeism and inability to perform duties and, therefore, should have upheld the appellant's removal. As to

the charge of chronic or excessive absenteeism, the appointing authority argues that the appellant's attendance record did not improve after his May 2015 suspension. Rather, it claims that the appellant continued a pattern of misconduct by routinely using sick days on Mondays, Fridays, before holidays, after holidays and following snowstorms. The appointing authority proffers that snow removal was one of the appellant's principal responsibilities as a Laborer 1, but the appellant was habitually absent following snowstorms. It submits that all of the sick days the appellant used in 2016 corresponded to snow events. Moreover, the appointing authority contends that the ALJ failed to recognize the 10 warnings it provided the appellant from November 2014 through January 2016 regarding the use of sick time, unauthorized absences and other infractions. Similarly, the appointing authority argues that the appellant's conduct supports the charge of inability to perform duties, as the appellant demonstrated a routine inability perform his critical snow removal duties by failing to make himself available on regular work days following winter storms.

As to the appellant's removal, the appointing authority maintains that the appellant's history of discipline in the relatively recent past make it appropriate to remove the appellant, as his persistent misconduct and indifference to his duties, including snow removal, demonstrate that any lesser disciplinary action is not likely to improve his conduct. It emphasizes that the written warnings it provided to the appellant were part of progressive discipline and intended to give the appellant an opportunity to improve his behavior. It notes that despite those warnings, the appellant used sick days in January 2016 to avoid snow removal duties and thereafter refused to provide doctor's notes for those absences before failing to report for a regular workday during a snowstorm on February 16, 2016.

In reply, the appellant asserts that the appointing authority failed to demonstrate that removal was the appropriate penalty. The appellant maintains that this matter must be viewed as an issue of progressive discipline for two minor infractions which the ALJ found not to be severe misconduct: one involving a holiday for which he declined overtime and a second for calling out and taking a personal day. In that regard, the appellant notes that the ALJ did not sustain the charges related to the February 15, 2016 incident because he was not scheduled to work, was not on a standby list and was permitted to decline overtime. As such, the February 16, 2016 absence, where he was unable to report to work due to icy road conditions, was the only incident that could support charges and, on its own, does not warrant removal, particularly as the suspension was not issued until after February 22, 2016 and could not form a "building block of progressive discipline." Moreover, the appellant submits that his absences in recent years were not chronic or excessive, since 2014 was the only year in which he actually exceeded his leave allotments. With regard to 2016, the appellant notes that he was within his leave allotments, having only utilized 7.5 out of the 15 days allotted to him. As such, he maintains that removal would not be appropriate, as the foregoing demonstrates

that the appointing authority is attempting to punish him for past acts already addressed by prior disciplinary actions.

In his exceptions, the appellant maintains that the insubordination and abuse of sick leave charges should be reversed. Specifically, the appellant argues that the ALJ erred in sustaining the insubordination charge, as his failure to provide doctor's notes for a March 2, 2015 absence could not, in and of itself, sustain the charge in the instant matter, given that he had already received discipline based upon that incident. As to the abuse of sick time charge, the appellant maintains he took February 16, 2016 as a personal day. In that regard, the appellant contends that the ALJ found no evidence that the appellant treated it as a sick day and submits that the Director of Ringwood DPW acknowledged in his testimony that an employee could use a personal day if he could not make it into work for a true winter-related reason. Therefore, because the appellant did not treat February 16, 2016 as a sick day and because he had already been disciplined for all prior attendance-related incidents, his absence on that date was insufficient to sustain the abuse of sick time charge. Finally, the appellant requests back pay, retroactive seniority and benefits.

In reply to the appellant's exceptions, the appointing authority proffers that while the appellant had not received the FNDA suspending him for 15 days until after February 16, 2016, he had notice of the possible suspension and underlying conduct related thereto through the Preliminary Notice of Disciplinary Action issued on February 10, 2016.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's upholding of the charges of abuse of sick time, insubordination, neglect of duty, and conduct unbecoming a public employee and dismissing the charges of inability to perform duties and other sufficient cause. However, the Commission does not agree with the dismissal of the charge of chronic or excessive absenteeism. The mere fact that the appellant did not exceed his allotted leave time in 2015 or through February 2016 does not foreclose a finding that his absenteeism during those periods was chronic or excessive. An employee may not exhibit a pattern of abuse of sick leave, such as a demonstrated pattern of use of leave days to extend weekends, holidays, or in a deliberate way that allows them to avoid performing duties at critical times. *See In the Matter of Bessie McDalton* (CSC, decided June 18, 2014) (Finding disciplinary action was warranted, despite the appellant's submission of doctor's notes, where her absences occurring either the day immediately preceding or after her days off, demonstrated a pattern of abuse). Here, the record of the appellant's relatively short tenure with the appointing authority is replete with a pattern of his use of leave time to shirk his duties, particularly the crucial public safety function of snow removal and the appellant was repeatedly warned of such between November 2014 and January 2016. When the appellant failed to report to work on February 16, 2016, it was the seventh sick day he used in 2016, meaning

that he had used nearly half of his sick leave days for 2016 in approximately one-and-a-half months. Notably, all seven sick days he used in 2016 corresponded to snow events. Viewed in that light, the February 16, 2016 absence is sufficient to support the charge of chronic or excessive absenteeism.

With regard to the penalty, the Commission does not agree with the ALJ's recommendation to modify the removal to a three-month suspension. In determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

The charges that were sustained are serious. The appellant's pattern of using sick time after a snow event or to extend a weekend or holiday is clearly disruptive to the appointing authority's work operations, particularly the vital public safety function of snow removal, given that those duties had to be reassigned to other employees. *See In the Matter of Wilbur George* (CSC, decided October 1, 2014) (Appellant's excessive use of sick time supported disciplinary action, where duties to be performed by appellant on days he was absent were either left undone or performed by someone else, creating an adverse impact on governmental operations). Moreover, it is clear that the appellant was sufficiently apprised of the need to correct deficiencies in his inappropriate use of his sick time. In that regard, since March 2013, the appointing authority issued no fewer than 10 communications to the appellant regarding issues with his use of sick leave time or requests for required documentation. The appellant's record also evidenced a four working day suspension in April 2015 and a seven working day suspension in May 2015, both for attendance-related infractions. Accordingly, based upon the seriousness of the appellant's offenses, and his prior disciplinary history, which includes one minor disciplinary action and two major disciplinary actions within a three-year period for similar infractions, the Commission concludes that removal is the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was appropriate. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 6TH DAY OF SEPTEMBER, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. CSV 09642-15,
CSV 04671-16 and CSV 04387-16
AGENCY DKT. NOS. 2015-3158,
2016-3249 and 2016-3197

IN THE MATTER OF CLAUDIO TUNDO, BOROUGH OF RINGWOOD DEPARTMENT OF PUBLIC WORKS.

Ryan M. Lockman, Esq., for Claudio Tundo

Justin D. Santagata, Esq., for the Borough of Ringwood Department of Public Works (Kaufman Semeraro & Leibman, attorneys)

Record Closed: June 26, 2017 Decided: July 31, 2017

BEFORE **RICHARD McGILL**, ALJ:

Claudio Tundo (appellant) filed appeals from two suspensions and a removal on charges from the position of Laborer 1 with the Borough of Ringwood Department of Public Works (respondent). The charges against appellant in the removal proceeding are as follows: (1) insubordination; (2) inability to perform duties; (3) chronic absenteeism; (4)

neglect of duty; (5) abuse of sick time; (6) conduct unbecoming a public employee; and (7) other sufficient cause.

The specification in the Preliminary Notice of Disciplinary Action in the removal proceeding states that appellant did not report to work on February 15 and 16, 2016, and that he has a long history of abuse of sick and personal time dating back to November 2014. The specification in the Final Notice of Disciplinary Action states that appellant has a long history of abuse of sick and personal time as well as a history of excessive absenteeism.

PROCEDURAL HISTORY

Respondent advised appellant of the removal on charges by Preliminary Notice of Disciplinary Action dated February 22, 2016. Thereafter, respondent informed appellant by Final Notice of Disciplinary Action dated February 29, 2016, that the charges were sustained and that the disciplinary action was removal.

Appellant requested a hearing by letter dated March 10, 2016, and the matter was transmitted to the Office of Administrative Law on March 21, 2016, for determination as a contested case. By Order dated August 9, 2016, the removal proceeding was consolidated with the appeals of two suspensions on charges, I/M/O Claudio Tundo, Borough of Ringwood Department of Public Works, OAL Dkt. NOS. CSV 09642-15 and CSV 04671-16.

Hearings were held on May 5 and 9, 2017, at the Office of Administrative Law in Newark, New Jersey. On the first hearing day, appellant withdrew his appeals of the two suspensions. The record closed on June 26, 2017, upon receipt of written summations.

ISSUES

The issues in this proceeding are whether the charges should be sustained and, if so, whether removal is the appropriate disciplinary action. The two main factual issues are whether appellant was called to report for work on February 15, 2016, and whether appellant was unable to get to work on February 16, 2016, due to icy road conditions.

FACTS

A. Undisputed Facts

The general course of events in this matter is essentially undisputed, and I **FIND** as follows:

1. Background

Appellant became a permanent employee of respondent as a Laborer 1 effective March 18, 2013, after being employed as a seasonal employee. Appellant's duties included driving a truck to plow snow.

Respondent has an Employee Manual, which includes sections on sick leave and abuse of sick leave. According to the section on sick leave, respondent's policy is subject to any bargaining unit contracts. The Collective Negotiations Agreement (CNA) in effect during the pertinent period of time provided that a full-time employee accumulates fifteen sick days per year. An employee may utilize five sick days as personal days yearly. In its attendance records, respondent provides an allowance of ten sick days and five personal days at the beginning of each year. If a personal day is not utilized, it is accrued to the next year as an unused sick day.

The section of the Employee Manual on abuse of sick time states as follows:

> An event is any sick time usage evidencing a pattern of absenteeism, including absences on: Fridays or Mondays, the first or last business day of the week; the day before or after a holiday or vacation day; or any combination of the above. An event will be charged for any usage for which a doctor's note is not supplied when required by this policy or required in conjunction with a disciplinary action.

Further, the Borough may, in its sole discretion, require a doctor's note for sick leave of any duration. A doctor's note must be written by a treating physician and provide sufficient information to determine the reason for the use of sick time.

The CNA also has a section on overtime. The pertinent provisions state as follows:

> G. Employees shall work overtime when requested to do so, if possible, and failure to work as requested will result in the employee being charged with the overtime on the overtime distribution records (and losing their place on the list if they took same).
>
> H. Overtime work shall be distributed by means of overtime roster. Each employee shall be listed on such roster. An employee unable to be reached for an overtime opportunity will have been considered to have used his turn. However, this provision shall not be construed to prevent men already on a task from being continued on for overtime. Employees on vacation will not be called for overtime unless the list has been exhausted and the department head deems it necessary.

Respondent maintained an early morning start schedule and a snow emergency standby schedule, which were posted in the Department of Public Works garage. Employees were compensated at a flat weekly rate when they were on standby.

2. Attendance Record

According to a summary of appellant's attendance records, appellant was out twenty-six days in 2013, fifty-eight days in 2014 and twenty-three days in 2015. These dates include fourteen "Worker's Comp" days as a result of an injury on the job in 2013, approximately thirty-three days due to "Disability" and one day for "Worker's Comp" in

2014, and five suspension days in 2015. Net of these amounts, appellant was out twelve days in 2013, twenty-four days in 2014 and eighteen days in 2015.

According to appellant's attendance record for 2013, in or about May, appellant had balances of 14.64 sick days, 4.00 personal days and 10.64 vacation days. Appellant used 14.00 sick days, 4.00 personal days, and 10.50 vacation days, leaving balances of 0.64 sick days, no personal days and 0.14 vacation days. Of the fourteen sick days, five were on a Monday, two were on a Friday and two were days before a holiday. Appellant produced a doctor's note for three consecutive sick days in August covering a Monday through Wednesday.

Appellant began 2014 with balances of 10.64 sick days, 5.00 personal days and 10.14 vacation days. Appellant used 14.14 sick days, 6.00 personal days and 10.14 vacation days, leaving deficits of 3.50 sick days and 1.00 personal day. The sick days included three Mondays, four Tuesdays, two Wednesdays, two Thursdays and three Fridays. Three of the Tuesdays were days after a holiday. Appellant produced doctor's notes for ten of the sick days. Appellant was assigned to light duty on November 19, 22, 23 and 26, 2014, but he did not report for work.

Appellant began 2015 with balances of 10.00 sick days, 5.00 personal days and 10.00 vacation days. Appellant was docked four vacation days as a disciplinary action as a result of the absences in November 2014. Appellant used 9.50 sick days, 4.50 personal days and 6.00 vacation days, leaving balances of 0.50 sick days, 0.50 personal days and no vacation days. Appellant produced doctor's notes for seven of the sick days. The sick days were dispersed as follows: two on Mondays, two on Tuesdays, one on a Wednesday, two on Thursdays and 2.50 on Fridays.

In January 2016, appellant used five sick days and half a personal day. Two of the sick days were on Mondays, and one was on a Friday. Appellant produced a doctor's note for a four-day span in which he used a total of three sick days. Appellant took off a Tuesday after a holiday on February 16, 2016.

3. Medical Documentation

Scott M. Heck is respondent's Borough Manager and Director of Public Works. On January 2, 2015, Mr. Heck sent a written warning to appellant for absences on November 19, 22, 23 and 26, 2014. The letter emphasizes that the doctor's note submitted by appellant indicated that appellant could perform light duty which was assigned to him.

By memo dated August 4, 2015, Mr. Heck advised appellant that he was required to provide documentation for sick leave on July 21 and 24, 2015. Mr. Heck reminded appellant that use of sick leave to extend weekends, vacations and other time off is improper use of sick leave. In a memo dated August 28, 2015, Mr. Heck noted that appellant had not provided the documentation as required by the memo dated August 4, 2015. Mr. Heck again stated that absences must be documented and that notes are required for any sick leave. By memo dated January 15, 2016, Mr. Heck noted that appellant took sick days from January 11 to 14, 2016, and that the doctor's note did not explain why appellant actually could not work. Mr. Heck sent appellant a memo dated January 27, 2016, in regard to his absences on January 22 and 25, 2016, and reminded him that he was required to provide a doctor's note for every sick day.

4. Overtime

During the course of his employment, appellant performed 37.09 hours overtime. By comparison, another employee had 304.76 hours of overtime. Mr. Heck acknowledged that Section G of the provision on overtime in the CNA does not say anything about discipline if an employee does not come in for overtime.

5. Snow Emergencies

On March 1, 2015, a supervisor called appellant at 11:00 p.m. to come in to plow snow. Appellant said that he could not do so because he was driving home from Pennsylvania. Appellant was told to call another supervisor when he got home.

At 11:12 p.m., appellant called the other supervisor and said that he would report to work at 7:00 a.m. on Monday. Appellant called the following morning and said that he was not coming to work because he was sick.

Appellant reported to work on Tuesday and said that he had to go to "O.H.," meaning Occupational Health. The supervisor granted appellant's request.

There was a snow event on January 11 and 12, 2016. Appellant was out sick on January 11, 2016, and on January 12, 2016, he left early and used half of a sick day.

A major snowstorm began on Friday, January 22, 2016, continued through January 24, 2016, and dropped 21.7 inches of snow. Appellant took sick days on January 22, 2016, and on Monday, January 25, 2016, while other employees worked the entire weekend to clear the snow.

Another snow event occurred on February 15 and 16, 2016. There was holiday, President's Day, on February 15. Appellant was not on the snow emergency standby schedule for the week from February 15 to February 21, 2016. Other facts in regard to this snow event are in dispute.

6. Past Record

On November 6, 2014, appellant received a written warning for use of sick time and personal time beyond the number of days in the union contract. In conjunction with a written warning dated January 2, 2015, Mr. Heck docked appellant four vacation days for his absences in November 2014. By Final Notice of Disciplinary Action dated April 17, 2015, appellant was given a four-day suspension for various charges related primarily to attendance in February 2015. By Final Notice of Disciplinary Action dated May 15, 2015, appellant was given a seven-day suspension for his failure to report to work in response to a call on March 1, 2015, and his absence on March 2, 2015.

By memo dated January 5, 2016, appellant was docked a day's pay for failure to comply with notification requirements in regard to an absence on December 22, 2015. By Final Notice of Disciplinary Action dated February 22, 2016, appellant was given a fifteen-day suspension as the result of his absences on January 22 and 25, 2016. The suspension was scheduled to run from February 22, 2016, to March 11, 2016. It is noteworthy that the removal in this matter became effective February 26, 2016, while the fifteen-day suspension was still in effect.

B. Disputed Facts

Gregory Cook testified that he is employed by respondent as a supervisor in the Department of Public Works. On February 15, 2016, Supervisor Cook was calling employees in for snow-related work. At 4:43 a.m. Supervisor Cook called appellant and spoke with him. Supervisor Cook said that he needed appellant to report to work, and appellant responded that he would not come in. Supervisor Cook recorded appellant's response on an overtime list.

Mr. Heck testified that a weather report was posted prior to February 15 and 16, 2016, and that there was a holiday on February 15, 2016. Appellant was called in on February 15, 2016, but he declined to come in. The following day, February 16, 2016, was a regular work day, but appellant did not report for work. Appellant said that his driveway was icy and he could not come in. Everyone else reported to work including individuals who travel greater distances than appellant. As a result, other employees had to cover appellant's route.

Appellant testified that he did not receive a telephone call from Supervisor Cook on February 15, 2016. Further, appellant never told Supervisor Cook that he did not want to work. By the evening of February 15, 2016, appellant had not received any call to come to work.

Appellant further testified that on the morning of February 16, 2016, the roads were icy and he had a forty-minute drive to work. Appellant went outside at approximately 5:45 a.m. to get to work by 7:00 a.m. Appellant pulled out of his driveway, but his all-wheel-drive vehicle slid into the curb. Appellant tried to get to work, but he turned back due to dangerous road conditions. Appellant called work about 6:00 a.m. and reported that he could not report to work due to icy road conditions. The supervisor said "Okay" and that he would see him the following day.

Respondent's witnesses impressed as more reliable, and their testimony is accepted as true. Based thereon, I **FIND** as follows. On February 15, 2016, Supervisor Cook telephoned appellant and spoke with him at 4:43 a.m. Supervisor Cook said that he needed appellant to come to work, but appellant declined to do so. On the morning of February 16, 2016, the roads were icy as the result of a snowstorm. Nonetheless, all other employees got to work. Appellant's testimony is not persuasive that the road conditions prevented him from getting to work for the entire day.

LAW AND ANALYSIS

An appointing authority may discipline an employee for insubordination, inability to perform duties, chronic absenteeism, neglect of duty, abuse of sick time, conduct unbecoming a public employee, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). The appointing authority's action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both the charge and the penalty. West New York v. Bock, 38 N.J. 500, 519 (1962). In an appeal concerning a major disciplinary action, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The appointing authority must prove its case by a fair preponderance of the believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

The first charge to be considered is chronic absenteeism. The summary of appellant's absences included fourteen Worker's Comp days in 2013 and approximately

thirty-three days for disability and one day for Worker's Comp in 2014. These dates are well in the past, and it seems evident that an appointing authority should not discipline an employee due to disability or time taken off due to an injury on the job. While the details as to appellant's disability and injuries on the job were not presented at the hearings, these absences will not be considered in regard to the charge of chronic absenteeism. Likewise, respondent included five suspension days as absences in 2015. These days also should not be considered in regard to a charge of chronic absenteeism.

Appellant finished 2013 with balances of 0.64 sick days and no personal days. In 2014, appellant had deficits of 3.50 sick days and 1.00 personal day by the end of the year. Those absences along with other charges led to disciplinary action in the form of a four-day suspension in April 2015. Thereafter, appellant's attendance improved in 2015 with year-end balances of 0.50 sick days and 0.50 personal days. In 2016, appellant used five sick days and half a personal day in January. In sum, appellant was previously disciplined for his attendance in 2014, and in 2015, which his last full year, appellant's sick and personal days were within his allotted time and a definite improvement over 2014. Appellant's use of sick and personal days in January 2016 was substantial for one month but well within his annual allotment. In view of the fact that appellant remained within his annual allotment of sick and personal days in 2015 and 2016 and the improvement in his attendance since the previous disciplinary action, I **CONCLUDE** that the charge of chronic absenteeism must be dismissed.

The next charge is inability to perform duties. In support of this charge, respondent cites appellant's attendance record and limited overtime. Appellant's overall attendance since the beginning of 2015 was satisfactory and does not bespeak an inability to perform his duties. Likewise, appellant's limited overtime is not necessarily indicative of an inability to perform duties. Under the circumstances, I **CONCLUDE** that the charge of inability to perform duties must be dismissed.

The next charge against appellant is insubordination. Insubordination includes acts of disobedience to proper authority. Here, in memos dated August 4, 2015, and August

28, 2015, Mr. Heck directed appellant to provide documentation for absences on July 21 and 24, 2015. Appellant failed to provide the documentation. This failure constituted insubordination. In addition, appellant failed to provide documentation in regard to other days on which he used sick time. Therefore, I **CONCLUDE** that the charge of insubordination must be sustained.

The next charge against appellant is abuse of sick time. It is noteworthy that the Final Notice of Disciplinary Action sets forth the charge of abuse of sick leave, while the specification states that appellant has a long history of abuse of sick and personal time dating back to November 2014. Appellant attached a summary of appellant's attendance, but there is no identification of specific dates that constitute abuse of sick time.

Despite the lack of specificity as to dates, the charge of abuse of sick time may be considered based on the definition in the Employee Handbook for the period from November 2014 to February 2016. The only full year in question is 2015. One basis for abuse of sick time is use of sick time on a Monday, a Friday or a day before or after a holiday. In 2015, appellant's use of 9.5 days of sick time was dispersed as follows: 2.00 on Mondays, 2.00 on Tuesdays, 1.00 on a Wednesday, 2.00 on Thursdays, and 2.50 on Fridays. None of the sick time was before or after a holiday. In January 2016, appellant used five sick days dispersed as follows: 2.00 Mondays, 0.50 of a Tuesday, 1.00 Wednesday, 0.50 of a Thursday and 1.00 Friday. Significantly, 3.50 of the 5.00 sick days corresponded to snow events. Additionally, appellant did not report to work on a Tuesday after a holiday in February 2016. This day also corresponded to a snow event.

Appellant also failed to produce adequate medical documentation for some of his absences. In November 2014, appellant produced a doctor's note, but Mr. Heck interpreted it to mean that appellant could perform light duty. Appellant believed that he could not work at all. Mr. Heck's interpretation is supported by the note which states as follows: "Patient can return to work with no use of the left arm and no overhead work if available."

In 2015, appellant failed to produce a doctor's note for a sick day on March 2, 2015. This absence corresponded to a snow event. In 2016, appellant did not provide a doctor's note for sick days on January 22 and 25, 2016. These absences also corresponded to a snow event.

Finally, appellant did not report for work on February 16, 2016. It is not clear how appellant or respondent treated this day for purposes of the attendance record, but there is no indication that appellant provided a doctor's note. This date also corresponded to a snow event.

In view of the above, appellant's sick days in 2016 showed a clear pattern of corresponding to snow events. Further, appellant failed to provide doctor's notes for some of his sick days. Under the circumstances, I **CONCLUDE** that the charge of abuse of sick time must be sustained.

The next charge is neglect of duty. Again, respondent did not specify in the Preliminary or Final Notice of Disciplinary Action the exact conduct that constitutes neglect of duty. Nonetheless, it appears that the concern is appellant's failure to report to work on regular work days that involved snow events.

In the above discussion of abuse of sick time, various dates were identified on which appellant took sick days that corresponded with snow events. Appellant did not produce doctor's notes for those dates, and the effect of his absence was that his work had to be assigned to other employees. Under the circumstances, I **CONCLUDE** that the charge of neglect of duty must be sustained.

The next charge against appellant is conduct unbecoming a public employee. "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a government unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City

of Atlantic City, 152 N.J. 532, 554 (1998); In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Here, appellant repeatedly took sick days when there was a snow event. The effect of appellant's neglect of duty was that his work had to be assigned to other employees. It is reasonable to infer that appellant's absences adversely affected the morale and efficiency of respondent's Department of Public Works. Under the circumstances, I **CONCLUDE** that the charge of conduct unbecoming a public employee must be sustained.

The final charge against appellant is other sufficient cause. The Preliminary and Final Notices of Disciplinary Action do not specify anything in particular as the other sufficient cause, but in its written summation respondent stated that appellant could no longer be trusted as even a minimally productive employee.

A charge of other sufficient cause typically involves a violation of a rule or regulation of the appointing authority. Here, the basis for the charge of other sufficient cause was not stated with specificity prior to filing of post-hearing summations. Further, there was no testimony as to appellant's overall job performance. It follows that there is no factual basis for this charge. Therefore, I **CONCLUDE** that the charge of other sufficient cause must be dismissed.

Disciplinary Action

The factors to consider with respect to the disciplinary action are the nature of the charges sustained and appellant's past record. West New York v. Bock, 38 N.J. at 523-24. Progressive discipline is a recognized and accepted principle in choosing the appropriate disciplinary action. In re Herrmann, 192 N.J. 19, 33 (2007). But removal may be the appropriate discipline for a single instance of severe misconduct. Ibid.

The misconduct in this matter relates to attendance. Appellant abused his sick time by using sick days to avoid working during snow events. The same avoidance of work during snow events constitutes neglect of duty and conduct unbecoming a public employee. It is noteworthy that the same conduct underlies these three charges. In addition, appellant's failure to provide medical documentation is a form of abuse of sick time under respondent's Employee Manual. This same misconduct underlies the charge of insubordination. Under the circumstances, the charges which have been sustained in this matter certainly warrant disciplinary action.

On the other hand, the charges which were sustained in this matter relate to attendance. Under the circumstances, this case does not involve the type of severe misconduct where one incident would warrant removal. It follows that progressive discipline would be appropriate for this case.

With respect to past record, appellant received two written warnings in regard to his use of sick time, and he was given a four-day suspension related to sick time. The first major disciplinary action against appellant was a seven-day suspension imposed by notice dated May 15, 2015. Thereafter, appellant's attendance improved significantly for the balance of 2015.

The second major disciplinary action against appellant was a fifteen-day suspension imposed by notice dated February 22, 2016. The suspension was scheduled to run from February 22, 2016, to March 11, 2016. The difficulty with this suspension from the perspective of progressive discipline is that appellant was removed effective February 26, 2016, and as a result, he did not have the opportunity to improve his conduct in response to the disciplinary action. It follows that the only major disciplinary action, to which appellant had an opportunity to respond, was the seven-day suspension.

Further, subsequent to the Preliminary Notice of Disciplinary Action dated February 10, 2016, advising appellant of the possible fifteen-day suspension, appellant's subsequent misconduct in support of the removal involved only two additional days, i.e.,

February 15 and 16, 2016, and only the charges based on February 16, 2016, were sustained in this proceeding. Whether one day or two, the additional misconduct does not warrant a leap from a fifteen-day suspension to a removal.

Under the circumstances, removal is a grossly excessive disciplinary action. In view of the charges which were sustained in this matter and appellant's past record, I **CONCLUDE** that a suspension for a period of three months is the appropriate disciplinary action.

Accordingly, it is **ORDERED** that:

1. The charge of chronic absenteeism be dismissed.
2. The charge of inability to perform duties be dismissed.
3. The charge of abuse of sick time be sustained.
4. The charge of insubordination be sustained.
5. The charge of neglect of duty be sustained.
6. The charge of conduct unbecoming a public employee be sustained.
7. The charge of other sufficient cause be dismissed.
8. The disciplinary action shall be a suspension for a period of three months.

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.

July 31, 2017
DATE

RICHARD McGill, ALJ

Date Received at Agency:

Date Mailed to Parties: AUG 1 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

WITNESS LIST

For appellant:

Claudio Tundo

For respondent:

Scott Heck

Gregory Cook

Susan Weller

EXHIBIT LIST

A-1 Letter dated March 21, 2013, from Scott Heck to Claudio Tundo

A-2 Early Morning Start – 11/23/15 to 3/20/16

A-3 Summary notes – attendance

A-4 Absentee Request Form – 1/12/16

A-5 Absentee Request Form – 1/14/16

A-6 Payroll record – 2013

A-8 Photograph of Claudio Tundo's driveway

R-3 Employee Manual for Borough of Ringwood

R-4 Preliminary Notice of Disciplinary Action dated February 22, 2016, and Final Notice of Disciplinary Action dated February 29, 2016

R-5 Memo dated August 4, 2015, from Scott Heck to C. Tundo

R-6 Memo dated August 28, 2015, from Scott Heck to C. Tundo

R-7 Memo dated September 2, 2015, from Scott Heck to Claudio Tundo

R-8 Memo dated November 6, 2014, from Scott Heck to C. Tundo

R-9 2014 attendance record for Claudio Tundo

R-10 Doctor's note dated November 19, 2014

R-11 Letter dated November 24, 2014, from Scott M. Heck to Claudio Tundo

R-12 Final Notice of Disciplinary Action dated February 22, 2016

R-13 Interoffice Memorandum dated November 24, 2014, from Sue Rohdieck to Scott Heck

R-14 Letter dated January 2, 2015, from Scott M. Heck to Claudio Tundo

R-15 Collective Negotiations Agreement effective January 1, 2014

R-16 Memo dated January 5, 2016, from Scott Heck to C. Tundo

R-17 Memo dated January 30, 2015, from Scott Heck to C. Tundo, re: Call Out

R-18 Preliminary Notice of Disciplinary Action dated February 10, 2016

R-19 Memo dated January 30, 2015, from Scott Heck to Claudio Tundo, re: Standby

R-20 Final Notice of Disciplinary Action dated April 17, 2015

R-21 Email dated March 5, 2015, from Doug Edler to Scott Heck

R-22 Memo dated January 15, 2016, from Scott Heck to C. Tundo

R-23 Letter dated May 15, 2015, from Kelley Halewicz to George Burr, Jr. and Justin Santagata, Esq., with Final Notice of Disciplinary Action dated May 15, 2015

R-24 Memo dated January 27, 2016, from Scott Heck to C. Tundo

R-25 CD recorded on February 25, 2016

R-26 2015 attendance record for Claudio Tundo

R-28 Snow Emergency Standby Schedule – 11/23/15 to 3/20/16

R-29 WeatherWorks Certified Snowfall Totals

R-30 Memo dated June 18, 2015, from Susan Weller to Scott Heck

R-30A Memo dated June 18, 2015, from Susan Weller to Scott Heck

R-31 Ringwood DPW Overtime List – 2/15/16

R-32 Computer screen; re: photo on 2/16/16

9-6-17

STATE OF NEW JERSEY

In the Matter of Darrick Valentine
Ann Klein Forensic Center,
Department of Human Services

CSC DKT. NO. 2016-894
OAL DKT. NO. CSV 16199-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 **BW**

The appeal of Darrick Valentine, Senior Medical Security Officer, Ann Klein Forensic Center, Department of Human Services, removal effective May 27, 2015, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin, who rendered his initial decision on July 27, 2017. No exceptions were filed.

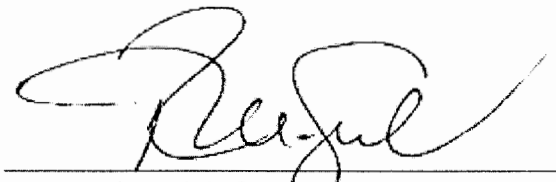
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Darrick Valentine.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16199-15
AGENCY DKT. NO. 2016-894

IN THE MATTER OF DARRICK VALENTINE, DEPARTMENT OF HUMAN SERVICES, ANN KLEIN FORENSIC CENTER.

William A. Nash, Esq., appearing for appellant, Darrick Valentine (Nash Law Firm, LLC, attorneys)

Angela Juneau Bezer, Deputy Attorney General, appearing for respondent, Department of Human Services, Ann Klein Forensic Center (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record closed: June 15, 2017 Decided: July 27, 2017

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Darrick Valentine, a Medical Security Officer at Ann Klein Forensic Center (AKFC), appeals disciplinary action seeking his removal for conduct unbecoming an employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); physical or mental abuse of a patient, client or resident, in violation of Administrative Order (A.O.) 4:08 C3; and

inappropriate physical contact or mistreatment of a patient, client, resident or employee, in violation of Administrative Order C5, by the respondent, AKFC.

At issue is whether the disciplinary guidelines in the New Jersey Department of Human Services Disciplinary Action Program Policy (DAP) Handbook, Administrative Order 4:08 Table of Offenses and Penalties, which indicate removal for a first offense of physical abuse of a patient, may be mitigated to allow for a lesser penalty.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action on May 27, 2015, suspending him without pay. Appellant did not request a departmental hearing, and on August 7, 2015, a Final Notice of Disciplinary Action was served, removing him from his position. Appellant filed an appeal, and the Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on October 9, 2015. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On July 14, 2016, respondent filed a Notice of Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5. On November 4, 2016, Dean J. Buono, ALJ, issued a ruling on the briefs which granted in part respondent's Motion, finding that appellant did commit the offenses he was charged with. Accordingly, the within hearing was held on the issue of discipline/penalty only.

The hearing was held on February 21, 2017.[1] Post-hearing letter-briefs were received from respondent on February 28, 2017, and appellant on March 24, 2017. The record closed on June 15, 2017.

[1] The recording system malfunctioned subsequent to the hearing. Accordingly, the parties reconstructed the record on June 14, 2017, pursuant to New Jersey Court Rule 2:5-3(f).

FACTUAL DISCUSSION

Undisputed Facts from the Summary Decision:

1. On April 18, 2015, appellant punched patient J.G. at Ann Klein Forensic Center (AKFC).

2. Such conduct constituted conduct unbecoming a public employee.

3. Appellant physically or mentally abused a patient.

4. This conduct constituted inappropriate physical contact or mistreatment of a patient.

Undisputed Facts from the within Hearing:

1. There is a history of violence by patients against AKFC employees.

2. Appellant was aware his job as a Medical Security Officer at AKFC would entail dealing with patients with psychological issues and criminal records and that there would be the potential for violence against employees.

3. Appellant had been attacked twice by patients prior to the within incident.

4. Appellant received initial training and periodic training thereafter as to proper employee procedures, specifically defensive guidelines to be followed when a patient displayed aggressive or violent behavior, as set forth in the Policy on Personal Defensive and Control Techniques in Aggressive Patient Situations and Emergencies. (Exhibit R-2.)

5. Appellant was aware of the "zero tolerance" policy which prohibited the physical abuse of patients, and that the penalty for a first offense of physical

abuse was removal. There were no circumstances under which punching a patient was permitted at AKFC.

6. On April 18, 2015, appellant punched patient J.G. and did not follow the required defensive protocols. (Exhibit R-1.) Appellant had never been previously disciplined or reported for violations.

7. Appellant never sought treatment for psychological or emotional issues prior to April 18, 2015. At no time did appellant seek help from his employer or advise anyone at AKFC that he had experienced psychological or emotional issues due to the violent behavior of patients.

8. On March 23, 2016, appellant began seeing Victor J. Nitti, Jr., Ph.D., who diagnosed appellant with Post-Traumatic Stress Disorder (PTSD).

9. On February 3, 2017, Dr. Nitti wrote that appellant's PTSD had remitted and that appellant could return to his position at AKFC.

Testimony:

For appellant:

Darrick Valentine, appellant, began working at AKFC in July 2007, first as an Escort Officer, then as a Medical Security Officer in Unit 5. Appellant tried to adhere to the required defensive techniques in the past but they "didn't work" for him. He was aware that he had not followed those defensive guidelines in the incident with patient J.G., but that was because he experienced a "hot white flash," and did not remember punching J.G. It was only after the incident, when he saw his fists were bruised and somebody told him what happened, that he became aware he had punched a patient. Appellant also testified that when patient J.G. threatened and shoved him, he became scared, and that is why he did not follow the defensive guidelines.

Appellant had experienced sleep problems as a result of dealing with patients' violent behavior, but had never informed anyone at work. He sought no help until approximately one year after the incident, when he began seeing Dr. Nitti. Appellant said Dr. Nitti taught him coping exercises if a violent situation were to arise again.

Appellant testified that the white flash "cannot happen again," although Dr. Nitti never told him he was permanently cured. Appellant later acknowledged that he may again someday suffer the white flash and symptoms of PTSD.[2] Appellant stated he would still fear for his safety if he returned to work at AKFC.

Appellant stated, with no further detail, that he had also seen a Dr. Bereanu.[3]

Credibility:

In evaluating evidence, it is necessary to assess the credibility of the witnesses. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with

[2] Dr. Nitti's letter/report did not address appellant's "hot white flash." (Exhibit A-1.)
[3] This was the only reference to Dr. Bereanu made at this hearing. Dr. Bereanu was not produced as a witness and her letter/report dated May 5, 2016, was not offered into evidence. No weight has been given to her report in reaching the within conclusions.

common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), *certif. denied*, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

After having the opportunity to review the evidence and observe his testimony, I accept the appellant's testimony as credible and truthful. Accordingly, I **FIND** as fact that appellant feared for his safety at his job, and that there was no certainty on his behalf as to whether the white flash or PTSD could reoccur.

LEGAL ARGUMENT AND CONCLUSION

The first issue is whether the disciplinary guidelines in the DAP Handbook Table of Offenses and Penalties, which indicated removal as the penalty for a first offense of physical abuse of a patient, could be mitigated to allow for a lesser penalty, in consideration of appellant's diagnosis of Post-Traumatic Stress Disorder.

Appellant's rights and duties are governed by the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.

In assessing the propriety of a penalty in a civil disciplinary action, the primary concern is the public good; factors to be considered are the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. North Princeton Development Center, 96 N.J.A.R. 2d 465 (CSV)(1996). Progressive

discipline is required in those cases where an employee is guilty of a series of offenses, none of which is sufficient to justify removal. Harris v. North Jersey Developmental Center, 94 N.J.A.R. 2d (CSV)(1994).

Respondent cited N.J.A.C. 4A:2-2.3(a)(6) for the charge of "conduct unbecoming a public employee"; penalties for this charge are set forth in N.J.A.C. 4A:2-2.2(a), which permit discipline ranging from suspension and demotion, to removal. For the other two charges, respondent cited the DAP Handbook Table of Offenses and Penalties. (Exhibit R-4.) In that Table, the charge of "Inappropriate physical contact or mistreatment of a patient, client, resident or employee" was listed as offense C-5, where for a first offense a supervisor had latitude to impose a minimum penalty of an "Official Reprimand" to a maximum penalty of "Removal"; for a second offense, the only penalty available was "Removal."

Because there was a range of penalties for these two charges, a civil service employer was entitled to consider the option of two-tier progressive discipline, which then allowed for mitigating factors to be considered.

But the focus here should be on the offense with the strictest penalty: offense C-3. The DAP Handbook Table of Offenses and Penalties indicates that for offense C-3, "[p]hysical or mental abuse of a patient, client, resident or employee," the penalty for the first offense is "removal." (Exhibit R-4).

Appellant committed a first offense of physical abuse of a patient. The issue then became whether mitigating factors may be considered in light of a penalty of removal for this first offense.

The DAP Handbook applies a "fairness" standard by allowing the "consideration of appropriate and demonstrable mitigating factors." (Exhibit R-4, Supplement 1, paragraph 1.) To mitigate the charges against him, appellant introduced evidence as to the violent working conditions at AKFC. Appellant claims these conditions caused him to suffer PTSD, and that the PTSD caused him to ignore the defensive guidelines he was trained to follow, leading to the physical abuse of patient J.G. Additionally,

appellant offered in mitigation the fact that he never had been previously disciplined or reported for violations.

In addressing these mitigating factors, it is noteworthy that appellant was aware from the beginning that he had accepted a position at a hospital housing mentally ill patients with criminal records, and that dealing with violent behavior was a part of the job for a Medical Security Officer. He was given training when he started his job at AKFC, specifically in how to deal with violent episodes, and received continuing training throughout his nearly eight years at AKFC. He was aware that there were no circumstances under which punching a patient was permitted. Appellant voluntarily undertook his job with full knowledge of what the position entailed.

Yet, despite being trained in AKFC defensive guidelines, appellant believed he was entitled to override those guidelines when he felt the need to defend himself. Further, appellant offered no assurances that if he returned to his job he would be willing to strictly follow the defensive guidelines required of AKFC employees, despite his awareness that the zero tolerance policy for physical abuse of patients meant his position could be terminated for even a single infraction.

PTSD is a serious condition which affects many who have dealt with stressful and violent occurrences. When considering it as a mitigating factor, however, one must look at the medical and mental history of the affected person.

Despite suffering and witnessing numerous violent encounters with patients, appellant never sought psychological or emotional help or counseling from AKFC during his nearly eight years working there (either before or after the incident with patient J.G.), although such help was available to employees. There had been no diagnosis of PTSD prior to the incident with patient J.G. Appellant never informed his supervisors that he was having emotional or psychological issues due to the violent nature of the job, or that he was having sleep problems. It was not until approximately one year after the incident with J.G.--and after he was removed from his job--that appellant sought help.

Accordingly, appellant has not on his own established a medical or mental history such that PTSD might have justified his physical abuse of a patient.

In deciding what weight to give Dr. Nitti's written letter/report (Exhibit A-1), it must be noted that Dr. Nitti did not appear at the discipline/penalty hearing to elaborate on his report; no foundation was laid as to whether Dr. Nitti had any expertise in identifying or treating PTSD; no information was given as to when the PTSD began or how long it would typically have taken to treat a patient for PTSD; Dr. Nitti wrote that appellant's PTSD was remitted and he could return to work, but never addressed in his report what the likelihood of reoccurrence was if appellant returned to AKFC; he taught appellant "coping methods" in case such a stressful situation did arise again; Dr. Nitti never stated that appellant was permanently cured. Appellant himself testified that there was a chance he might again display symptoms of PTSD. Finally, Dr. Nitti's letter/report never addressed the "hot white flash", a claim introduced by appellant at this hearing.

In focusing on the effect on the public good, as set out in George v. North Princeton Development Center, supra, there is concern for returning an employee to a job where he has for many years feared for his safety; that may have caused him to suffer from PTSD and/or may have caused a sleep disorder; and that may have caused him to blackout in fear at a critical moment when he needed to consciously follow safety guidelines in order to deal with an aggressive patient. Appellant stated he would still fear for his safety if he returned to work at AKFC.

Without any expert medical guidance as to the white flash scenario, or sufficient medical guidance as to how long it takes a person to fully recover from PTSD, or the likelihood of recurrence of PTSD, sending such an employee back to a job where he has to deal with aggressive patients would put those very patients in jeopardy of once again suffering physical abuse at the hands of a Medical Security Officer.

Accordingly, appellant's introduction of PTSD as a mitigating factor did not carry sufficient weight to overturn respondent's decision to remove appellant for physical abuse of a patient.

The second issue is whether the disciplinary guidelines in the DAP Handbook could be mitigated due to the appellant having no prior disciplinary actions on his record.

When considering removal of an employee, his entire prior work/disciplinary record must be considered. In re Stallworth, 208 N.J. 182 (2010). In the within matter, appellant had never been disciplined or reported at AKFC prior to the incident with patient J.G.

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Id.

Numerous cases have upheld the removal of an employee for a first violation. In re Hermann, 192 N.J. 19 (2007) (in upholding an employee's removal, the court held that while progressive discipline is a worthy principle, it is not subject to universal application); *See also* Henry v. Rahway State Prison, supra (progressive discipline bypassed by the court where an employee was engaged in severe misconduct, especially where the employee's position involved public safety and the misconduct caused a risk of harm to persons or property); Bowden v. Bayside State Prison, 268 N.J. 469 (App. Div. 1993), *certif. denied* 135 N.J. 469 (1994) (upholding the removal of a corrections officer for a first major discipline, having taken into consideration the important role that corrections officers play in dealing with inmates).

A security officer at a facility such as AKFC, which houses patients with criminal records and psychological issues, is charged with the safety of those patients while at the same time having to maintain order at the facility. The mere fact that appellant had

not been disciplined before is not sufficient to require the use of progressive discipline, and does not preclude his being removed for a first disciplinary action, especially when such misconduct has the potential to cause serious harm to patients at that facility.

Accordingly, none of the mitigating factors introduced by appellant carry sufficient weight to overturn respondent's decision to remove appellant for a first offense of physical abuse of a patient.

ORDER

Accordingly, I **ORDER** that the disciplinary action of respondent Ann Klein Forensic Center in removing appellant Valentine from his position as a Medical Security Officer is **AFFIRMED**, and that the appeal is hereby **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION** pursuant to N.J.A.C. 1:1-18.6., by which law it 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.

July 27, 2017
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: July 27, 2017

Date Mailed to Parties: July 27, 2017

JNR/cb

APPENDIX

WITNESSES

For appellant:

Mark Smith

Stanley Sprouse

Darrick Valentine, appellant

Charles Moore, respondent representative

For respondent:

Sandra Ferguson

Hector Figueroa

EXHIBITS

For appellant:

A-1 Letter from Victor J. Nitti, Jr., Ph.D. to appellant counsel William A. Nash, Esq.

For respondent:

R-1 DVD of April 18, 2015, incident between petitioner and J.G., along with viewing instructions

R-2 AKFC Policy on Personal Defensive and Control Techniques in Aggressive Patient Situations and Emergencies

R-3 Final Notice of Disciplinary Action served on petitioner, dated August 7, 2015

R-4 New Jersey Department of Human Services Disciplinary Action Program Handbook (DV-26 through DV-48)

BRIEFS

For appellant:

Letter-brief dated March 24, 2017

For respondent:

Letter-brief dated February 28, 2017

In the Matter of Jonathan Warren
New Jersey State Prison,
Department of Corrections

CSC DKT. NO. 2016-3608
OAL DKT. NO. CSV 5865-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 6, 2017 JM

The Civil Service Commission, at its meeting of September 6, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 6, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 5865-16
AGENCY DKT. NO. 2016-3608

IN THE MATTER OF JONATHAN WARREN, NEW JERSEY STATE PRISON, DEPARTMENT OF CORRECTIONS.

Todd McConnell, Union Representative, PBA Local 105, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Karen Campbell, Legal Specialist, Office of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: August 3, 2017 Decided: August 4, 2017

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 15, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

August 4, 2017
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 8/7/17

Date Mailed to Parties: 8/7/17

/cb

SETTLEMENT AGREEMENT

WARREN, JONATHAN
APPELLANT
V.

NEW JERSEY STATE PRISON, NEW JERSEY DEPARTMENT OF CORRECTIONS

OAL DOCKET NO. CSV 05865-2016S
AGENCY DOCKET NO. 2016-3608

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated March 17, 2016, contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)(1) incompetency, inefficiency or failure to perform duties.	Thirty (30) working day suspension	3/17/16
2.	NJAC 4A:2-2.3(a)(3) Inability to perform duties	same	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same	same
4.	HRB 84-17, as amended B2 Neglect of duty, loafing Idleness, or willful failure to devote attention to tasks which could result in danger to persons or property	same	same
5.	HRB 84-17, as amended B9, Incompetency or inefficiency	same	same

6.	HRB 84-17, as amended C8 Falsification; Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding.	same	same
7.	HRB 84-17, as amended C9 Insubordination – intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor.	same	same
8.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same	same

B. The parties have agreed to the following:

1. The total number of days of suspended pay the Respondent has imposed on Appellant to date is as follows: 30 working days suspension.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: Appellant served 30 working days suspension and will be awarded five (5) days back pay.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Authorized leave without pay.

C. The Appellant Jonathan Warren withdraws the appeal and request for hearing, and the Respondent Appointing Authority, NJ Department of Corrections agrees that the following result will occur with regard to each charge:

	Charge	Disposition
1.	NJAC 4A:2-2.3(a)(1) Incompetency, Inefficiency or failure to Perform duties.	10 day suspension

2.	NJAC 4A:2-2.3(a)(3) Inability to perform duties	same
3.	NJAC 4A:2-2.3(a)(12) Other sufficient cause	same
4.	HRB 84-17, as amended B2 Neglect of duty, loafing Idleness, or willful failure to devote attention to tasks which could result in danger to persons or property	same
5.	HRB 84-17, as amended B9, Incompetency or inefficiency	same
6.	HRB 84-17, as amended C8 Falsification; Intentional misstatement of material fact in connection with work, employment application, or any other record, investigation or other proceeding.	same
7.	HRB 84-17, as amended C9 Insubordination – intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor.	same
8.	HRB 84-17, as amended E1 Violation of a rule, regulation, policy, procedure, order or administrative decision	same

The NJ Department of Corrections shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant

or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

D. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as provided in paragraph B(2).

E. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

F. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

G. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

H. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

DATE: 8 3 17

JONATHAN WARREN, Appellant

DATE: 8/3/17

TODD McCONNELL, EVP
On Behalf of Appellant

DATE: 8/3/17

KAREN CAMPBELL, ESQ.
Legal Specialist
Office of Employee Relations
On Behalf of Respondent

CERTIFICATION

I, JONATHAN WARREN, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATE: 8·3·17

JONATHAN WARREN

9-6-17

STATE OF NEW JERSEY

In the Matter of Peter Zampella
Hudson County,
Department of Roads and Public Property

CSC DKT. NO. 2017-1329
OAL DKT. NO. CSV 18314-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEP 07 2017 **BW**

The appeal of Peter Zampella, Senior Maintenance Repairer, Hudson County, Department of Roads and Public Property, 90 working day suspension, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on August 10, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 6, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 18314-16

PETER ZAMPELLA, JR.,
Appellant,
v.
HUDSON COUNTY, DEPARTMENT OF ROADS AND PUBLIC PROPERTY,
Respondent.

John Brannigan, Esq., for Appellant (Oxfeld Cohen, attorneys)

Angelo Auteri, Esq., for Respondent (Scarinci Hollenbeck, attorneys)

Record Closed: July 26, 2017 Decided: August 10, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Peter Zampella, Jr., appeals a Final Notice of Disciplinary Action, dated October 18, 2016, which imposed a penalty of ninety-day suspension for conduct unbecoming a public employee, neglect of duty, and chronic and excessive lateness.

repairer and worked in the Brennan Courthouse. Appellant's shift was from 3:00 p.m. to 11:00 p.m. Monday through Friday. Appellant was the "head man" and would assign work to other employees.

Mr. Madigan reviewed the Appellant's timesheets and noted that Appellant was late twenty-one times between the dates of January 23, 2016, and July 27, 2016.

Mr. Madigan, and Appellant's supervisor discussed Appellant's tardiness numerous times with him. Each time Appellant would advise that he would correct his tardiness.

Mr. Madigan reviewed Appellant's prior disciplinary history, which consisted of two written warnings; minor discipline with a one-day suspension; minor discipline with a three-day suspension; a verbal warning; and, major discipline with a forty-five-day suspension.

Mr. Madigan noted that when Appellant was at work he performed his job satisfactorily. When Appellant was late he rarely called in advance. Mr. Madigan recalled two times that Appellant called to advise he would be late. Mr. Madigan also noted that even if an employee called in advance, the employee was still late for work.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant, Peter Zampella, Jr., was employed by Hudson County, Department of Roads and Public Property as a senior maintenance repairer.

2. Appellant's work shift was 3:00 p.m. to 11:00 p.m. Monday through Friday.

3. Appellant was late for work a total of twenty-one times between January 23, 2016, and July 27, 2016, as follows:

    a. February 3, 2016 – 15 minutes

b. Written verbal warning dated March 30, 2006, for chronic and excessive absenteeism;

c. Notice of Minor Disciplinary Action dated July 19, 2012, with a one-day suspension for neglect of duty and excessive lateness;

d. Notice of Minor Disciplinary Action dated March 5, 2013, with a three-day suspension for not going to work and not calling in;

e. Verbal warning dated March 3, 2014, for leaving work early;

f. Notice of Major Disciplinary Action dated July 15, 2015, with a forty-five-day suspension for conduct unbecoming a public employee, neglect of duty, and chronic and excessive lateness.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-

offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

As to the charges of conduct unbecoming a public employee, Respondent has met its burden of proof by a preponderance of the credible evidence. In reaching this conclusion it is important to note that it is unacceptable for an employee to be habitually late for work. This conduct "adversely affects the morale or efficiency of a governmental unit." See Karins, supra, 152 N.J. at 554.

Neglect of duty is not defined in the New Jersey Administrative Code. However, the charge has been interpreted to mean that "[a]n employee has neglected to perform an act as required by his or her job title or was negligent in its discharge." Avanti, supra, 97 N.J.A.R.2d (CSV) 564; Ruggerio v. Jackson Twp. Dep't of Law and Pub. Safety, 92 N.J.A.R.2d (CSV) 214. The ALJ in Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), http://njlaw.rutgers.edu/collections/oal/, reasoned:

> The term "neglect" connotes a deviation from normal standards of conduct. Matter of Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). The term "duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955) (police chief violated his sworn duty by failing to enforce criminal laws).

Although a finding of neglect does not require an intentional or willful act, there must be some evidence that an employee somehow breached a duty of care owed to his employer.

the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463, 465.

In Bock, supra, 38 N.J. at 522, which was decided more than fifty years ago, 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." Herrmann, supra, 192 N.J. at 29 (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. at 523-24.

As the Supreme Court explained in Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for

major disciplinary action for chronic lateness resulting in a forty-five-day suspension. Much of his disciplinary history revolves around his inability to arrive at work in a timely manner.

Based upon the above authorities, I **CONCLUDE** that progressive discipline should apply. The question remains whether a ninety-day suspension is warranted, or that a lesser penalty be imposed.

I further **CONCLUDE** that the penalty of a ninety-day suspension is appropriate given Appellant's prior disciplinary history, most of which entails excessive tardiness, and therefore should be upheld.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**;

It is further **ORDERED** that the Final Notice of Disciplinary Action providing for a penalty of ninety-day suspension, effective October 11, 2016, is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

APPENDIX

List of Witnesses

For Appellant:

None

For Respondent:

John Madigan, Clerk

List of Exhibits

For Appellant:

None

For Respondent:

R-1 Preliminary Notice of Disciplinary Action dated August 12, 2016

R-2 Appellant's timesheets

R-3 Final Notice of Discplinary Action dated October 18, 2016

R-4 Appellant's prior disciplines

9-20-17

STATE OF NEW JERSEY

In the Matter of Maryann Agyare, Hunterdon Development Center, Department of Human Services

CSC DKT. NO. 2017-1660
OAL DKT. NO. CSV 18283-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 18283-16
AGENCY DKT. NO. 2017-1660

IN THE MATTER OF MARYANN AGYARE,
DEPARTMENT OF HUMAN SERVICES,
HUNTERDON DEVELOPMENTAL CENTER.

Rashida N. Hasan, Esq. for appellant Maryann Agyare

Elizabeth Davies, Deputy Attorney General, for Department of Human Services, Hunterdon Developmental Center, respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 23, 2017 Decided: August 23, 2017

BEFORE **DOROTHY INCARVITO-GARRABRANT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of Maryann Agyare from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matter was transmitted to the Office of Administrative Law for determination as a contested case on December 5, 2016, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

August 23, 2017
DATE

DOROTHY INCARVITO-GARRABRANT, ALJ

Date Received at Agency: 8/24/17

Date Mailed to Parties: 8/24/17

/lam

OAL DKT. NO. CSV 18283-16

SETTLEMENT AGREEMENT

IN THE MATTER OF
MARYANN AGYARE
AND
HUNTERDON DEVELOPMENTAL CENTER, DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated November 1, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-7.4 Serious mistake due to carelessness which Would result in danger and/or injury to persons Or property	Removal	January 12, 2016
2. Admin. Order 4:08 E-1.4 Violation of a rule, regulation, policy	Removal	January 12, 2016
3. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Removal	January 12, 2016
4. N.J.A.C. 4A:2-2.3(a)7 Neglect of duty	Removal	January 12, 2016
5. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause.	Removal	January 12, 2016

The **Final** Notice of Disciplinary Action dated January 12, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-7.3 Serious mistake due to carelessness which Would result in danger and/or injury to persons Or property	Removal	January 12, 2016
2. Admin. Order 4:08 E-1.3 Violation of a rule, regulation, policy procedure, order or administrative decision.	Removal	January 12, 2016

B. The parties have agreed to the following:

The Appellant agrees to a general resignation which shall be effective January 12, 2016. Appellant agrees not to seek or accept employment with the Department of Human Services or its subsidiaries at any time in the future.

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Maryann Agyare withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages

and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8-21-17
DATE

M. Agyare
Maryann Agyare, Appellant

8/21/17
DATE

Rashida N. Hasan, Esq.
ON BEHALF OF Appellant

8/11/17
DATE

Kim M. Heft
ON BEHALF OF Respondent

8/11/17
DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Maryann Agyare, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8-21-17
DATE

M. Agyare
Maryann Agyare

9-20-17

STATE OF NEW JERSEY

In the Matter of Clare Alexander, City of Newark, Department of Economic and Housing Development

CSC DKT. NO. 2015-3031
OAL DKT. NO. CSV 07244-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 07244-15
AGENCY DKT. NO. 2015-3031

IN THE MATTER OF
CLARE ALEXANDER ET AL.[1],
CITY OF NEWARK, DEPT. ECONOMIC
& HOUSING DEV.

Lynsey A. Stehling, Esq. for appellant (Law Offices of Daniel J. Zirrith, attorneys)

Kimberly K. Holmes, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel, attorney)

Record Closed: August 21, 2017 Decided: August 21, 2017

BEFORE **KELLY J. KIRK**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on May 19, 2015, for determination as a contested case. The parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

---

[1] "By letter dated June 23, 2017, the appeal of Rafael Zabala was withdrawn.

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

August 21, 2017

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: 8-24-17

Date Mailed to Parties: AUG 24 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

CLARE ALEXANDER, Appellant, -v- CITY OF NEWARK Respondent,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 07244-2015** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement",) is made and entered into between Clare Alexander ("Alexander" or "Appellant"), Newark Council 21 ("Union") and the City of Newark ("City" or "Respondent") (Alexander, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from Alexander's layoff from the City's Department of Economic Housing and Development on or about May 8, 2015.

In consideration of the promises contained herein, the parties have agreed to resolve all issues herein and herein referenced as follows:

1. In consideration for the Settlement and General Release and other undertakings contained herein, the City agrees to pay to Alexander, as full and complete settlement and final satisfaction of all of Alexander's claims, the gross sum of **TEN THOUSAND DOLLARS ($10,000.00)** ("Payment").

2. The City will make its best efforts to ensure any payment that is due pursuant to this Agreement is made within forty-five (45) days from the date of signature from all parties.

3. In consideration for the payment, Alexander agrees to release and give up any and all claims and rights which she may have against the City, including those of which she is not aware and those not mentioned in this release.

4. Alexander agrees to release any and all claims of any type, nature or description, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the releasor now has or which may hereinafter accrue on account of or in any way arising out of any and all known and unknown, foreseen and unforeseen damages which allegedly occurred beginning on or about May 8, 2015 and which is the subject matter of the appeal filed in the Office of Administrative Law, Docket No. CSV 07244-2015.

5. Alexanders further waives any and all rights and/or claims which she has and/or may have to: 1) A hearing on the merits of the layoff and/or this Agreement; 2) To challenge the layoff and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake in any and all litigation against the City in State, Federal and/or Administrative Courts.

6. Alexander and the Union each further agree that there is no consideration due Alexander, her counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.

7. Alexander and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New

Jersey State Court or agency and/or to any United States Court or agency, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

8. Alexander and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the layoff, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

9. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Alexander's estate, and purchasers and/or assignees of Alexander's, the City's and/or the Union's interests shall also be bound.

10. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

11. Alexander and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

12. Alexander and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

13. This Agreement contains the sole and entire agreement between Alexander, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Alexander specifically represents and acknowledges in executing this Agreement that she has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

14. Alexander agrees and acknowledges that she has been fully and fairly represented by her Attorney and the Union in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.

15. Alexander agrees and acknowledges that she has had a full opportunity to review this Agreement with her Attorney and/or Union representative and she enters into same knowingly and voluntarily.

16. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

17. By signing this Settlement Agreement, Alexander states that:

    a. She has read it;

    b. She understands it and knows that she is giving up important rights, and any and all other federal and state

employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c. She agrees with everything contained in this Agreement;
d. Her Attorney and Union representative negotiated this Agreement in her presence and with her knowledge and consent;
e. She consulted with her Attorney prior to executing this Agreement;
f. She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

5/16/17
Date

BY: _____
Baye Adofo-Wilson, Director
Economic Housing and Development

5/16/17
Date

BY: Clare Alexander
Clare Alexander

5/16/17
Date

_____
Lynsey A. Stehling, Esq.
Attorney for Clare Alexander

Approved as to Form and Legality:

5/16/17
Date

Corinne E. Rivers
Corinne E. Rivers, Esq.
Law Department, City of Newark

CERTIFICATION

I, Clare Alexander, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

5/16/17
DATE

Clare Alexander
Clare Alexander

9-20-17

STATE OF NEW JERSEY

In the Matter of Seraphin Alexandre,
Greystone Park Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2017-1008
OAL DKT. NO. CSV 15381-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15381-16
AGENCY DKT. NO. 2017-1008

IN THE MATTER OF SERAPHIN ALEXANDRE, DEPARTMENT OF HUMAN SERVICES, GREYSTONE PARK PSYCHIATRIC HOSPITAL.

William A. Nash, Esq., for appellant Seraphin Alexandre (Nash Law Firm, attorneys)

Elizabeth A. Davis, Deputy Attorney General, for Department of Human Services (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 28, 2017 Decided: August 29, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Seraphin Alexandre filed an appeal from a Final Notice of Disciplinary Action dated September 26, 2016, issued by respondent Department of Human Services, Greystone Park Psychiatric Hospital. The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on October 7, 2016, for determination as a contested case. Prior to the commencement of a

hearing, the parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

8/29/17

DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency:

9-1-17

Date Mailed to Parties:

SEP 1 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DKT. NO. CSV - 15381 - 2016
AGENCY DKT. NO. 200 –
SETTLEMENT AGREEMENT

SA VBN

IN THE MATTER OF
Seraphin Alexandre
AND
DHS, Greystone Park Psychiatric Hospital
~~Seraphin Alexandre~~

J-1

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 9/26/16 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. 4:08 B2	Neglect of Duty	8/3/16
2. 4:08 E1	Violation of Policy	8/3/16
3. 4:08 C8	Falsification	8/3/16
4. NJAC 4A:2-2.3a6	Conduct Unbecoming	8/3/16
5. NJAC 4A:2-2.3a12	other Suff. Cause	8/3/16

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: Six Months.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: Personal Reasons Leave (Authorized).

C. The Appellant Seraphin Alexandre withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority Greystone Park Psychiatric Hospital agrees that:
the following result will occur with regard to each charge:

Charge			Disposition
1.	4:08 B2	Neglect of Duty	six month suspension
2.	4:08 E1	Violation of Policy	six month Suspension
3.	4:08 C8	Falsification	six month Suspension
4.	NJAC 4A:2-2.3ab	Conduct Unbecoming	six month Suspension
5.	NJAC 4A:2-2.3a12	other Suff. Cause	six month Suspension

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Greystone Park Psychiatric Hosp. (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services shall be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Seraphin Alexandre's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act

of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/28/17
DATE

8/25/17
DATE

8/28/17
DATE

ON BEHALF OF

ON BEHALF OF Greystone Park Psychiatric Hosp

CERTIFICATION

I, Seraphin Alexandre, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/29/17
DATE

9-20-17

STATE OF NEW JERSEY

In the Matter of Rosalba Dominguez
Judiciary, Somerset Vicinage

CSC DKT. NO. 2015-2610
OAL DKT. NO. CSV 4227-15

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: September 21, 2017 BW

The appeal of Rosalba Dominguez, Senior Probation Officer, Judiciary, Somerset Vicinage, removal effective March 12, 2015, on charges, was heard by Administrative Law Judge Susan M. Scarola, who rendered her initial decision on August 14, 2017. Exceptions were filed on behalf of the appellant, and a reply to exceptions was filed on behalf of the appointing authority.

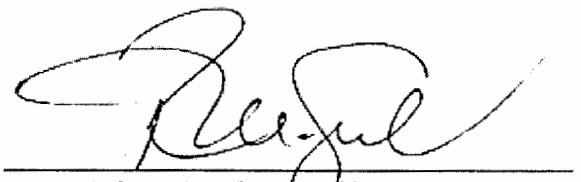
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 20, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Rosalba Dominguez.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 4227-15
AGENCY DKT. NO. 2015-2610

IN THE MATTER OF ROSALBA DOMINGUEZ, NEW JERSEY JUDICIARY, SOMERSET VICINAGE.

Brian M. Cige, Esq., appearing for appellant, Rosalba Dominguez (Law Offices of Brian Cige)

Thomas Russo, Esq., for respondent, New Jersey Judiciary, Somerset Vicinage (Glenn A. Grant, J.A.D., Acting Administrative Director of the New Jersey Courts, attorney)

Record Closed: June 30, 2017 Decided: August 14, 2017

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Appellant, Rosalba Dominguez, a senior probation officer (PO) at respondent, State of New Jersey Judiciary, Somerset/Hunterdon/Warren Vicinage, appeals disciplinary action seeking her removal for conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of the Code of Conduct for Judiciary Employees

Canon 3 (avoiding actual or apparent impropriety) by attempting to use her judiciary position to unduly influence police officers from Clinton Township to refrain from charging her boyfriend with driving while intoxicated, by providing a false name to law-enforcement authorities, and by calling 911 in a non-emergency situation.

The appellant denies the allegations and contends that her conduct had no influence on the arresting officers, and, further, that she was intoxicated, and therefore was not acting deliberately.

PROCEDURAL HISTORY

On September 29, 2014, the New Jersey Judiciary, Vicinage 13 (Somerset County), issued a Preliminary Notice of Disciplinary Action suspending appellant without pay pending a departmental hearing. Following a departmental hearing, the judiciary issued a Final Notice of Disciplinary Action on March 11, 2015, sustaining the charges and removing appellant from her position effective March 12, 2015. Appellant filed a timely notice of appeal.

The Civil Service Commission, Merit System Practices, transmitted the case to the Office of Administrative Law, where it was filed on March 26, 2015. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on August 29, and 30, 2016, before the Hon. John Schuster III, ALJ. The record remained open until September 30, 2016, for the receipt of briefs.[1] Judge Schuster retired before writing the decision. The matter was reassigned on May 17, 2017, and the record reopened. A conference call with counsel was held on June 9, 2017. As neither party had ordered a transcript of the proceedings, recordings of the hearing were then ordered. The record closed on June 30, 2017, after the recordings were received.[2]

[1] Extensions of time were then granted for the filing of the Initial Decision.
[2] The recordings and the evidence form the basis for this decision.

FACTUAL DISCUSSION

Testimony

For Respondent

Clinton Township patrolman Joseph Sangiovanni testified that he was working during the early-morning hours of August 17, 2014, on DWI (driving while intoxicated) patrol, when he stopped a vehicle operated by appellant's boyfriend; the appellant was the passenger. The driver was given field sobriety tests and subsequently arrested for DWI. Officer Latif and Sergeant DeRosa also responded to the scene to assist Patrolman Sangiovanni. Officer Latif was the officer who took the appellant to headquarters (HQ).

The appellant was disrespectful to Officer Latif and gave him a false name. She later called 911 when she was outside HQ, which was a misuse of the system. She claimed that she was a PO, and he believed she was using her position to try to help the driver. The driver said appellant was a PO. The appellant later admitted she was not professional.

Patrolman Sangiovanni's dash camera recorded the motor-vehicle stop. The appellant said she had been drinking and was a probation officer. She was boisterous.

Clinton Township patrolman Umair Latif testified that he was on patrol on August 17, 2014, and called for backup on the motor-vehicle stop with Sergeant DeRosa. The appellant identified herself as a PO, and said that they should cut her boyfriend a break. The appellant called another police officer from North Plainfield to intercede on her boyfriend's behalf. This phone call was heard by Patrolman Latif and Sergeant DeRosa, who put appellant's cell phone on speaker. The appellant tried to call the North Plainfield officer again, but the second call was not answered.

Patrolman Latif drove the appellant to HQ. No recording was made of this because his camera was broken. When asked if she wanted water, the appellant

declined, but asked for vodka. Patrolman Latif felt disrespected by appellant. He asked her for her name and she said "Rosa Rodriguez," and she refused to spell her last name.

The appellant was outside HQ and called 911 about her boyfriend, which was inappropriate, as it was not an emergency and tied up the system. This could be considered a criminal offense. Patrolman Latif and Sergeant DeRosa went out to talk to her and told her not to use 911.

The appellant appeared intoxicated. She had her cell phone out and Sergeant DeRosa asked her to get off the phone. At HQ, she was upset and wanted the sergeant's name so she could file a complaint against him.

She was not arrested; she was not charged with giving a fake name or using 911 inappropriately. When leaving HQ, the appellant admitted she had been disrespectful.

Clinton Township sergeant Thomas DeRosa testified that on the evening of August 17, 2014, he was in charge of and working patrol, specifically on drunk-driving enforcement. Patrolman Sangiovanni called him for backup. Both he and Sangiovanni had working dash cameras.

Multiple times, the appellant stated that she was a PO, and volunteered this information without being asked. He believed she wanted them to give her boyfriend a break on the DWI arrest and wanted no charges brought against him. She complained that she was not given any courtesy and that she would remember that.

The appellant called a police officer from North Plainfield to try to get him to intercede. When he did not intervene, she called him names.

Patrolman Latif drove the appellant to HQ. While there, she went outside and called 911. DeRosa told her that calling 911 in a non-emergency was a crime, as well as unprofessional and inappropriate. She also advised dispatch on the call that she was there to pick up her boyfriend, even though she was obviously intoxicated. At HQ,

the appellant was irritated. She was distracting, although the officers could still do their job. She was rambling on about cops getting breaks, but they have no discretion on a DWI offense.

The following week, Sergeant DeRosa reported the incident to the Somerset County trial court administrator and was referred to chief probation officer (CPO) Ron Kirk. Sergeant DeRosa felt that the 911 call was serious. He told Kirk that the appellant had identified herself as a PO upon his arrival and multiple times thereafter. DeRosa provided a copy of the three police reports (prepared by patrolmen Sangiovanni and Latif and him), as well as the dash-cam videos from his car and Sangiovanni's recording.

The appellant never filed a complaint against him.

Ronald Kirk testified that he has been CPO in Vicinage 13 for the New Jersey Judiciary since July 2013. Probation officers take an oath of office and are held to a higher standard. It is a responsible position, as it affects people's lives. POs must interact with law enforcement and must maintain good relationships with local safety personnel. They are supposed to be role models to the people on probation as they try to get them back on the right track.

POs have a code of conduct to follow which applies inside and outside of the workplace, during working and non-working hours. All employees are given a copy of the code, read it, and have training on it. Voluntary identification as a PO is prohibited, but a PO can answer the question if asked.

The appellant is a senior PO in Somerset County, assigned to the adult-supervision section, which includes drug offenders and those on court-ordered probation. Her job was to supervise offenders, and oversee reporting, drug testing, and record checking. She would be in contact with law enforcement and reach out to fellow law-enforcement officers. She would handle home visits and answer any law-enforcement questions about someone serving time on probation.

The Somerset County Probation Department was contacted by Sergeant DeRosa and advised that the appellant's conduct was very much inappropriate. Sergeant DeRosa said that the appellant said she was a PO but had no identification with her. She was trying to get her boyfriend out of a DWI charge. She was disrespectful and continued to be; she gave a false name; and she called 911. Kirk spoke with his supervisors, Farkas and Morejon, and they agreed to take no action until the police reports were received.

During the week of September 8, 2014, Kirk received the police reports and DVDs from the Clinton Police Department. He reviewed them and gave them to Morejon. They then discussed the matter, and both had serious concerns about the appellant's behavior.

On September 18, 2014, Kirk spoke with the appellant in the presence of her union representative. The appellant said she identified herself as a PO but only after she was asked. She was not looking for a favor, as it would be a violation of the canon and she would not do that. She admitted that she had dialed 911 because she was cold and was trying to get back in the building. She said she was "not a partyer" when asked if she had been drinking.

A summary of the incident was prepared, and the conclusion was a suspension without pay pending review and approval by the assignment judge. On September 24, 2014, the appellant was provided with notice of immediate suspension issued by Eugene Farkas, the trial-court administrator. The appellant was provided with a copy of the Preliminary Notice of Disciplinary Action, and after the hearing officer's decision and approval of the assignment judge, the Final Notice of Disciplinary Action.

Kirk and the other administrators concluded that the appellant's action was egregious: she identified herself as a PO without prompting; she said she was able to drive (when she was intoxicated); she contacted a North Plainfield police officer to intervene on her behalf; she asked for vodka; she gave a false name (a criminal act), which called her integrity into question; and she called 911 in a non-emergency. The latter offenses were the major reasons for the disciplinary action. The credibility and

integrity of the Probation Department were called into question. The appellant's intoxication was not relevant to the decision to charge.

Rachel Morejon is the Human Resources Division manager for the New Jersey Judiciary, Vicinage 13. She reports to the trial-court administrator, who reports to the assignment judge.

All employees receive the Code of Conduct for Judiciary Employees, which covers workplace and outside-of-workplace conduct. In addition, employees receive a copy of a memorandum from the Hon. Glenn Grant, J.A.D., administrative director of the courts, on risk avoidance. The memo directs employees to avoid using their judiciary affiliation. Employees are also advised that their conduct must be above reproach in order to preserve the integrity of and public respect for the court system. Any violation of this policy is forbidden and could result in discipline, including termination.

In addition to orientation, employees receive frequent training on this and other management policies. Frequent review is also done as employees turn on their computers, which serves as a reminder to them of the policy.

The appellant commenced work in 2004 and received a copy of the code of conduct, a risk-management memo, and training. Her most recent training was in early 2014.

As for the appellant's disciplinary history, the stipulation reached by the parties was accurate. She had no disciplines for behavior, only for attendance, and this was taken into consideration when determining the appropriate discipline.

This particular incident had been brought to Morejon's attention by Kirk, who gave her three police reports and dash-cam videos. She reviewed the materials. She had meetings with Kirk and Farkas, and one with the assignment judge. They reviewed the information and discussed how to proceed. They interviewed the appellant, and Kirk asked about the call to 911.

At the second meeting, they agreed on the discipline to impose. The Clinton Police had no input into the determination. After a hearing before the Administrative Office of the Courts hearing judge, they agreed that the behavior was egregious and decided that removal was appropriate. The assignment judge agreed.

Morejon had no knowledge of the appellant's intoxication at the time of the incident; it was not a part of this discipline, either as an offense or with regard to punishment.

Morejon spoke with DeRosa in preparation for the departmental hearing. She was aware that the appellant had asked for the name of DeRosa's supervisor and that his report was prepared after the appellant said she was going to file a complaint against him, but this was not significant to her decision.

[By stipulation] Sgt. Edward Ciempola[3] testified that during the early-morning hours of August 17, 2014, he received a telephone call from the appellant, who was an acquaintance, asking him to speak with Clinton Township police officers and to intervene in the motor-vehicle stop to prevent the appellant's boyfriend's arrest or to undo it. In a second telephone call to the sergeant, which went unanswered, the appellant left a nasty voicemail message and called him names, as she was angered that he had failed in "undoing" the boyfriend's arrest.

For Appellant

Rosalba Dominguez testified that she started working for the Somerset County Probation Department in 2004; she later became a senior PO dealing with adult populations. Her disciplinary record was clean from 2004 through 2010, when she had a death in her family. This affected her health, and she ran out of sick time and vacation time. Her only disciplines were for attendance, not behavior.

[3] The parties stipulated to the testimony of Sergeant Ciempola. (See Joint Exhibit 1.)

On August 17, 2014, she and her boyfriend went to Asbury Park. The whole day is blurry to her. She drank mixed drinks. They left after dark, and had dinner and were doing shots. After they left, her boyfriend was pulled over. Sometime during the day she had lost her credentials.

At the motor-vehicle stop, she was not aware of her boyfriend's behavior, as she was intoxicated. She called her police-officer friend in North Plainfield to validate her name and position. She does not remember her intentions that night. At HQ, she was in a fog, and has a poor memory of events there. She was waiting for her boyfriend. She did not recall asking for vodka or giving a false name. She did not know where she was, exactly. She felt that Sergeant DeRosa was annoyed and aggressive to her. She thought the 911 call was appropriate because she was outside HQ and was cold, but did not know her location. This seemed like an emergency to her.

The next day she realized it had been a long, bad night the evening before, and she decided she did not want to file a complaint against DeRosa.

Findings of Fact

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

After reviewing the evidence and the DVD, I accept the testimony of the police officers and the stipulation of the testimony of Officer Ciempola as truthful and as **FACT**. The events were described in a straightforward manner; they had no reason to lie or dissemble. The testimony of the three officers was consistent and supported by the dash-cam video.

On August 17, 2014, the appellant was a passenger in a vehicle driven by her boyfriend when he was pulled over for suspected DWI. As the officers addressed that situation as procedure dictated, the appellant repeatedly told the officers that she was a probation officer and entitled to courtesy from them regarding the DWI. When that effort did not appear to be successful, the appellant tried to interfere by calling a police-officer acquaintance from North Plainfield and asking him to intervene to try to stop or undo the arrest of her boyfriend. When that officer did not help her, she called him back and left nasty voicemail messages. She was disrespectful of the Clinton police officers; she was boisterous. When Patrolman Sangiovanni asked for her name, the appellant provided a false one. When the appellant went outside the police station, she called 911 because she was cold, even though it was not an emergency. When asked if she wanted a glass of water, she stated she wanted vodka. The dash-cam videos provide additional support for the testimony of Patrolman Sangiovanni and Sergeant DeRosa.

The appellant agrees that she was intoxicated that night. She did not remember most of what had occurred: she did not remember providing a false name to the police officer or being disrespectful. She did not remember asking for vodka. The appellant did not remember her intentions that night. I **FIND** that she contacted the North Plainfield officer to curry favor with the Clinton officers, and to try to get him to intercede in the boyfriend's arrest. I also **FIND** that the appellant dialed 911 in a non-emergency situation.

I also accept as **FACT** the testimony of Kirk and Morejon as to the procedure followed after they became aware of the appellant's behavior during the traffic stop. The appellant had notice of the behavior expected for a probation officer, and the possible consequences for any violation. The discipline sought to be imposed was not because of the appellant's intoxication, but rather because of the conduct in which she had engaged.

LEGAL ANALYSIS AND CONCLUSION

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her office. N.J.S.A. 11A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Civil Service Commission requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

Here, the judiciary has charged the appellant with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of the Code of Conduct for Judiciary Employees Canon 3 (avoiding actual or apparent impropriety) by attempting to use her judiciary position to unduly influence police officers from Clinton Township to refrain from charging her boyfriend with driving while intoxicated, by calling 911 in a non-emergency situation, and by giving a false name to law-enforcement authorities.

Conduct unbecoming a public employee has been interpreted broadly as conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not "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." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Canon 3 of the Code of Conduct for Judiciary Employees (avoiding actual or apparent impropriety) provides:

> A court employee shall observe high standards of conduct so that the integrity and independence of the courts may be preserved, and shall avoid impropriety or the appearance of impropriety.
>
> . . . .
>
> Specifically, a judiciary employee shall not:

> a. Use or attempt to use the official position or the prestige of judicial affiliation to secure special privileges or exemptions for the employee or others.

Here, although the appellant was aware of her obligations as an employee of the judiciary—she was to observe high standards of conduct to avoid impropriety or the appearance of impropriety—she then engaged in inappropriate conduct: she repeatedly identified herself as a probation officer in an attempt to curry favor with law-enforcement officers; she contacted a police officer from another jurisdiction to try to get him to intercede and "undo" her boyfriend's arrest; when asked for her name, she provided a false one to law-enforcement officers; and she called 911 in a non-emergency situation. Such conduct tends to destroy public respect for governmental employees and confidence in the delivery of governmental services.

The appellant sought to justify her conduct by blaming it on her intoxication. She claimed not to remember some of her conduct that night, but denied that her conduct was intentional. The appellant's intoxicated state should not be used as a justification for behavior that she later recognized was inappropriate.

Applying the law to the facts, I **CONCLUDE** that the appointing authority has sustained by a preponderance of the credible evidence the charges of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), specifically, violation of Canon 3 of the Code of Conduct for Judiciary Employees.

Penalty

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. W. New York v. Bock, 38 N.J. 500 (1962). However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Progressive discipline is not a "fixed and immutable rule to be followed without question." Carter v. Bordentown,

191 N.J. 474, 484 (2007). Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished record. Ibid.

Here, the appellant had been employed as a probation officer since 2004. In mitigation, her only disciplines were for attendance, and not behavior, and came at a stressful time in her life. She later acknowledged her misconduct and stated that it would not recur.

The aggravating factors are significant: the appellant's behavior continued over a period of time; it involved conduct such as calling 911 in a non-emergency and providing a false name to law-enforcement authorities (which could be considered as potential criminal behavior); it involved a law-enforcement officer from another jurisdiction and an attempt to have him interfere with her boyfriend's arrest; it involved being disrespectful to the arresting law-enforcement officers; and it involved an effort by her to use her position within the judiciary to influence an arrest. Such conduct is egregious and requires the appropriate penalty of removal of the appellant from her position as a senior probation officer.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12), are sustained, and that the action of the respondent appointing authority removing the appellant from her position as a senior probation officer is hereby **AFFIRMED**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

August 14, 2017
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: August 15, 2017

Date Mailed to Parties: August 15, 2017

APPENDIX

WITNESSES

For appellant:

Patrolman Joseph Sangiovanni

Patrolman Umair Latif

Sergeant Thomas DeRosa

Ronald Kirk

Rachel Morejon

For respondent:

Rosalba Dominguez

EXHIBITS

Joint:

J-1 Stipulation of Facts (Sgt. Edward Ciempola)

J-2 Stipulation of Prior Disciplinary Record

For appellant:

None

For respondent:

R-1 Investigation Report by Patrolman Sangiovanni

R-2 CAD Incident Report

R-3 Dash-cam recording of motor-vehicle stop

R-4 Supplementary Investigation Report by Patrolman Latif

R-5 Supplementary Investigation Report by Sergeant DeRosa

R-6 Dash-cam recording of motor-vehicle stop

R-7 Code of Conduct for Judiciary Employees

R-8 Probation Employees' Credentials Package Policy

R-9 Probation Credentials Package Receipt

R-10 Summary of Probation investigation

R-11 Notice to appellant of suspension

R-12 Letter from union to Kirk

R-13 Decision of suspension

R-14 Preliminary Notice of Disciplinary Action

R-15 Memo from Judge Ciccone

R-16 Final Notice of Disciplinary Action

R-17 Employee Risk Avoidance memo

R-18 Calendar Year 2011 Pop-Ups

R-19 Calendar Year 2012 Pop-Ups

R-20 Appellant's training record

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Steven Hotz,
Department of Corrections

CSC Docket No. 2017-1342
OAL Docket No. CSR 16631-16

ISSUED: OCT 04 2017 (SLD)

The appeal of Steven Hotz, a Senior Correction Officer, Garden State Youth Correctional Facility, Department of Corrections, of his removal, effective October 7, 2016, on charges, was heard by Administrative Law Judge Joseph Lavery (ALJ), who rendered his initial decision on July 11, 2017. Exceptions were filed on behalf of the appellant and a reply to the exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on September 20, 2017, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the recommendation to uphold the removal.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA) which indicated that he was removed on charges of conduct unbecoming a public employee, and other sufficient cause, *i.e.*, physical or mental abuse of an inmate, falsification and/or intentional misstatement of a material fact in connection with work or in any record, report, investigation or other proceeding and violation of a rule, regulation, policy, procedure, order or administrative decision. Specifically, the appointing authority asserted that in November 2015, the appellant and two other Senior Correction Officers physically abused an inmate by holding him down in a barber chair, punching and slapping

him and cutting his hair. The appointing authority also alleged that the appellant provided a supplemental interview in which he admitted to providing false information during his initial interview. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

Prior to the hearing, the appointing authority brought a motion for partial summary decision. It asserted that there were no material facts in dispute with regard to the charge of falsification. Specifically, it maintained that the appellant gave two recorded statements. During the first interview on March 11, 2016, he denied any knowledge of or familiarity with the inmate and/or the incident at issue. However, during the second interview on May 26, 2016, the appellant admitted to knowing the inmate, and he conceded that he took part in the incident although he denied that he physically abused the inmate. In response, the appellant brought a cross-motion for partial summary decision, requesting the dismissal of the falsification charge for violations of constitutional and statutory requirements. Specifically, he argued that the charges against him were ambiguous and lacked specificity. The appellant also argued that the charge of falsification was not filed within the 45-day time limit imposed by *N.J.S.A.* 30:4-3.11a. Further, he asserted that the March 11, 2016 interview was in violation of the fifth, sixth and 14th amendments of the United States Constitution, and the Attorney General's Guidelines. The appellant asserted that, as all inferences must be made in favor of him, factual issues remain including the interpretation of policy, and his reason for his statements.

In deciding the motions, with regard to the appellant's allegation that the falsification charge was not timely filed, the ALJ determined that issue concerned a dispute of fact that was to be resolved at the hearing, but that issue did not bar him from determining whether the substance of the falsification charge could be decided on the motion of summary decision. The ALJ found that a comparison of the video recordings of the appellant's interview make it clear that the appellant lied in the March 11, 2016 interview. Moreover, the appellant's statements in the May 26, 2016 interview confirm that he knew his prior statements were untrue. The ALJ concluded that the change could only be seen as contradictory, and his March 11, 2016 statements were *per se* an intentional misstatement of material facts. The ALJ found that the appellant's state of mind was irrelevant to the charges since his own video-recorded statements precluded any doubt that it was his intention to deceive. The ALJ found the remainder of the appellant's arguments unpersuasive. In this regard, he noted that the charges against the appellant were not ambiguous as the specifications related to the falsification charge indicated that the appellant "admitted to providing false information in the initial interview." He also found that no interpretation of the policy was needed, as the policy concerning personal conduct should be read narrowly. The ALJ found that there were no constitutional deficiencies present in either interview. In this regard, he found that the appellant

submitted to both interviews with full knowledge that they were administrative in nature and not criminal interviews. Moreover, the appellant was provided with due process as evidenced by the appointing authority's adherence to *N.L.R.B. v. Weingarten Inc.*, 420 *U.S.* 251 (1975). In this regard, a union representative was present during the March 11, 2016 interview, the appellant did not request the presence of his attorney and the appellant signed the customary Weingarten form. The ALJ found that the appellant's reliance on the Attorney General's Guidelines was misplaced as it was found in *In re Cox*, Docket No. A-2471-14T4 (App. Div. December 7, 2016), that those guidelines did not apply to Correction Officers. Finally, the ALJ found that the absence of an affidavit from the appointing authority in response to the appellant's cross-motion was an insufficient basis to grant the appellant's cross-motion. In this regard, he noted that the appointing authority had submitted its motion for partial summary decision, accompanied by a brief and exhibits, as well as the entirety of the record, which was more than ample for the purpose of summary decision. Accordingly, the ALJ granted the appointing authority's motion for partial summary decision and upheld the charge of falsification. However, he ordered that the penalty for falsification, the remaining charges, and arguments concerning the timeliness of the falsification charge would be addressed at the hearing.

In his initial decision, the ALJ found that based on the testimony of the appointing authority's witnesses, and the appellant, that on November 6, 2015, the appellant was called over the radio to the barbershop by Senior Correction Officer Ivonne Collazo. When he arrived at the barbershop, he found the inmate arguing with Collazo and when the inmate raised his arm, the appellant and Senior Correction Officer Brian Attardi grabbed the inmate and forcibly placed the inmate into the barber's chair, after which Collazo proceeded to "buzz" off the inmate's hair with a clipper she brought with her. The appellant then turned to Senior Correction Officer Jason Terhune who was receiving a haircut, and questioned what was happening. The appellant then left the area and returned to his escort duty. However, the ALJ found that the appellant had not punched, slapped or cut the appellant's hair. The ALJ also found that the appellant had no knowledge that the incident would occur. Consequently, aside from the previously upheld falsification charge, the ALJ dismissed the remaining charges against the appellant.

With regard to the falsification charge, the ALJ found that sufficient evidence was not presented at the hearing to warrant the dismissal pursuant to *N.J.S.A.* 30:4-3.11a. In this regard, the ALJ noted that the appellant's falsification was only apparent, at the earliest, after the May 26, 2016 interview. Therefore, the July 8, 2016 amended Preliminary Notice of Disciplinary Action (PNDA) which listed the charge of falsification was within the mandatory 45-day time limit. Moreover, the ALJ determined that the appellant's behavior was so egregious as to warrant removal. Specifically, he noted that the appellant unreservedly lied during a formal interview on March 11, 2016. Moreover, although the appellant claimed he was

assured by Collazo the matter would go away if he did not talk about the incident, such statements could not be considered either coercion or an order. Furthermore, the ALJ noted that falsification in a correctional facility strikes at the heart of correction officer's responsibility or accountability.

In his exceptions, the appellant argues that the ALJ erred in granting partial summary decision in favor of the appointing authority and denying his request for summary decision. Specifically, he argues that in response to his request for summary decision, the appointing authority failed to submit an affidavit in response. Therefore, pursuant to *N.J.A.C.* 1-1:12.5(b), he was entitled to summary decision in his favor. In this regard, he notes that since the appointing authority failed to raise any issue of material fact which controverted the appellant's request, he was entitled to a determination that the charge of falsification was untimely as it was filed beyond the 45-day time limit, and thus, should have been dismissed. The appellant maintains that he provided his first statement on March 11, 2016 during which he denied any knowledge of the incident, and the initial charges, minus the falsification charge were issued on April 15, 2016. The appellant contends that as the appointing authority had enough information to charge him regarding the underlying conduct on April 15, 2016, it certainly had enough information to charge him with falsification on that same date.

Additionally, the appellant asserts that the March 11, 2016 interview cannot be used as a basis for discipline as the interview was "constitutionally offensive." Specifically, he maintains that he was informed that he was a target of a criminal investigation on December 7, 2015, at which time he invoked his right to counsel and his fifth-amendment right from self-incrimination. He denies that he was ever told that he was no longer under criminal investigation. Instead, he asserts that he was "summoned" to an interview and "forced to answer questions under threat of termination" on March 11, 2017. The appellant maintains that he was denied the opportunity to consult with his counsel and forced to answer "nonspecific questions" about the events in November 2015. Moreover, the appellant argues that the appointing authority violated the Attorney General's Policy concerning criminal and administrative investigations.

The appellant further argues that the imposition of discipline in this matter was arbitrary and capricious. Specifically, he contends that a Correction Lieutenant involved in the incident, who is held to a higher standard, only received a 10 working day suspension. The appellant also argues that the charges of abuse of an inmate, conduct unbecoming a public employee, violation of a policy and other sufficient cause should have all been dismissed. In this regard, the appellant maintains that for the charge of violation of a policy, the charge itself lacks specificity. With regard to the other charges, the appellant argues that the appointing authority failed to submit any competent proof to support those charges. Even assuming *arguendo* that there was just cause for discipline, the appellant

argues that removal was not appropriate. Specifically, he asserts that the alleged falsification was the result of dubious interrogation tactics that violated his rights as evidenced by the fact that he provided accurate information later.

In response, the appointing authority rebuts the appellant's allegations, indicating that the ALJ properly assessed the testimony and evidence in the record and presented clear, reasonable and logical reasons for his ultimate findings and conclusions. It also argues that the appellant's cross-motion for summary decision was procedurally barred as it was filed less than 30 days before the hearing date and in the form of opposition to its motion for partial summary decision. The appointing authority asserts that with regard to the appellant's arguments concerning the Correction Lieutenant, his discipline is irrelevant to this matter as he was disciplined for a sole charge that was not a subject of this matter. The appointing authority notes that with regard to the charge of falsification, it was timely issued as it was only after the appellant's second interview on May 26, 2016 that it learned of the extent of the appellant's deception and his intent behind the deception. The appointing authority further asserts that the other charges should have also been sustained. Finally, the appointing authority argues that removal is appropriate in this matter as the appellant's actions were particularly egregious.

Based on its *de novo* review of the record, the Commission agrees with the ALJ that the charge of falsification should be upheld, the remaining charges dismissed and the appellant should be removed from employment. In his initial decision, the ALJ found, after an opportunity to assess the witnesses and their testimony, that the testimony of the appellant and the appointing authority's witnesses was credible with regard to the remaining charges. In this regard, 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 witnesses and common human experience that are not transmitted by the record." *See 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 the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this case, there is nothing in the record or in the appellant's exceptions or the appointing authority's reply which convinces the Commission that the ALJ's assessment of the credibility of the appellant or the other witnesses was not based on the evidence, or was otherwise in error, or that his conclusions based on these

determinations were improper. Thus, the Commission finds that all but the falsification charge was properly dismissed.

Moreover, with regard to the charge of falsification, the Commission notes that the 45-day time period for filing disciplinary charges found *N.J.S.A.* 30:4-3.11a commences on the date on which the person filing the complaint has sufficient notice of the conduct underlying the disciplinary charges. The appellant argues that as the appointing authority determined it had sufficient information to charge him with the underlying conduct, despite his denials in the March 11, 2016 interview, then it certainly had enough information to also charge him with falsification. The Commission does not agree. The Commission agrees with the ALJ that it was only after the May 26, 2016 interview that the appointing authority had sufficient information to file the charge of falsification. It was only after the second interview that it became apparent that the appellant lied in the first March 11, 2016 interview about knowing the inmate and being involved in the incident. The Commission also does not agree with the appellant that the March 11, 2016 interview violated the constitutional protections afforded to the appellant. In this regard, the ALJ found, and the appellant does not dispute, that he was provided with his Weingarten rights and that a union representative was present during the interview. As noted by the ALJ, the appellant did not request that his attorney be present and he denied during the interview that he was being coerced.

In determining the proper penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). Even when a Correction Officer does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry v. Rahway State Prison, supra*, 81 *N.J.* at 579-80. In this regard, the Commission emphasizes that a Correction Officer is a law enforcement officer who, by the very nature of his job duties, is held to a

higher standard of conduct than other public employees. *See Moorestown v. Armstrong,* 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied,* 47 *N.J.* 80 (1966). *See also, In re Phillips,* 117 *N.J.* 567 (1990). Moreover, the Commission is also mindful that:

> The appraisal of the seriousness of [the appellant's] offense and degree which such offenses subvert discipline . . . are matters peculiarly within the expertise of the corrections officials. The appraisal is subject to *de novo* review by the [Civil Service Commission], *Rahway State Prison, supra,* but that appraisal should be given significant weight. *Bowden v. Bayside State Prison*, 268 *N.J. Super.* 301, 306 (App. Div. 1993), *cert. denied*, 135 *N.J.* 469 (1994).

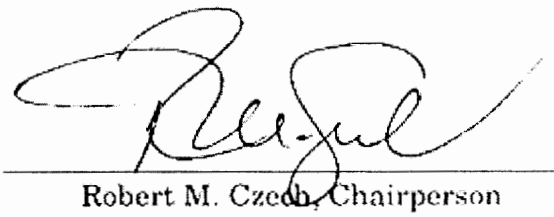
In the instant matter, the appellant blatantly lied in an interview about his knowledge of and involvement in the alleged abuse of an inmate. Although the appellant was ultimately determined not to have abused an inmate, his failure to provide a factual and accurate statement during the interview was sufficiently egregious, in and of itself, to support his removal. *See In the Matter of Anthony Carter*, Docket No. A-2599-03T2 (App. Div. March 14, 2005) (Senior Correction Officer, who intentionally falsified material information on his employment application when he indicated that he was unemployed during a period of time when he was actually terminated from his position with a county detention center in Maryland, removed rather than suspended). Although the appellant argues that removal is too severe since the Correction Lieutenant only received a 10 working day suspension, the Commission does not agree. In this regard, the Commission determines the appropriate penalty based on the particular circumstances and, absent compelling circumstances, will not compare the penalty in a separate matter. In this matter, the egregiousness of the appellant's misconduct clearly warrants removal from such a safety sensitive law enforcement position, regardless of his prior disciplinary history. Accordingly, the foregoing circumstances provide a sufficient basis to uphold the removal.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was justified. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF SEPTEMBER, 2017



Robert M. Czech, Chairperson
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSR 16631-16

IN THE MATTER OF STEVEN HOTZ,
GARDEN STATE YOUTH CORRECTIONAL
FACILITY, DEPARTMENT OF CORRECTIONS.

David J. Heintjes, Esq., for appellant Steven Hotz

Emily M. Bisnauth, Deputy Attorney General, for respondent Garden State Youth Correctional Facility (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: June 9, 2017 Decided: July 11, 2017

BEFORE **JOSEPH LAVERY,** ALJ t/a:

STATEMENT OF THE CASE

This is an appeal by **Steven Hotz, appellant**, challenging his termination from the position of Senior Correction Officer (SCO), Garden State Youth Correctional Facility. The grounds for his removal were (a) abuse of an inmate, and (b) falsification.

Respondent appointing authority, Garden State Youth Correctional Facility, New Jersey Department of Corrections (Garden State) contests the appeal and asks that all charges be affirmed and that the penalty be upheld.

Today's initial decision:

(a) incorporates by reference the partial summary decision order upholding the charge of falsification[1],
(b) dismisses the charge of inmate abuse, and
(c) affirms the removal of appellant from employment solely on the charge of falsification.

Procedural History:

This case was filed in the Office of Administrative Law (OAL) on October 27, 2016. The Acting Director and Chief Administrative Law Judge on December 1, 2016, appointed the undersigned to hear this case in the capacity of temporary administrative law judge, who convened a prehearing conference on December 15, 2016, and set hearing dates. Adjournments to accommodate motions followed[2]. On January 18, 2017, oral argument was heard.[3] On March 24, 2017, an order issued granting respondent's motion for partial summary decision, and denying appellant's cross-motion for partial summary decision. Plenary hearing convened on March 28, March 29[4], and April 11, 2017. An order settling the record was promulgated on May 24, 2017. On June 9, 2017, the last summation was filed in the OAL. On that date, the record closed.

Background:

Appellant, Steven Hotz, served as a Correction Officer and, later, as a Senior Correction Officer in the New Jersey Department of Corrections for a period of approximately ten years. The appointing authority now seeks affirmation of their termination of his employment. The event which triggered his final discipline occurred initially on November 6, 2015, when appellant took part in the debasement of an inmate

[1] Order granting respondent's motion for partial summary decision and denying appellant's cross-motion for partial summary decision (March 24, 2017).
[2] Appellant waived his 180-day disposition rights under N.J.S.A. 40A:14-200 by letter of January 11, 2017.
[3] See letter of the administrative law judge dated January 19, 2017, and e-mail to Marianne Hatrak dated May 3, 2017.
[4] On the hearing date of March 29, 2017, the audio recording system failed. Testimony was reconstructed from the collective notes of counsel and the administrative law judge.

barber, Edwin Lopez. For this he was subjected to charges arising from physical and mental abuse of an inmate. (Exhibit R-1A.) Whether his actions were knowing and intentional is in issue before this tribunal today. In any event, the fallout from that episode worsened when appellant lied about what took place in the first of two subsequent investigatory interviews by the agency's Special Investigation Division (SID). This deception caused the amendment of the charges to include that of falsification. (Exhibit R-1B.)

On the charge arising from falsification, the largely uncontested facts were discussed and, in part, decided by an earlier order of this tribunal granting respondent Garden State partial summary decision[5]. The material factual background decided in that order still may usefully serve, in part, for today's purposes:

> The facts which the appointing authority proffers as undisputed involve alleged mistreatment of an inmate. Garden State relates that an inmate, E.L., was restrained in a barber chair, and his hair was cut off against his will. It maintains further that during the first investigatory interview of March 11, 2016, by SID investigators which followed, appellant repeatedly denied any knowledge of the inmate and of the incident, and categorically denied any participation in it. During questioning, according to Garden State, appellant answered that it was possible others had "made up a story," untruths which had happened before. Nevertheless, unpersuaded by appellant, on April 15, 2016, the appointing authority charged him with conduct unbecoming a public employee, physical or mental abuse of an inmate and other sufficient causes. (Respondent's Exhibit 9.)
>
> Afterwards, the appointing authority contends, in a second, supplementing SID interview held on May 26, 2016, appellant altered his position on the facts. Shown a photo of the inmate, appellant admitted knowing him. Further, appellant now conceded that he took part in the episode in the barbershop on November 6, 2015, albeit, in his version of events, only to the extent of physically calming the inmate. The latter had raised his arm in a movement suggesting threat. Appellant conceded that he and SCO Attardi had forcibly placed the inmate in a barber's chair, but blamed SCO Collazzo for a buzzed haircut which then occurred. Finally, in this same interview, appellant added that on the day of the incident, he and SCO Collazzo had discussed the event, but that she advised him not to say or do anything about it. She counseled that she had been assured that nothing would happen to them if they stayed silent.

[5] See footnote 1.

> Armed with this supplementing information, the appointing authority compared the two separate visually recorded statements and found that appellant had engaged in falsification. On July 8, 2016, it therefore issued an amended preliminary notice of disciplinary action charging him with falsification. (Respondent's Exhibit 9.) Eventually, appellant was removed by final notice of disciplinary action dated September 30, 2016. (Respondent's Exhibit 10.) . . .
> [Id at 2-3].

Against this background, the current appeal is brought, and the parties presented their cases at hearing solely as they related to the charge of abusing an inmate:

Arguments of the parties:

Respondent appointing authority's case:

With partial summary decision now granted on the issue of falsification, Garden State addressed the remaining charge of inmate abuse. It did so through testimony of witnesses accompanied by exhibits and through submission of post-hearing written summations:

The sole eyewitness testimony proffered by the appointing authority was that of **SCO Jason M. Terhune,** an SCO who had been working in the institution for only four months into his probationary period after completing his academy training when he saw what took place with inmate Edwin Lopez. SCO Terhune stated that, at the time, he was still trying to familiarize himself with the local protocols. On November 6, 2015, the SCO recalled, he had entered the barber shop where officers received their haircuts. At some point between 11:00 a.m. and 1:00 p.m. he had gone there during his half-hour break. Inmate James Traylor was cutting his hair. While seated in the chair, inmate Edwin Lopez entered and seated himself in a chair used for those waiting. SCO Ivonne Collazo followed.

SCO Terhune recalled that SCO Collazo confronted inmate Lopez, giving him a choice between getting his hair cut in retaliation for a poor haircut given Lieutenant Ervin, or being placed in lockup. She indicated that this was at the behest of Lieutenant Ervin, and said "What the lieutenant wants, the lieutenant gets." This seemed an odd

statement in SCO Terhune's judgment. Appellant was not present at the time. Afterward, despite his having declined the haircut option, SCO Terhune said, SCO Collazo nevertheless called for assistance on Terhune's lapel phone. She intended to give the haircut anyway. SCOs Attardi and appellant responded within three minutes.

SCO Terhune additionally stated that SCO Collazo directed that the two officers place the inmate in a barber chair, and both complied, keeping the inmate restrained with his arms somehow held behind. The inmate had not been seated willingly. SCO Terhune remembered that appellant had at one point looked at him, "lipping" something which SCO Terhune could not understand but which seemed to indicate appellant's state of confusion. Once in the chair, SCO Collazo gave the inmate a buzz cut, using clippers which SCO Terhune believed she had brought with her. Both appellant and the second SCO, Officer Attardi, then released the inmate from the barber chair and left the shop.

SCO Terhune testified that he had not witnessed any violence by appellant against the inmate. Specifically, he had not seen SCO Attardi smack the inmate in the face or in the back of the head, and he had not observed appellant strike the inmate elsewhere on his body. Notwithstanding, after the haircut, the inmate sat with his head down, and was red-faced with embarrassment or anger. SCO Collazo told him she would allow the repair of his haircut by another inmate. Appellant and SCO Attardi left.

All this took place, in SCO Terhune's estimation, in only a fraction of the time during which he continued to receive his own haircut from the regular barber, inmate Traylor. He himself was there for less than thirty minutes. The precise time frame of appellant's presence in the barbershop, SCO Terhune did not feel comfortable estimating. SCO Terhune was certain that the only persons present during the episode with the inmate were himself, inmate Traylor who was cutting his hair, Inmate Lopez, SCO Attardi and SCO Collazo.

Relying on his report (Exhibit R-4.)[6] to serve as his direct testimony preliminary to cross-examination, **Roy Becker-Rowley**, **Senior Investigator**, **Special Investigations Division (SID)** recalled his part in the review of appellant's actions. He noted that he was not the primary investigator. His role was only to collect basic information after receiving an allegation from the Ombudsman. (Exhibit A-51.) The information forwarded and his later investigation, including interviews with the inmate, appellant and numerous correction officers, civilian and inmate witnesses, collectively was comprised of statements alleging that inmate Lopez had been set upon by two correction officers, SCO's Attardi and appellant. These statements included assertions that the two officers had beaten the inmate and had forced him into a barber chair, while three other officers watched. In the course of the attack by the two, according to the inmate himself, his head had been shaved by SCO Collazo as retaliation for his having given Lieutenant Harry Ervin a "bad" haircut. The clippers used had been obtained from outside the barbershop.

Afterwards, Investigator Becker-Rowley reported, the inmate had been treated in the infirmary, but had been released with continuing complaints of rib and back pain. Investigator Becker-Rowley stated in testimony that he had seen no sign of injury when interviewing the inmate in the infirmary. However, an injury report form (Exhibit R-27.) was issued by the infirmary. It recorded minimal redness of Inmate Lopez's right scapular area and complaints by the inmate of pain in the same shoulder.

According to the report of Investigator Becker-Rowley, later that day, the inmate had been visited by SCO's Paul Walker and George Davino, and the following day by CO Sergeant Kory Acchione. All asked about the event, and inquired about the inmate's intended response. Now concerned that he would be further abused, Inmate Lopez formally reported the incident, and indicated a willingness to take a lie detector test. Investigator Becker-Rowley himself was not present during the incident in issue, or during any of the events or times covered by those he interviewed.

[6] Completed November 12, 2015.

In additional testimony, the investigator principally responsible for scrutiny of the event, **Kurt Rocco, Sr. Investigator, SID**, also acknowledged his reports as his direct testimony. (Exhibits R-5, R-6 and R-7.) The investigator emphasized that his role was only to collect information, not to conclude as to guilt. Like Senior Investigator Becker-Rowley, he, too, had not personally observed any aspect of what had occurred before or during the incident.

Senior Investigator Rocco's first report (Exhibit R-5.), was submitted on April 13, 2016. It thoroughly and extensively summarizes the results of his interviews with witnesses thought to have been involved prior, during, and after the barbershop incident on November 6, 2015, from which the charges against appellant arise. (Exhibits R-1A, R-1B and R-1C.) That information ended in a major disciplinary suspension of Lieutenant Ervin. The information gathered concerning the actions of appellant, SCO Attardi and SCO Collazo in the barbershop ended in their termination as correction officers. With the exception of SCO Terhune, none of the persons interviewed by the appointing authority, on the basis of whose collective testimony disciplinary charges eventually issued, were called by the State to testify at hearing.

The investigator recorded in his first report that he had interviewed appellant on March 11, 2016, with Principal Investigator Edward Soltys. Appellant signed the Weingarten Rights form and had a union representative present. The interview was taped. (Exhibit R-16.) As noted in the order granting partial summary decision, on that date, the appellant denied any involvement with Inmate Lopez's mistreatment. He could not recall whether he had been in the barber shop on November 6, or where his work assignment was that day. According to investigator Rocco, appellant specifically denied knowing Inmate Lopez, denied being summoned to the barber shop, denied forcibly placing Inmate Lopez in the barber chair, witnessing SCO Attardi doing so, or witnessing SCO Collazo cutting the inmate's hair.

After appellant retained counsel, Senior Investigator Rocco, with Principal Investigator Edward Soltys, again interviewed appellant on May 26, 2016. (Exhibits. R-6, R-17.) As with the earlier interview, the requisite legal preliminaries were observed, including video-taping. This time the interview included the presence of counsel rather

than a union representative, compliance with Garrity rights, and provision of use immunity. At that time, it is reported, appellant described in full his version of what had occurred on November 6, 2015. This account differed entirely from his lengthy denial of involvement documented in investigator Rocco's earlier report. (Exhibit R-5.)

Finally, according to officer Rocco's testimony and report, based in part on the video of the second interview, appellant now stated that he had, in fact, taken part in the haircut of inmate Lopez. He had responded to a two-way radio summons from SCO Collazo to come to the center. He had no knowledge of why he was being called, since he had been on escort duty elsewhere. On arrival at the barber shop where he saw SCO Collazo, he found inmate Lopez in an agitated state confronting SCO's Attardi and Collazo, and in reaction to the inmate's raised arm suggesting resistance, he and SCO Attardi forcibly placed the struggling inmate into a barber's chair. To his surprise, SCO Collazo then passed clippers she was holding over the inmate's head, in a single-pass "buzz" cut.

Senior Investigator Rocco reported that appellant denied foreknowledge that SCO Collazo had planned this action. Appellant recalled that he had expressed alarm contemporaneously by turning to SCO Terhune and by saying "What the fuck is this about!" Once this occurred, appellant stated, he left immediately to return to the duty station he had left. Appellant denied that he or SCO Attardi during this unexpected turn of events had struck or in any other way abused the inmate.

In post-hearing written summation, Garden State recounted testimony and facts of record, arguing that the application of law to these facts required decision for the State. It maintained that the facts demonstrated conduct unbecoming an employee through abuse of an inmate. The facts also demonstrated appellant's unlawful conspiracy with another officer to thwart an investigation, and revealed failure of appellant to do his duty to help the victimized inmate. Appellant's special status as a law enforcement officer therefore demands his termination, the State maintains.

Appellant's case in reply:

Appellant denied the charge of inmate abuse. He adopted as his direct testimony his video-recorded interview of May 26, 2016 (Exhibit R-17.) during which he asserted that he was wholly unaware of why he had been radioed twice by SCO Collazo to report to center. The contents of that interview were also summarized without material contradiction of record in Senior Investigator Rocco's report, supra (Exhibit R-6, at DOC 202-204.) and under the heading herein, "Respondent appointing authority's case."

Additionally, in this same interview, appellant emphasized that he had no prior knowledge of any controversy involving Lieutenant Irvin's haircut. When he responded to the radio call from SCO Collazo, he first saw her at the barber shop, as he was descending nearby stairs from his duty assignment as an escort to a civilian technician. He had no idea of what assistance was needed by SCO Collazo. However, when he reached her, he found inmate Lopez in the shop engaged in a heated "in-your-face" confrontation with SCO Attardi. This appeared to him as a threatening development. When the inmate raised his arm, appellant grasped it. With SCO Attardi, he forcibly placed the inmate in a barber chair, restraining him to end what appellant saw as an incipient altercation. While in the process, he spoke to the inmate in attempt to calm him. It was then that the buzz-cut by SCO Collazo occurred.

Taken by surprise, appellant remembered, he commented to SCO Terhune, who was still in the next receiving a haircut: "What the fuck is this?" Officer Terhune merely shrugged. Appellant stated that he immediately left to return to his escort duty assignment. He estimated his time in the shop as lasting approximately thirty seconds. The time taken to reach the barber shop took approximately three minutes..

He explained that his request to amend his March 11, 2016, answers concerning the incident on November 6, 2015, was motivated by his need to do the right thing. He noted that he had spoken to SCO Collazo after the barber shop event, demanding to know why she had called him at all, drawing him into this "shit-storm." Appellant conceded that she should not have. He stated further that before the first SID interview, he had been assured by SCO Collazo that she herself had spoken to Major Paladino, a

life-long acquaintance. The latter, according to SCO Collazo in several subsequent conversations with appellant, had assured her that all would be well. She said the problem raised by the inmate's complaint would go away if appellant would follow the major's instructions to "just play ball" and "be quiet." After a six-month transfer he would be returned to Garden State. Appellant insisted that, being sensitive to his family responsibilities, his previous denials to investigators in the first videoed interview had been an effort to not get involved.

Appellant could not recall if handcuffs had been used, or if a code had been called. He did agree that there had been restraint of the inmate, and that, after the buzz-cut, the latter had appeared depleted and slumped. Appellant stated that once the cut was concluded, he himself left.

Being called as appellant's witness, **Senior Investigator Rocco** acknowledged that his office had forwarded the case to the prosecutor's office for criminal charge assessment. After review, that office declined to move on criminal charges, so advising SID on March 8, 2016. (Exhibit A-30.) He stated that he knew nothing about the status of use immunity. As to guilt, the investigator declared that his role was to collect, not conclude.

For his part, **Lieutenant Harry Irvin, Jr.** testified that he was on duty on November 5 and 6, 2015. However, he had not ordered a haircut for inmate Lopez. The lieutenant disclosed that he had been given a ten-day suspension nonetheless.

In corroboration of appellant's testimony, **SCO Kevin A. Rodriquez** confirmed that he had unexpectedly relieved appellant to act as custody escort of a civilian technician, and that appellant had returned within approximately five minutes.

The Administrator of Garden State, **Derrick Loury**, recalled in testimony that he had received an ombudsman's referral. (Exhibit A-51.) Additionally, he knew that afterward a report was submitted to him in early spring of 2016 (Exhibit R-5.), and that it was this report which prompted his discipline of appellant. (Exhibit R-1A.) After the second SID interview, the charge of falsification was added. (Exhibit R-1B.)

In post-hearing written summation, appellant summarized testimony, proposed findings of fact, and argued the law. He maintained that the charges were insufficiently specific. As such they were unconstitutional for lack of due process. Further, the charge of falsification was not timely filed within the forty-five-day period envisioned by N.J.S.A. 30:4-3.11a, and should be dismissed. Additionally, appellant states, the charges were arbitrary and capricious, in violation of civil service law. There is no evidence of his physically or mentally abusing the inmate, there is no substantiation of conduct unbecoming an employee, or of violation of any other rule, regulation, policy, procedure, order or administrative decision. Finally, appellant argues, if discipline is to be imposed, a lesser penalty is appropriate in view of a minimal past discipline history over ten years of employment.

FINDINGS OF FACT

To resolve disputes of material fact, I make the following **FINDINGS:**

1. On November 6, 2015, appellant was called over the radio for immediate assistance by SCO Ivonne Collazo.
2. Appellant was not told by SCO Collazo the reason for her request, nor did he know what that reason was.
3. Appellant, on duty serving as an escort for a civilian, asked a passing officer, SCO Kevin Rodriguez to relieve him.
4. Appellant descended a stairway to find SCO Collazo motioning him into the Correction Officers' barber shop, just beneath.
5. Entering the shop, he found inmate Edwin Lopez arguing heatedly face-to-face with SCO Attardi. Appellant did not understand the cause of the argument.
6. On reaching the arguing pair, sensing resistance to an officer, appellant caught the inmate's hand when he raised it, and the two officers forced him into a barber chair, restraining his arms behind him, while SCO Collazo imposed a rapid pass-over "buzz" cut, with scissors she had brought with her to the barber shop.

7. Surprised, appellant turned to SCO Jason M. Terhune whose hair was being cut nearby, and projecting a visible affect of confusion, said to the officer: "What the fuck is this?!"
8. The inmate slumped in the chair, in a "depleted" state, and was released.
9. At no point did appellant punch or slap the inmate or cut his hair off.
10. Appellant then immediately left and returned to his escort duty, relieving SCO Rodriguez.
11. The total time of his absence from his escort assignment was approximately five minutes.
12. Appellant had no foreknowledge of SCO Collazo's intention to buzz-cut inmate Lopez, nor of the background to it, and left quickly thereafter to avoid further involvement.

LEGAL ANALYSIS AND CONCLUSION

Burden of persuasion:

The burden of persuasion falls on the agency in enforcement proceedings, such as those in which it is sought to prove an employee has engaged in violations susceptible to removal as a penalty, under controlling regulations, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings, Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion, Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power, State v. Lewis, 67 N.J. 47 (1975).

The Charges:

This case involves a penalty. Where punishment is sought, the words of the charges brought to justify it must be strictly construed. There can be no departure from their boundary in the trial of fact or application of law. Any decision must arise from the plain meaning of the charges' words. For that reason, the State's post-hearing accusations of conspiracy with SCO Collazo and failure to come to the aid of inmate Lopez after his buzz cut will not be evaluated.

The basic charge of falsification will likewise not be considered here. That was decided in the summary decision order already cited. Notwithstanding, appellant was permitted in that order to provide at subsequent plenary hearing any facts which he believed would demonstrate violation of N.J.S.A. 30:4-3.11a. At that hearing, no preponderating evidence was entered into the record which would demonstrate that the falsification charge should be dismissed pursuant to N.J.S.A. 30:4-3.11a. As has been known from the outset, appellant's falsification was apparent at the earliest only after the May 26, 2016, videoed interview. The specifics of that charge, based on the most plausible facts show that an amended version of the preliminary notice was served on July 8, 2016. (Exhibit R-2, FNDA 9-30-16.) Consequently, the falsification charge was filed within the statutorily-mandated forty-five days thereafter.

To evaluate the remaining issue of inmate abuse it is useful to print the relevant specifics of the charges here, verbatim:

> On or about November 8, 2016 an incident occurred wherein physical force was used against an inmate. This action led to an SID investigation That revealed the following. Officer Steven Hotz was one of 3 Officers who did physically abuse the inmate in the Garden State Youth Correctional Facility Staff Barbershop; specifically, by holding him down in the barber chair, punching and slapping him, and cutting his hair off. This constitutes conduct unbecoming, physical abuse of an inmate and a violation of law enforcement rules, policies, and procedures. Total disregard was given as it pertains to the policy as set forth in the Law Enforcement Officers Handbook as well as the NJDOC employee handbook. Additionally, SCO Hotz did provide a supplemental interview with the NJDOC Internal Affairs Units, in which he admitted to providing false information during the initial interview.

[Exhibit R-2; Final Notice of Disciplinary Action (31-B).]

The Civil Service Rules and the Human Resources Bulletin cited therein as "Sustained Charges" were N.J.A.C. 4A:2-2.3(a)6, Conduct Unbecoming A Public Employee; N.J.A.C. 4A:2-2.3(a)12, Other Sufficient Cause; HRB 84-17C.3. Physical or mental abuse of an inmate, patient, client, resident, or employee; HRB 84-17C.8. Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation or other proceeding.

As has been noted, the appointing authority has already demonstrated that appellant violated those regulations forbidding falsification[7]. However, in the remainder of the case it has not demonstrated by a preponderance of evidence that appellant abused inmate Edwin Lopez. The sole eyewitness, SCO Jason M. Terhune corroborated appellant's claim of confusion over what took place in the barber chair when SCO Collazo cut the inmate's hair. SCO Terhune also credibly stated that he did not see appellant strike the inmate, nor did he see SCO Attardi hit him in the face or back of the head. The State's sole eye-witness thus provided testimony more exculpatory than damaging.

Appellant himself testified similarly. Mindful of the wise legal maxim: "False in one, false in all," his statements must be carefully scrutinized. Nonetheless, his demeanor is forthright and consistent during his second videoed interview of May 26. (Exhibit R-17.) It meshes with his persuasive (albeit ineffective) defense that his earlier falsification arose from the urging and assurances of a high-ranked officer, conveyed to him by SCO Collazo.

[7] See footnote 1.

SCO Rodriguez, was not shown to have any interest in the outcome of the case. In his testimony, he limited appellant's absence to about five minutes. He was fully credible. The serendipity of SCO Rodriquez's appearance, his happenstance relief of appellant, and appellant's brief, five-minute absence fits within appellant's claim, i.e., he was pulled into the barbershop fray without prior planning on his part, and without a formulated intent to abuse inmate Lopez. Alarmed by SCO Collazo's act, he left at once.

It is true that the appointing authority provided testimony from fully professional and credentialed investigative officers: Senior Investigator Rocco and Senior Investigator Becker-Rowley. Their reports and testimony were meticulous. The accompanying documentation (Exhibits R-4, R-5, R-6 and R-7.) summarized extensively their witness interviews. Nevertheless, this data describes a factual backdrop extending well beyond that underlying the narrow charges against appellant quoted supra. Understandably, neither investigator could personally say he was present at the scene in issue. Yet, to offset this lack no eyewitness inmate or correction officer interviewee but SCO Terhune was called by the State to testify. Consequently, the investigatory record compiled, insofar as it bears on the charges, and with the exception of appellant's two videoed interviews, is today held as being without evidentiary weight. It is hearsay unsupported by competent evidence. N.J.A.C. 1:1-15.5.

Conclusion:

I CONCLUDE, from the above analysis, that the preponderating evidence with respect to the charge of inmate abuse (Exhibit R-2.) is that presented by appellant. For this reason, this charge (though not the charge of falsification) should be **DISMISSED.**

PENALTY

The weighing of suitable penalty is an inapplicable inquiry with respect to the dismissed charge of inmate abuse. However, the question of appropriate penalty for the charge of falsification, upheld earlier through summary decision, remains to be determined.

For the reasons which follow, appellant's removal for egregious falsification must be affirmed, without regard to the doctrine of progressive discipline, In re Hermann, 192 N.J. 19, 36 (2007).

It is well-settled judicial and administrative case law that police officers specifically and sworn law enforcement officers generally are special government officers. Misconduct anywhere in public service is objectionable. Yet, when it takes place in law enforcement, the level of seriousness is significantly enhanced. In a leading case, our superior court has held:

> A police officer is a special kind of public employee. His primary duty is to enforce and uphold the law . . . He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have respect of the public.
> [Twp. of Moorestown v. Armstrong, 898 N.J. Super. 560, 566, 215 A.2d 775 (App. Div. 1965), certif. denied, 47 N.J. 80, 219 A.2d 417 (1966)]

Correction officers are law enforcement officers. Removal in circumstances comparable in seriousness to the instant matter is not unusual. In the case of In re Carter, 191 N.J. 474, 485-486 (2007), affirming removal of an officer who slept while on duty, the Court held:

> In matters involving discipline of police and corrections officers, public safety concerns may also bear upon the propriety of the dismissal sanction. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980) (affirming appellate reversal of Board decision to reduce penalty from dismissal to suspension for prison guard who falsified report because of Board's failure to consider seriousness of charge); In re Hall, 335 N.J. Super. 45, 51, 760 A.2d 1148 (App. Div. 200) (reversing Board's decision to reduce penalty imposed on police officer for attempted theft from dismissal to suspension), certif. denied, 167 N.J. 629, 772 A.2d 931 (2001); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06, 633 A.2d 577 (App. Div. 1993) (holding that it was arbitrary, capricious, or unreasonable to reduce penalty from removal to six months suspension for prison guard who gambled with inmates for cigarettes), certif. denied, 135 N.J. 469, 640 A.2d 850 (1994).

It is also true that the appropriateness of progressive discipline attends the circumstances of the offense. Where the violation is sufficiently serious, the violation per se could be enough to warrant disregard of the graduated discipline concept. This was

discussed in IMO Ruby Saunders, CSR 15250-13 April 14, 2014): In re Saunders, CSR 15250-13, Initial Decision (April 14, 2014), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, CSC (July 16, 2014), <http://www.state.nj.us/csc/about/meetings/search/index.html>.

> Appellant is without any record of discipline during the brief period of her employment as a Correction Officer Recruit. She has one record of commendation for attention to detail in searches (Exhibit N). It is not disputed that her single counseling for raising her voice and speaking over a supervisor, Ibid, does not qualify as a discipline but, is rather, an instruction.
>
> Ordinarily, any penalty would be considered within the context of an employment history of discipline, or lack of it. West New York v. Bock, 38 N.J. 500, 523 (1962). Nevertheless, this progressive discipline policy is not inflexible. It is a concept which may be set aside when the offense under consideration is sufficiently egregious. In re Stallworth, 208 N.J. 182, 199 (2008).
>
> In appellant's case, the level of seriousness accompanying the offenses charged is enhanced by her law enforcement title. The reported judicial case law is replete with recognition of the special nature of that status, with respect for the unusually great responsibilities imposed on law enforcement, and with affirmance of the strict accountability demanded of an officer:
> [Id at 18-19]

In the instant case, appellant lied unreservedly during a formal SID investigatory interview. (Exhibit R-16.) It cannot be claimed that he was ordered to do so by Major Paladino. The two apparently never spoke concerning the incident. Appellant instead relied on the second-hand assurances of SCO Collazo that the incident would fade away if appellant did not tell the truth. Her persuasion can hardly be held as coercion. Neither can this rationale of appellant justify blatant falsification. His act was clearly in violation of the rules cited by the appointing authority.

Falsification in the setting of a correctional facility such as Garden State strikes at the heart of a correction officer's responsibility and accountability. He or she is an integral actor in a paramilitary organization, subject to its regulatory code and the orders of superiors. Superior officers must depend on the honesty of their subordinates to

maintain good order in a dangerous environment. Fellow correction officers must have confidence that they can rely on the truth of information dispensed by their colleague. Such certainty is essential. It is fundamental to secure law enforcement cooperation during those work demands which place at risk officer and inmate safety. Appellant's demonstrated dishonesty threatens this arrangement. For all these reasons, termination is appropriate.

ORDER

I **ORDER** therefore **(a)** that the charge of inmate abuse be **DISMISSED,** but **(b)** that the **removal** of appellant from his position of Senior Correction Officer be **AFFIRMED,** based on the previous finding of falsification through an order of partial summary decision.

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.

July 11, 2017
DATE

JOSEPH LAVERY, ALJ t/a

Date Received at Agency: 7-11-17

Date Mailed to Parties: 7-11-17

mph

WITNESSES

For appellant:

Steven Hotz
Kurt Rocco
Harry J. Ervin, Jr.
Kevin A. Rodriguez, Jr.
Derrick Loury

For respondent:

Jason M. Terhune
Roy Becker-Rowley
Kurt Rocco

EXHIBITS

For appellant:

A-3 Witness Acknowledgment Form: Jason Terhune
A-12 Weingarten rights form; PNDA 4/15/16; 5/14/16
A-14 Memo from Tad Drummond to Edward Soltys, March 8, 2016
A-16 Photograph: Steven Hotz
A-25 PNDA 4/15/16
A-30 Daily Authorized Visitor List
A-51 Memo: Melissa Matthews, Assistant Ombudsman, dated 11/10/2015
A-52 Initial Decision and Final Administrative Decision, November 30, 2015
A-53(a) Proffered hearing notes for March 29, 2017
A-53(b) Objections to respondent's hearing notes

For respondent:

R-1a PNDA 4/15/16 Steven Hotz

R-1b Amended PNDA 4/15/16 Steven Hotz

R-1c Amended (2) PNDA 4/15/16 Steven Hotz

R-2 FNDA 9/30/16 Steven Hotz

R-4 Interoffice Communication: Roy Rowley to Salvatore Leto

R-5 Report; Kurt Rocco 12/09/2015

R-6 Supplemental Report Kurt Rocco 06/09/2016

R-7 Supplemental Report Kurt Rocco 07/28/2016

R-9 Handbook of Information and Rules NJDOC

R-10 Law Enforcement Personnel Rules and Regulations NJDOC

R-11 HRB 84-17

R-15 Work History, Steven Hotz.

R-16 First SID interview, Steven Hotz (DVD)

R-17 Second SID interview, Steven Hotz (DVD)

R-18a Photograph

R-18b Photograph

R-18c Photograph

R-22 Photo: Steven Hotz

R-27 Injury Report Form: Edwin Lopez 11/15

R-29 FNDA 9/30/16; PNDA 3/11/2014; Settlement Agreement: 8/12/08

R-30(a) Proffered hearing notes of respondent for March 29, 2017

R-30(b) Objections to appellant's proffered hearing

3.24.2017

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION AND DENYING APPELLANT'S CROSS-MOTION FOR PARTIAL SUMMARY DECISION

OAL DKT. NO. CSR 16631-16

IN THE MATTER OF STEVEN HOTZ, GARDEN STATE YOUTH CORRECTONAL FACILITY, DEPARTMENT OF CORRECTIONS.

David J. Heintjes, Esq., for appellant Steven Hotz

Emily Bisnauth, Deputy Attorney General, for respondent Garden State Youth Correctional Facility (Christopher S. Porrino, Attorney General of New Jersey, attorney)

BEFORE **JOSEPH LAVERY,** ALJ t/a:

The Motions:

The **appointing authority, Garden State Youth Correctional Facility (Garden State), respondent**, in response to appellant's appeal from his termination as a Senior Corrections Officer, brings this motion for partial summary decision. It contends there are no material facts

in dispute concerning a charge of falsification. Further, it opposes appellant's cross-motion for partial summary decision.

Appellant, Steven Hotz, brings a cross-motion for partial summary decision asking for dismissal of the charge for constitutional and statutory reasons, as well as because of underlying factual circumstances showing violation of the Attorney General's Guidelines. All these legal flaws cited in defense raise material issues of fact, barring summary disposition, he argues. Appellant also opposes the appointing authority's motion for partial summary decision.

The appointing authority's motion and argument in opposition:

Respondent **Garden State** in the main relies on a comparison of two videoed Special Investigation Division (SID) interviews to support its motion. The first interview was held on March 11, 2016, the second on May 26, 2016. Respondent argues: (a) that appellant gave false and misleading statements to investigators in the first interview, (b) that appellant later admitted to false statements made then, (c) that appellant knew this behavior was prohibited by policy and rules, and (d) that removal for this conduct is supported by precedent.

The facts which the appointing authority proffers as undisputed involve alleged mistreatment of an inmate. Garden State relates that an inmate, E.L., was restrained in a barber chair, and his hair was cut off against his will. It maintains further that during the first investigatory interview of March 11, 2016, by SID investigators which followed, appellant repeatedly denied any knowledge of the inmate and of the incident, and categorically denied any participation in it. During questioning, according to Garden State, appellant answered that it was possible others had "made up a story," untruths which had happened before. Nevertheless, unpersuaded by appellant, on April 15, 2016, the appointing authority charged him with conduct unbecoming a public employee, physical or mental abuse of an inmate and other sufficient causes. (Respondent's Exhibit 9.)

Afterwards, the appointing authority contends, in a second, supplementing SID interview held on May 26, 2016, appellant altered his position on the facts. Shown a photo of

the inmate, appellant admitted knowing him. Further, appellant now conceded that he took part in the episode in the barbershop on November 6, 2015, albeit, in his version of events, only to the extent of physically calming the inmate. The latter had raised his arm in a movement suggesting threat. Appellant conceded that he and SCO Attardi had forcibly placed the inmate in a barber's chair, but blamed SCO Collazzo for a buzzed haircut which then occurred. Finally, in this same interview, appellant added that on the day of the incident, he and SCO Collazzo had discussed the event, but that she advised him not to say or do anything about it. She counseled that she had been assured that nothing would happen to them if they stayed silent.

Armed with this supplementing information, the appointing authority compared the two separate visually recorded statements and found that appellant had engaged in falsification. On July 8, 2016, it therefore issued an amended preliminary notice of disciplinary action charging him with falsification. (Respondent's Exhibit 9.) Eventually, appellant was removed by final notice of disciplinary action dated September 30, 2016. (Respondents Exhibit 10.)

Addressing the rule authorizing full and partial summary decision, N.J.A.C. 1:1-12.5, respondent appointing authority maintains it could identify no genuine issue of material fact with respect to the falsification charge. Additionally, it argues that appellant has not supplied a responding affidavit showing a genuine issue of fact. Therefore, viewing the case in the light most favorable to the moving party, Garden State insists that a rational fact-finder could only resolve the dispute in its favor, citing relevant opinions of both the New Jersey and the United States Supreme Courts. Moreover, the appointing authority states, once it is granted partial summary decision for falsification, case law also compels termination as a penalty.

In its brief in opposition to appellant's cross-motion, the appointing authority offered further rationale for its position. It stressed that in the March 11, 2016, interview appellant denied knowledge of every detail he was questioned on, ranging from his presence in the barber shop, to recollection of who might have been there and their activities, through forced placement of the inmate in the barber's chair, and finally to the involuntary haircut while being

held by himself and his fellow corrections officer, SCO Attardi. Yet, on May 26, 2016, appellant recanted on every topic touched. In its view, this was falsification.

Garden State believes appellant's defenses are specious, and none support denial of its motion for partial decision. Fear of job loss would not excuse lying. During the March 11 interview appellant denied he had been threatened, when questioned during the interview. He explained that he falsified because of jail rumors that the case was "going nowhere," and because SCO Collazzo had advised him to do nothing.

The appointing authority counters appellant's briefed criticisms by noting that it is not compelled by N.J.A.C. 1:1-12.5 to submit a supporting affidavit with its motion for partial summary decision, that it has clearly specified the rules and regulations violated, and that its motion is based not on hearsay, but on the evidentiary record, including especially appellant's videoed interview statements.

Garden State denies that any protections to be afforded in a criminal investigation were denied appellant. It notes that after counsel demanded them by letter in December of 2015, they were provided, so long as the criminal investigation existed. When notified on March 8, 2016, by the Burlington County Prosecutor's office that the criminal investigation had ended, the appointing authority moved immediately to conduct an administrative interview. They did so on March 11, 2016. Appellant's union representative was present. He was advised that the proceeding was administrative, and given the usual Weingarten protections, as proven by the acknowledgement form which he signed (Respondent's Exhibit 3).

Finally, respondent believes the matter is ripe to impose a penalty of removal. Nonetheless, it accepts that if this tribunal concludes hearing on the question of penalty is necessary, it will not contest the ruling.

Appellant's cross-motion and opposition argument:

In reply, **appellant, Steven Hotz,** maintains that respondent Garden State's motion should be denied, and his cross-motion for dismissal should be granted. He reasons as follows:

First, the charges were ambiguous and lacking specificity. The appointing authority argues beyond the charge of falsification and into the charge of inmate abuse by labeling the alleged falsification "conduct unbecoming a public employee," this, even though its motion for partial summary decision rests solely on an accusation of falsification.

Second, the charge of falsification was not filed within the forty-five-day parameter imposed by N.J.S.A. 30:4-3.11a, once sufficient information has been obtained to file the matter upon which the complaint is based. Therefore, by the terms of that statutory section, the appointing authority's complaint must be dismissed in its entirety.

Third, the March 11, 2016, interview was constitutionally offensive. He was questioned without counsel of record, and without realizing that, after review, the Burlington County Prosecutor's Office had returned the file to the appointing authority for administrative disposition. This amounts to coercion of his statements. Consequently, these circumstances offend the fifth, sixth and fourteenth amendments of the U.S. Constitution. They also are violative of protocols in the Attorney General's Guidelines.

Fourth, respondent's motion for partial summary disposition lacks supporting affidavits to show that no material facts are in dispute. The deficiency leaves the entire record comprised of hearsay. This tribunal is therefore bereft of a basis on which to judge the weight and competence of the evidence as anticipated in N.J.A.C. 1:1-15.5, in particular where credibility must be assessed.

Fifth, with discovery still in process, this tribunal is without a complete record. Discovery is especially necessary to support appellant's defense of untimely charges being barred by N.J.S.A. 30:4-3.11a.

Sixth, drawing all inferences in favor of appellant, as summary decision requires, substantial factual issues remain to be resolved. There must be testimony as to interpretation of policy. This is needed to establish whether appellant's behavior was inappropriate. Any reliance on inmate hearsay would be without a residuum of competent evidence. There must be a hearing to provide it.

Seventh and eighth, a hearing must be held to establish credibility, thus denying the basis for summary decision. Likewise, there can be no summary decision where the defense is grounded on state of mind, with emphasis on duress, which can only be established through testimony.

Finally appellant insists that no penalty can be levied without a determination of its appropriateness. The totality of his employment record must be explored. Further, there must be a comparison with other penalties administered to the actors involved. This can only be accomplished through trial.

In its second brief, opposing respondent Garden State's earlier opposition to appellant's cross-motion, he states that his own cross-motion must be granted as a matter of law. In his view, this is so for reasons derived from N.J.A.C. 1:1-12.5. Respondent has not raised issues of material fact and has not supported its motion with affidavit. This is a fatal shortcoming, appellant insists.

Analysis and Conclusions of Law:

The controlling rule in any motion for summary decision or partial summary decision is N.J.A.C. 1:1-12.5. For the instant purposes, it is instructive to quote in pertinent part two relevant sub-sections, (b) and (c):

> (b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, 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 prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding . . .
>
> . . .
>
> (c) If, on motion under this section, a decision is not rendered on all the substantive issues in the contested case and a hearing is necessary, the judge at the time of ruling on the motion, by examining the papers on file in the case as well as the motion papers, and by interrogating counsel, if necessary, shall, if practicable, ascertain what material facts exist without substantial controversy and shall thereupon enter an order specifying those facts and directing such further proceedings in the contested case as are appropriate. At the hearing in the contested case, the facts so specified shall be deemed established.
> [Emphasis added]
>
> . . .

Any comparison of the videos recording the answers by appellant to questions posed by SID investigators on March 11 and May 26, 2016. makes clear beyond cavil that he lied in the first interview. On March 11, 2016, appellant denied any knowledge whatever of the event which occurred during the event in the barbershop on November 6, 2016, and insisted he was not present, and played no part in it. He knew this to be untrue, as his own statements in the second SID interview of May 26, 2016, confirm. At that time, he recanted his testimony in full. Beyond a reasonable dispute, the change can only be seen as contradictory. It was per se a disclosure of falsification on March 11. The deception fits within the charge of violating HRB 84-17, at C. (Personal Conduct) 8 as a clear intention to misstate material facts:

> Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report or other proceeding.

Appellant's defenses against this charge relate to state of mind: i.e., influence exerted by SCO Collazo; anxiety over the possibility of dismissal from employment. It is not suggested that appellant did not comprehend the content of his false statements, or that he was compelled by the appointing authority to dissemble. Any other state of mind beyond this perspective may, or may not, have a bearing on penalty, and, as a consequence, testimony may still be elicited to attack penalty on those grounds at plenary hearing. Appellant's own video-recorded statements preclude any doubt, however, that it was his intention to deceive. Credibility is not a concern when only the content of appellant's answers is in issue, as here.

Therefore, consistent with N.J.A.C. 1:1-12.5(d), it is today specified and found to be facts which exists without substantial controversy as follows: Appellant's March 11, 2016, answers claiming that he had no knowledge of, or that he had no presence at, or that he had not participated in, the event involving inmate E.L which occurred November 6, 2015, in the prison barber shop, were false. These findings will be held as established during the upcoming plenary hearing.

The remaining defenses raised by appellant on his cross-motion are addressed below. They do not prevent granting the appointing authority's motion for a partial summary decision holding that appellant committed falsification:

The appointing authority's charges are not ambiguous. The specification of falsification in the amended[1] preliminary notice and the final notice of disciplinary action clearly state that appellant "admitted to providing false information in the initial interview." (Respondent's Exhibits 9 and 10.) This is the charge which he prepared to defend against on Garden State's present motion.

Whether or not the appointing authority's charges were filed within the time-frame of N.J.S.A. 30:4-3.11a is a dispute of fact to be resolved at plenary hearing, toward which discovery is continuing. So too, if found factually, is the dispute of law over whether the delay

[1] Amended Preliminary Notice of Disciplinary Action, dated July 8, 2016.

beyond that time obviates Garden State's case. Nevertheless, this tribunal is not barred from making today's identification of facts not in dispute. N.J.S.A. 1:1-12.5(d). If successful at plenary hearing on the factual and legal aspects of his claim of fatal untimeliness under N.J.S.A. 30:4-3.11a, appellant would not be barred from arguing at that time that today's order must be revisited.

There is no constitutional deficiency present in either the SID interview of March 11, 2016, or the supplemental interview of May 26, 2016. Neither the fifth amendment nor the sixth amendment of the U.S. Constitution, as applied to these facts, have been violated. Appellant submitted to both interviews with full knowledge that they were administrative, not criminal, interviews. (Respondent's Exhibits 3 and 4.) The due process mandate of the fourteenth amendment was likewise satisfied by the appointing authority's adherence to Weingarten[2] requirements. A union representative was present on March 11, 2016, and appellant did not request the presence of his attorney at that time. Appellant signed the customary Weingarten form confirming that the elements of the Court's holdings in the Weingarten case were satisfied. See also, Goldberg v. Kelly, 397 U.S. 254 (1970). These procedures consist of all that is required of the appointing authority when assuring the inherent safeguards of due process in an administrative disciplinary setting. Appellant's reliance on the Attorney General's Guidelines is misplaced. They do not apply to correction officers. In re Cox, Dkt. No. A-2471-14T4 (App. Div. December 7, 2016).

The absence of affidavits from the appointing authority's opposition to appellant's cross-motion is insufficient to grant his cross-motion. The shortcoming is offset by the appointing authority's motion itself, by its accompanying brief with exhibits, as well as by the entirety of the record. Facts must be found which a reasonable observer would see as devoid of substantial controversy and which would be material to a partial summary decision finding that falsification occurred. The record is more than ample for this purpose.

As to the interpretation of policy, over which appellant anticipates need for factual testimony, nothing of record discloses how that would be relevant to whether appellant falsified.

[2] N.L.R.B. v. Weingarten, Inc. 420 U.S. 251 (1975)

On the arguments submitted, it is difficult to understand why the dispositive written policy, HRB 84-17 C. (Personal Conduct) 8 should not be presumed to speak for itself. This is inescapably true where a severe disciplinary penalty hangs in the balance. The reading of the section must be narrow. It must be limited to the plain intent of the regulating words. Any ostensible breach thereof would not be a call for an interpretive, subjective search for meaning. Explanation by witnesses cannot stand between the clear expression of the determinative HRB 84-17 section, nor may witnesses filter the direct application of this section by the administrative law judge to the facts found.

Finally, testimony and argument to establish penalty, if any, to be imposed after de novo consideration here, must abide the full trial of the remaining charges and related factual issues. West New York v. Bock, 38 N.J. 500 (1962). Penalty cannot fairly be decided today.

ORDER

I ORDER, therefore, as follows:

1. Respondent's charge of falsification is affirmed, and appellant's continued factual or legal defense against that charge at hearing is foreclosed.
2. The penalty for the offense of falsification will be decided after opportunity during plenary hearing for both sides to provide argument addressing appropriate discipline.
3. Plenary hearing on the remaining portions of respondent's charges will now proceed.
4. Appellant during plenary hearing may pursue factual and legal argument in support of his affirmative defense grounded on N.J.S.A. 30:4-3.11a, to which respondent may reply similarly.

This order may be reviewed by the **CIVL SERVICE COMMISSION**, either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

March 24, 2017
DATE

JOSEPH LAVERY, ALJ t/a

mph

9-20-17

STATE OF NEW JERSEY

In the Matter of Carl Magby Jr., City of Hackensack, Department of Sanitation

CSC DKT. NO. 2017-1907
OAL DKT. NO. CSV 19444-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 19444-16

AGENCY REF. NO. 2017-1907

IN THE MATTER OF CARL MAGBY, JR., CITY OF HACKENSACK, DEPARTMENT OF SANITATION,

---

Ryan Lockman, Esq., for appellant (Mark B. Frost & Associates)

Raymond R. wiss, Esq., for respondent (Wiss & Bouregy, P.C.)

Record Closed: August 3, 2017 Decided: August 3, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on December 27, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted wherein the parties agree on a hearing date. The matter was scheduled for hearings on April 5 and June 22, 2017. The April hearing date was adjourned at the request of appellant's counsel due to discovery issues. Prior to the June hearing date appellant's counsel advised that the matter is resolved. The June hearing date was cancelled and a status conference was conducted on July 31, 2017. On August 1, 2017 the undersigned received a copy of the

Settlement Agreement, via fax. On August 3, 2017 OAL received the fully executed settlement agreement, by regular mail, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

8-3-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: 8-7-17

Date Mailed to Parties: AUG 7 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

In the Matter of	:	**OFFICE OF ADMINISTRATIVE LAW**
Carl Magby, Jr. and the	:	**CSV 1944-16**
City of Hackensack,	:	
	:	**STIPULATED ORDER**

THIS MATTER having been resolved by the parties pursuant to the enclosed settlement agreement;

IT IS HEREBY STIPULATED AND AGREED that all disciplinary charges against Carl Magby have been rescinded and are hereby rescinded, consistent with the attached settlement agreement.

Ryan Lockman
Mark B. Frost & Associates
Counsel for Carl Magby, Jr.

Dated: August 1, 2017

Raymond R. Wiss
Wiss & Bouregy
Counsel for the City of Hackensack

Dated: August 1, 2017

IT IS HEREBY ORDERED, this _____ day of _____, 2017:

A.L.J.

AGREEMENT AND GENERAL RELEASE

This Agreement and General Release, dated as of **June 15, 2017**, is given by, the Releasor, **Carl Magby, Jr.**, individually referred to as "**Employee**", to the **City of Hackensack**, referred to as the "City" including all of the City's elected and appointed officials, officers, agents, representatives and employees.

WHEREAS, Employee and the City desire to resolve issues and claims which may arise, or which may have arisen, out of Employee's employment with the City; and

WHEREAS, the parties to this Agreement agree that this Agreement is being entered into without any admissions of any liability or obligation on the part of the City; and

WHEREAS, Employee and the City (the "Parties") have engaged in discussions and reached agreement on certain matters which they wish to memorialize by way of this Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals, which are expressly incorporated into this Release, and the mutual undertakings below, the Parties, intending to be now legally bound, agree as follows:

1. Release

   a. Employee understands that this Agreement includes a release of all claims (the "Claims") against the City, whether based on federal, state, common law, or Administrative claims, that in any way relates to his employment with the City, the events, circumstances, conduct, employment relations, complaints, grievances or claims that have been made by him, or that might have been raised or could have been raised in the future between the Parties based on any conduct which has happened up until now, including under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq.; the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-2(a), et al; and the New Jersey Civil Rights Act, N.J.S.A. 10-6.2, et al. Employee specifically releases and gives up any and all claims and rights including, without limitation, any claims of age discrimination, gender discrimination and disability discrimination, and/or retaliation, including those claims of which Employee is not aware and those not mentioned in this Agreement.

   b. This Agreement applies to claims resulting from anything which has happened up to now. Employee warrants that no promise or inducement has been offered by the parties being released, except as herein set forth; that this Agreement is executed without reliance upon any statement or representation by the person or parties released or their representatives or physicians, concerning the nature and extent of the injuries and damages and legal liability therefore; and that Employee is of legal

age, is legally competent to execute this Agreement, and accepts full responsibility for it. Employee agrees as further consideration and inducement for this compromise settlement that the settlement and release shall apply to all unknown or unanticipated injuries, claims and damages, including but not limited to claims for attorneys fees, resulting from this matter as well as to those now disclosed or which may be discovered in the future. It is Employee's intent, in executing this document to release and discharge the individual persons, entities, and corporations named in this Agreement.

c. This Agreement contains the entire agreement between the Parties hereto. The terms of this Agreement are contractual and not merely recital. Employee warrants as further consideration of said sum paid that no other person, firm, corporation, entity or government body is entitled to any claim whatsoever growing out of the aforesaid Claims. Employee will indemnify and hold harmless the party or parties released from any and all other claims which are presently known or might arise from the aforesaid Claims.

d. The City hereby releases Employee from all claims, whether based on federal, state, common law or administrative claims that in any way relate to his employment with the City, or otherwise or which might have been raised or could have been raised in the future between the Parties based on any conduct which has happened until now, including those claims of which the City are not aware and those not mentioned in this Agreement.

2. <u>Resignation/Termination of Employee's Employment; Dismissal of PNDA; Payment of Accrued Unused Days</u>

a. Employee hereby irrevocably agrees to retire from his employment with the City effective June 30, 2017 (the "Retirement Date"), and to file a retirement application with the New Jersey Division of Pensions effective July 1, 2017.

b. Employer agrees that Employee has retired in good standing and that there are no disciplinary proceedings pending against him as of the date of his retirement. Any disciplinary matters pending as of the date of this Agreement have been rescinded prior to the effective date hereof. Employee's personnel will reflect this fact. If an inquiry is made to the City as to Employee's employment history with the City, the City will provide a neutral reference and indicate that Employee has retired in good standing and that there were no disciplinary proceedings pending against him as of the date of his retirement.

c. Employee shall receive all salary payments and pension credits payable to him through December 31, 2016, as if he had worked full time from the date of his suspension of November 8, 2016 through December 31, 2016.

d. Within sixty (60) days of the date of this Agreement, and provided that Employee has submitted his retirement application effective July 1, 2017, Employer shall pay to Employee the following sums:

(i) Employee's accrued vacation time as permitted under the CBA. The City asserts that this amount is $2,524.75, representing 14.75 hours of accrued vacation time. The City will provide supporting documentation of same.

(ii) Back pay as set forth in paragraph 2(c) above.

e. Employer and Employee agree that Employee has no other accrued contractual entitlements.

f. Employer agrees to properly, accurately and promptly report *all* of Employee's accrued service time and/or pension time to the New Jersey Division of Pensions and Benefits.

3. Attorney's Fees and Expenses

It is specifically understood and agreed that any amounts payable under this Agreement includes all attorney's fees and costs to which Employee and/or his attorneys may be entitled and the settlement sum is specifically intended to be inclusive of all attorney's fees and costs. Employee understands that by executing this Agreement, he releases and waives any claim or right for attorney's fees and expenses in connection with the Claims. Neither Employee nor any counsel for Employee, nor anyone acting on their behalf, shall make application for additional monies in addition to the amounts set forth in this Agreement, nor shall any of them make any application for attorney's fees or costs as those amounts are included in the total payment being made herein.

4. Tax Consequences

The City makes no representation regarding the Federal or State tax consequences of any of the payments referred to herein and shall not be responsible for any tax liability, interest or penalty incurred by Employee, which in any way arises out of or is related to said payment. Employee shall pay the Federal or State taxes, if any, which are required by law to be paid by her with respect to this settlement. Employee agrees that she will be responsible for the payment of all applicable State, Federal and local taxes with respect to same. Employee further agrees that in the event the Internal Revenue Service or any other taxing authority deems any withholding tax, interest, penalties, or other amounts to be due from the City with respect to this settlement payment, Employee will fully indemnify and hold harmless the City for any sums that the City may be required to pay.

5. Who is Bound

Employee is bound by this Agreement. Anyone who succeeds to Employee's rights and responsibilities, including but not limited to Employee's heirs or the executor of Employee's estate, is also bound. This Agreement is made for the City's benefit and all who succeed to the City's rights and responsibilities.

6. Choice of Law

This Agreement is a by-product of arms length negotiations and it is the agreement of the Parties that any dispute regarding the interpretation of the Agreement will be determined by the application of New Jersey law.

7. Severability

Should any provision of this Agreement be declared or determined by any Court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity and enforceability or the remaining parts, terms or provision, shall not be affected thereby and said illegal, unenforceable or invalid part, term or provision shall be deemed not to be part of this Agreement.

8. Negotiated Agreement: No Construction Against Any Party

This Agreement was not drafted by any of the Parties, but rather is the result of negotiations among the Parties with the benefit of their attorneys. Each Party to this Agreement read this Agreement and has freely and voluntarily executed it. No ambiguity that may arise in this agreement shall be resolved by construing the Agreement against any of the Parties as drafter of same.

9. Signatures

Employee understands and agrees to the terms of this Agreement. If this Agreement is made by a corporation, its proper corporate officers sign and its corporate seal is affixed.

10. Use of Release as Evidence

Neither the fact of this Agreement, nor any of its terms, nor the payment of the consideration hereunder, shall constitute or be deemed an admission of liability by Employee or of any violation of any duty, statute, law or regulation.

11. Voluntary Acceptance of Agreement

Employee represents that he has or has been given a reasonable opportunity to, fully discuss this Agreement with his attorneys, and has carefully read and fully understands its provisions. Employee further represents that he enters into this Agreement voluntarily.

12. **No Publicity or Disparagement**

(a) Employee and the City represent that, except as may be required by law or legal process, Employee will not disparage the City in any way nor suggest that the settlement in any way reflects any admission of liability on the City's part.

Signed by: _____
CARL MAGBY, JR.

IN WITNESS OR ATTESTATION WHEREOF,

_____
An attorney at law in the state of New Jersey
(or a licensed Notary Public)

Jaclyn M. Stout
Notary Public of New Jersey
My Commission Expires
December 8, 2019

Dated: 6-19-17

Signed By: _____
REPRESENTATIVE ON BEHALF OF THE CITY

IN WITNESS OF ATTESTATION WHEREOF,

_____
RAYMOND R. WISS, ESQ.
An attorney at law in the state of New Jersey
(or a licensed Notary Public)

Dated:_____

Angiulo, Nicholas

From: Angiulo, Nicholas
Sent: Wednesday, September 13, 2017 9:05 AM
To: 'Wiss Bouregy'
Cc: rlockman@mfrostlaw.com; Raymond Wiss
Subject: RE: Carl Magby, Jr. v. City of Hackensack - Settlement

Mr. Wiss:

Yes, that will suffice. So, in essence, he is considered separated from his employment effective January 1, 2017, with a deferred retirement date of July 1, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Wiss Bouregy [mailto:WissBouregy@wiss-law.com]
Sent: Wednesday, September 13, 2017 9:01 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>
Cc: rlockman@mfrostlaw.com; Raymond Wiss <RWiss@wiss-law.com>
Subject: Carl Magby, Jr. v. City of Hackensack - Settlement

Mr. Anqiulo,

In response to your inquiry, please be advised that Mr. Magby's last day of employment with the City of Hackensack was December 31, 2016. While Mr. Magby may not have filed his retirement application until July 1, 2017, he was not employed by the City of Hackensack subsequent to December 31, 2106.

Hopefully, this fully responds to your inquiry.

Regards,
Ray

Wiss & Bouregy, P.C.
345 Kinderkamack Road
Westwood, NJ 07675
T: 201-497-6680
F: 201-497-6677
Email: wissbouregy@wiss-law.com

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Thursday, September 07, 2017 10:38 AM
To: rlockman@mfrostlaw.com; Raymond Wiss <RWiss@wiss-law.com>
Subject: RE: RE: Carl Magby, Jr. v. City of Hackensack - Settlement
Importance: High

Mr. Lockman and Mr. Wiss:

Per my telephone conversation with Mr. Lockman via telephone last week, we require all periods of time to be accounted for in an employee's personnel record. Thus, I indicated that we needed specific clarification as to how to account for the period of time between the end of Mr. Magby's receipt of back pay (January 1, 2017) and his retirement/resignation in good standing (July 1, 2017). While I ***assume*** that this period of time should be considered as an approved leave of absence without pay, I cannot present the matter for the Commission's acknowledgment without confirmation from the parties that this is correct. Please advise as soon as possible.
Thank you for your cooperation.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: rlockman@mfrostlaw.com [mailto:rlockman@mfrostlaw.com]
Sent: Tuesday, August 29, 2017 9:55 AM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; rwiss@wiss-law.com
Subject: RE: RE: Carl Magby, Jr. v. City of Hackensack - Settlement

Mr. Angiulo,

I have conferred with Mr. Wiss, and we are unclear as to what you believe is not contained in the release.

Thanks,

Ryan Lockman

Ryan Lockman, Esq.
MARK B. FROST & ASSOCIATES
1515 Market Street, Suite 1300
Philadelphia, PA 19102
t: (215) 351-3333
f: (215) 351-3332
RLockman@MFrostLaw.com

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Wednesday, August 23, 2017 11:08 AM

To: rlockman@mfrostlaw.com; rwiss@wiss-law.com
Subject: RE: RE: Carl Magby, Jr. v. City of Hackensack - Settlement
Importance: High

Mr. Lockman and Mr. Wiss:

I have not yet received a response to the below e-mail. As I would like to get this matter on the September 6, 2017 Civil Service Commission's meeting agenda (which is finalized on August 30, 2017), I would appreciate the requested clarification as soon as possible.

Thank you for your cooperation.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

From: Angiulo, Nicholas
Sent: Wednesday, August 16, 2017 10:33 AM
To: 'rlockman@mfrostlaw.com' <rlockman@mfrostlaw.com>; 'rwiss@wiss-law.com' <rwiss@wiss-law.com>
Subject: RE: Carl Magby, Jr. v. City of Hackensack - Settlement
Importance: High

Mr. Lockman and Mr. Wiss:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Carl Magby, Jr. from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Magby agrees to "retire from his employment" effective June 30, 2017 and receive back pay for the period from November 8, 2016 through December 31, 2016. However, the record does not reflect how to record the time period from January 1, 2017 through June 30, 2017 in his personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

9-20-17

STATE OF NEW JERSEY

In the Matter of Yhamile Rodriguez-Perez, Superior Court of New Jersey, Monmouth Vicinage

CSC DKT. NO. 2017-2771
OAL DKT. NO. CSV 03975-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03975-17

AGENCY DKT. NO. 2017-2771

IN THE MATTER OF
YHAMILE RODRIGUEZ-PEREZ,
SUPERIOR COURT OF NEW JERSEY,
MONMOUTH VICINAGE.

Sandra L. McGraw, Senior Staff Representative, CWA Local 1032, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Thomas Russo, Esq., Administrative Office of the Courts, for respondent Superior Court of New Jersey, Monmouth Vicinage, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: August 29, 2017 Decided: August 30, 2017

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter concerns the appeal of Yhamile Rodriguez-Perez, from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case March 22, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

August 30, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 8/31/17

Date Mailed to Parties: 8/31/17

/nd

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is made and entered into by and between Yhamile Rodriguez-Perez (hereinafter referred to as "Employee"); the Communications Workers of America, A.F.L.-C.I.O., Local 1032 (hereinafter referred to as "Union"); and the State of New Jersey Judiciary, Monmouth Vicinage (hereinafter referred to as "Vicinage").

W I T N E S S E T H:

WHEREAS, the Employee was employed by the Vicinage in the capacity of a Judiciary Clerk 2-Bilingual assigned to the Vicinage's Civil Division; and

WHEREAS, during her employment with the Vicinage, the Employee was a member of a collective negotiations unit represented by the Union; and

WHEREAS, the Vicinage terminated the Employee's employment, effective February 8, 2017, at the conclusion of an unsuccessful, extended working test period; and

WHEREAS, the Employee appealed the termination to the Civil Service Commission of the State of New Jersey (hereinafter referred to as "CSC"), which has transmitted the appeal to the Office of Administrative Law of the State of New Jersey (hereinafter referred to as "OAL"), which has scheduled the matter for a settlement conference on August 29, 2017; and

WHEREAS, the parties to this Agreement desire to fully and finally settle all matters in dispute between them regarding the Employee's employment and release at the end of the extended working test period; and

WHEREAS, in consideration for the settlement of all claims that have, or could have, been raised by the Employee and/or the Union relating to the Employee's employment with the

Vicinage and her release at the end of the extended working test period, and for other good and valuable consideration, including the mutual promises and terms and conditions contained in this Agreement;

IT IS AGREED AS FOLLOWS:

1. The Vicinage will deem the Employee to have resigned from the above-referenced position, effective February 8, 2017. The Vicinage agrees that the Employee's records will reflect a general resignation, in accordance with N.J.A.C. 4A:2-6.3.

2. The Employee agrees not to seek or accept employment now or in the future, in any capacity, with the State of New Jersey Judiciary, including the Administrative Office of the Courts, all Vicinages and all municipal courts.

3. The Employee agrees to withdraw the pending appeal filed with the CSC, wherein she challenges the release from employment. The appeal, which is captioned Yhmaile Rodriguez-Perez v. Superior Court of N.J., Monmouth Vicinage, Agency Ref. No. 2017-2771; OAL Dkt. No. CSV 03975-2017S; is hereby withdrawn with prejudice.

4. The Employee and Union agree not to appeal any subject matter related to the Employee's employment by the Vicinage and the Employee's release from employment, in any other forum, including, but not limited to, a discipline, grievance or arbitration.

5. In the event that the Vicinage is contacted, in the future, by a prospective employer regarding the Employee, it will provide a neutral job reference consisting of the following information: (a) the Employee's dates of service in the

Vicinage; (b) her job title; (c) her salary history and (d) that she resigned. The Vicinage will not comment on the Employee's job performance.

6. In consideration of the promises made herein by the Vicinage, the Employee agrees to release and forever discharge all potential and existing claims arising out of her employment with the Vicinage and release at the end of the extended working test period, including, but not limited to, any alleged violation of the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, Section 1981 et seq. of Title 1974, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Occupational Safety and Health Act, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the Family and Medical Leave Act, the New Jersey Family Leave Act, the New Jersey Employer-Employee Relations Act, each of the foregoing as amended, and any and all other federal, State or local wage and hour laws, civil or human rights laws, or any other alleged violation of any local, State or federal law, regulation, or ordinance, and/or public policy, collective negotiations agreement, contract or tort or common law claim and/or any claim for attorneys' fees having any bearing whatsoever on this matter that the Employee now has or may have as of the date of this Agreement. The Employee acknowledges and agrees that this release extends to anyone who succeeds to her rights and responsibilities, including but not limited to, heirs, assignees or successors in interest, and that this release is given for the benefit of the State of New Jersey Judiciary, the Vicinage and such entities' employees, agents and representatives.

7. In consideration of the promises made herein by the Vicinage, the Union agrees to release and forever discharge all potential and existing claims arising out of the Employee's employment by the Vicinage and release from employment at the end of the extended working test period, including, but not limited to, any alleged violation of the New Jersey Employer-Employee Relations Act, or any other alleged violation of any local, State or federal law, regulation, ordinance and/or public policy, collective negotiations agreement, contract or tort or other common law claim and/or any claim for attorney's fees having any bearing on these matters, which the Union now has, or may have, as of the date of this Agreement.

8. The Employee acknowledges that she has carefully read and fully understands all of the provisions of this Agreement, and she was afforded the opportunity to review and discuss each provision with an attorney and/or Union representative.

9. To the extent that the Employee utilized the services of an attorney and/or Union representative, she acknowledges that she is satisfied with the advice and services provided by said individual(s).

10. The Employee acknowledges that she is voluntarily executing this Agreement.

11. The parties acknowledge and agree that each party shall be responsible for their own attorney's fees and costs, if any.

12. The construction, interpretation and performance of this Agreement shall be governed by the laws of the State of New Jersey.

13. This settlement shall not be considered binding or serve as precedent in any other matter, except as set forth herein.

14. This Agreement contains the entire agreement between the parties and fully

supersedes any and all prior agreements or understandings pertaining to the subject matter addressed in this Agreement. The parties represent and acknowledge that, in executing this Agreement, no one has relied upon any representation or statement not set forth herein with regard to the subject matter of this Agreement.

15. The parties acknowledge and agree that neither party is to be regarded as the prevailing party in the aforementioned proceeding. The parties further acknowledge and agree that nothing contained herein shall be construed in a court or agency of competent jurisdiction or in any other legal matter or proceeding to be an admission of liability or wrongdoing by either party, except as otherwise specifically provided herein.

16. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, but all of which together shall constitute one and the same instrument. Any signatory hereto may indicate acceptance of this Agreement with a facsimile signature, provided that an original signature is provided to all other parties thereafter.

17. If any term or condition of this Agreement shall be declared invalid or unenforceable, to any extent or in any application, by a court or agency of competent jurisdiction, then such term or condition shall automatically, and without any further action, be reformed so as to retain the fullest extent of any restriction therein permitted by law and the remainder of this Agreement, and such term or condition, except to such extent or in such application, shall not be affected thereby, and each and every term and condition of this Agreement shall

be valid and enforced to the fullest extent and in the broadest application permitted by law.

18. The parties understand and agree that this Agreement is subject to, and shall take effect upon, its approval by the OAL and the CSC. Both parties agree to waive the right to file exceptions and cross-exceptions in the above-referenced appeal.

Yhamile Rodriguez-Perez, Employee

Dated: August 29, 2017

Sandra L. McGraw, Sr. Staff Rep.
Union

Dated: August 29, 2017

Terry Mapson-Steed, H.R. Div. Mgr.,
Monmouth Vicinage

Dated: August 29, 2017

Thomas Russo, Esq.
Staff Attorney,
Administrative Office of the Courts
Attorney for Employer

Dated: August 29, 2017

9-20-17

STATE OF NEW JERSEY

In the Matter of Shirley Savage Ancora Psychiatric Hosptial, Department of Human Services	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NOS. 2013-2273 & 2013-2274 OAL DKT. NOS. CSV 11496-13 & 11497-13 **(Consolidated)**	:	

ISSUED: September 21, 2017 BW

The appeal of Shirley Savage, Human Services Assistant, Ancora Psychiatric Hosptial, Department of Human Services, two removals effective January 22, 2013, on charges, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders, who rendered her initial decision on August 24, 2017. Exceptions were filed on behalf of the appellant, and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of September 20, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Shirley Savage.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

IN THE MATTER OF SHIRLEY SAVAGE, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

OAL DKT. NO. CSV 11496-13
AGENCY DKT. NO. 2013-2274

AND

IN THE MATTER OF SHIRLEY SAVAGE, DEPARTMENT OF HUMAN SERVICES, ANCORA PSYCHIATRIC HOSPITAL.

OAL DKT. NO. CSV 11497-13
AGENCY DKT. NO. 2013-2273

William B. Hildebrand, Esq., for appellant (Law Offices of William B. Hildebrand, LLC)

Peter Jenkins, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: March 1, 2017 Decided: August 24, 2017

BEFORE **LAURA SANDERS**, Acting Director & Chief ALJ:

STATEMENT OF THE FACTS

Appellant Shirley Savage appeals the action by Ancora Psychiatric Hospital, effective January 22, 2013, terminating her from her position as a human services assistant on grounds of insubordination, conduct unbecoming, and violation of policies related to allegations she left her work assignment without authorization in October 2012. A second set of termination charges alleges that she left her assignment early and uncompleted on January 11, 2013. Ms. Savage contends that on both occasions other staff members failed to act in accordance with the hospital's relief protocols, and that in both instances she sincerely believed she had been relieved of duty.

PROCEDURAL HISTORY

On January 17, 2013, Savage was served with a Preliminary Notice of Disciplinary Action. She requested a departmental hearing, which was held on June 24, 2013. On July 8, 2013, a Final Notice of Disciplinary Action sustaining the charges was issued. She timely appealed the action to the Civil Service Commission (CSC), which determined to transmit the contested case to the Office of Administrative Law (OAL), where it was filed on August 13, 2013, and docketed as CSV 11496-13. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A second PNDA related to the January 2013 allegations was served on January 17, 2013. Following a departmental hearing on June 5, 2013, a second FNDA removing her effective January 22, 2013, was issued. She again appealed the termination to the CSC, which transmitted the matter to the OAL. It was filed on August 13, 2013, and docketed as CSV 11497-13. Administrative Law Judge Patricia M. Kerins consolidated the matters by order dated December 19, 2013, and heard them on June 30, 2014, October 22, 2014, and September 1, 2015, and the record was left open to March 1, 2017, for closing statements. The record then closed. Following numerous extensions, an additional extension was granted to allow time to contact the parties pursuant to N.J.A.C. 1:1-14.13 to determine if the parties could settle or wished to relitigate the matter upon transfer to a new judge. The answer having been in the negative, the undersigned was assigned the case. An additional extension was granted to allow time to review the record, and write the initial decision.

FACTUAL DISCUSSION

The parties agree on some of the facts. Ancora Psychiatric Hospital is a facility of the New Jersey Department of Human Services that provides psychiatric, medical, and rehabilitation services to mentally ill patients. Patients who are at risk of harming themselves or others are sometimes placed on what is known as "one-to-one" monitoring, which involves continuous observation by a staff member placed from one to six feet away, depending on what the doctor has instructed. In such instances, the staff member is assigned solely to that one patient, and is expected to remain with that patient until another staff person relieves them of duty. They also are expected to periodically record their observations of the patient during the assignment. Ancora Psychiatric Hospital Nursing Policy and Procedure, Change of Shift, reviewed and revised July 10, 2012, includes in paragraph sixteen a statement that, "[S]taff working a double shift are relieved first." (R-2.) The initial disputed instance occurred on October 13, 2012, when Savage, who was completing a double shift, was assigned to one-to-one monitoring of a patient. The second contested incident happened on January 11, 2013. Beyond these limited facts, there is significant disagreement as to what exactly occurred on both evenings.

Respondent offered three witnesses to the October 13, 2012, incident. Remi Etokhana, who is a human services assistant, testified that she was working the 11:30-p.m.-to-7:30-a.m. shift on October 13, 2012. The charge nurse assigned Etokhana to relieve a staff member who had been monitoring a patient during the prior shift. Etokhana was not assigned to relieve Savage, but saw her sitting nearby with a patient to whom she was assigned. Although Etokhana said, "No I was not supposed to relieve you," (Tr. June 30, 2014, at 13) she saw Savage walk away from her patient. Etokhana proceeded to relieve the person she was assigned to replace, and did not see anyone come to relieve Savage. (Id. at 14.) A couple of seconds later, an aide named Patricia Greer appeared and took responsibility for Savage's patient. (Id. at 43.) Initially, Etokhana said nothing about an empty soda can sitting next to Savage's chair, but later said she did see one, and that soda is not permissible. (Id. at 43, 44.) Although she was aware that soda should not be there, because it was considered contraband, she

did not pick it up, because, in her view, the can was the responsibility of the staff member who had left it.

Patricia Greer testified that she had arrived for the third shift and was coming out of the break room when she saw Savage leave through the exit door of the ward. (Id. at 52.) This was around 11:40–11:45 p.m. That particular night, she had no special assignment, so her job was to relieve whichever staff member she reached first. When she arrived in the ward for her one-to-one assignment, she saw that a clipboard holding the monitoring sheet for the patient had been left in front of the patient, but no one was there. (Id. at 57.) Greer immediately got another staff member named James to stand there, then went to locate the charge nurse. (Id. at 58.) At the time, the patient who was supposed to be monitored was snoring loudly. (Id. at 96.) Greer said her understanding of the priority for staff working double shifts meant that they are the first relieved after patient census was done. (Id. at 99.)

Adetutu Ogunleye,[1] who at the time of the OAL hearing had been a charge nurse at Ancora for about four years, testified that she worked with Savage from 7 p.m. to about 11 to 11:30 p.m. on some days. She described Savage as "aggressive verbally," given to arguing about assignments or arguing with other staff members. (Tr. October 22, 2014, at 8.) At the shift change, the outgoing charge nurse generally told Ogunleye what patients or staff needed to be relieved first, and then "you approach the one-to-one if you are going to relieve a one-to-one." (Id. at 9.) Responsibility for a patient is actually transferred from one employee to another when the incoming staff person takes the keyboard from the outgoing staff member, and both sign off. (Id. at 10.) When the entire formal transfer process fails to occur, it is a "big risk to the patient's safety." (Id. at 25.) Ogunleye's practice is always to ask the outgoing charge nurse which staff members should be relieved first. (Id. at 31.)

On October 13, 2012, Ogunleye assigned Remi Etokhana to relieve a pool nurse that had been working sixteen hours. Shortly afterward, she heard Etokhana yelling to

[1] It is not clear whether Ms. Ogunleye's first name is Adecutu, as it says in the transcript of October 22, 2014, or Adetutu, as it is spelled on her statement of October 13, 2012. (R-8.) Given that various staff member referred to her as "Tutu," the t form has been utilized here.

her down the hall. When Ogunleye left the nurses' station and went to see why Etokhana was yelling, Etokhana said that Savage had just walked away from a one-to-one. (Id. at 11.) At that point, Ogunleye was able to reach Savage and ask that she please return because she had not been relieved, but "she looked at me and just ignored me and walked away." (Ibid.) Savage did mumble something, Ogunleye said, but she could not recall what it was. (Id. at 12.) Ogunleye checked on the one-to-one, then assigned another staff member, Patricia Greer, to watch him, returned to the nurses' station, and made a call to the nursing supervisor. She was certain that Savage had left the one-to-one patient alone, because when she arrived no one was watching him, and she had not yet assigned anyone to relieve Savage. (Id. at 13.)

Shirley Savage testified on her own behalf. She started employment at Ancora in November 2004 as a temporary employee, before becoming a full-time human services assistant. She said that sixteen-hour workers are supposed to be relieved first, both because they go into double-time payment after sixteen hours, and because they are generally expected to return to work eight hours later for their regular shifts. (Id. at 81.) She had previously experienced favoritism when it came to being relieved. "I never had a problem with anybody, . . . but soon as someone knows that I'm 16 hours, they'll go and relieve another staff because of favoritism . . . , that's my girl over there, that's my best friend over there, that's my cousin over there . . . ." (Id. at 82.) She said she filed complaints with the charge nurses about it, as well as complained to the supervisor, who told her to put it in writing. Once she had done so, she said, "all of them deliberately, intentionally started not relieving me on purpose . . . ." (Id. at 84.)

Savage said that Remi Etokhana "had this thing about linen," and would always go get linen first before relieving her. (The term "linen" here is used to describe a sheet or blanket.) In October 2012, Savage told Etokhana about the patient, who was sleeping, and that there was no other information to exchange. Savage said, "Here's the clipboard" and "See you later" to Etokhana, who came after her as she walked away, saying she was supposed to relieve the pool nurse (who had not been working sixteen hours). So Savage went to the supervisor's office, where the supervisor told her to go back and check. She did so, finding Patricia Greer sitting with the patient. (Id. at 92.) Savage said she knows full well that just walking away would endanger a patient's

life, which is why she would not have left had she not thought Etokhana was relieving her. "I never left the patient unattended, because I left staff sitting there." (Id. at 93.) She also asked, "why are we having a conversation about the patient if she's not going to relieve me?" (Id. at 110.) Savage then returned to the supervisor's office, to complain about Etokhana. She asked that the camera recording for that night in the corridor be downloaded, because she felt that the camera would support her story that Etokhana was right there with the patient, and was aware that she, not one of the nurses, had worked sixteen hours and should be relieved.[2] (Id. at 106.) At the point at which Savage walked away, Etokhana had told her she was not there to relieve Savage, she intended to relieve a nurse named Norayda. That nurse, who was located next to Savage, had not worked sixteen hours, and told Etokhana that Savage was first. (Id. at 146.) From Savage's viewpoint, Etokhana was standing next to the patient to whom Savage was assigned, Savage was entitled to be relieved, she had signed off in front of Etokhana, and Etokhana was now responsible for the patient. (Id. at 147.)

With regard to the January 11, 2013, incident, respondent offered testimony from four staff members, along with identification of a video. (R-33.) On that January night, Etokhana testified, when she started work, she was assigned to relieve a nurse named James, who was preparing to leave after working the second shift. When she approached Savage, the appellant said she had been a working double, and wanted to go home. (Tr. October 22, 2014, at 34.) Etokhana said she had cleaned up after Savage on some other occasions, so she asked Savage whether she was going to remove the used linen from her chair when she left. To this, Savage replied, "No, that [sheet] doesn't matter," so Etokhana refused to sign Savage out because, as far as she was concerned, Savage was supposed to clean up before she left and had not done so. (Tr. June 30, 2014, at 20 and 34.) Asked why she did not just put her fresh linen right over the top of the sheet Savage had been sitting upon, Etokhana said it was not hygienic enough. (Id. at 35.) Although Savage walked away, Etokhana said she already had signed out another staff member, James, so even though this left Savage's patient with no coverage, she could not sign Savage out. (Id. at 36.) She

[2] Counsel for respondent stated that the facility does not permanently save video. Rather, after thirty days it records over the old video. He said more than thirty days passed before the investigative process related to the first incident reached the point of seeking the video, which by then had been recorded over. (Tr. October 22, 2014, at 70.)

acknowledged that she could have signed Savage out instead of James, but chose not to do so because she did not want to sit on the sheet on which Savage had been seated. (Id. at 37–38.)

James Ronchetti had been a nurse at Ancora for nine years at the time of the June 30, 2014, hearing date. He recalled being assigned to a one-to-one on January 11, 2013, on second shift between 3:15 p.m. and 11:45 p.m. (Id. at 102, 103.) He testified that he saw the one employee come to relieve Savage, then refuse because of the blankets on the chair. "Ms. Savage refused to take the blankets and then just left." Ronchetti said he yelled out to her, saying, "They're not signing you off," but the appellant continued to walk out. (Id. at 104.) He said Ms. Savage's exit was improper because staff are not supposed to leave one-to-one assignments, especially those like her patient, who were there on suicide concerns, because such patients "can hurt themselves at any time." (Id. at 104.) Ronchetti did not recall seeing Savage drink from a soda can, nor did he recall seeing a soda can anywhere near Savage or the patient. (Id. at 110.)

Ronchetti said that when Remi Etokhana approached Savage, she had no clean linen with her. (Id. at 111.) To Ronchetti's knowledge, Etokhana could have removed Savage's linen. Instead, she relieved him, and just sat on his chair, which had no linen upon it. (Id. at 113.)

Adetutu Ogunleye, the charge nurse, also testified in relation to the January 2013 incident. She recalled hearing Patricia Greer calling that she was needed to assess a patient. When she arrived in the hallway, a one-to-one patient who was a suicide risk was there, unsupervised. (Tr. October 22, 2014, at 17.) She determined that Shirley Savage was assigned to watch the patient, although she was not present. Etokhana told her that Savage had walked away. The outgoing-shift nurse also told her that Savage was not watching the one-to-one when she made the rounds at 11:30 p.m. (Id. at 18.) Ogunleye said the relief procedure was to start with relieving temporary staff members first, followed by those who had been working sixteen hours. (Id. at 19.) On this date, on realizing the patient was without supervision, she assigned another staff member, then returned to the nurses' station and called the nursing supervisor, the

medical officer, and the psychiatrist on duty. Ogunleye acknowledged that she had no evidence of harm to the patient. (Id. at 39.)

Patricia Greer said that following a short in-service training, she arrived in the corridor off which the patients' bedrooms are located around 11:45 p.m. and saw an empty chair. On it was a clipboard and an empty can. (Tr. June 30, 2014, at 87.) She did not know where the can came from, and she saw no one monitoring the patient. (Ibid.) She removed the linen from the chair, placing it on the floor, and put the can in her case for disposal later. (Id. at 88.) Greer said that at some point she had received a memo directing staff not to put linen on the chairs. (Id. at 88–89.) A sign-in sheet from that night has a note she identified as hers stating that she signed off on the patient at 11:53, which she said means she took responsibility for him at that time. (Id. at 95.) On her arrival in the hallway, she saw Savage going out of the exit door in the hallway leading toward the supervisor's office. That particular corridor does not include either of the two hallways where patients are housed. (Id. at 64.) She did not speak to Savage at all. Rather, she notified Ogunleye. Greer also testified in relation to a video offered by respondent. (R-33.) The video, which carried a date of January 11, 2013, at a time identified as 11:42 through 11:43 p.m., shows Savage exiting through a rear door. It also shows Greer arriving at 11:44 p.m. Greer testified that when she signed in at twelve, which is shown on the official monitoring sheet (R-22, APH 40), no one was present. She would have received the prior sheet, APH 39 within R-22, which had Savage's name on it, at the time she was coming on. All of the time slots—11 p.m. through 11:45 p.m.—had information filled in.

Savage also testified about the January 2013 incident. On that particular evening, Remi Etokhana again was coming down that hall with linens, approaching a staff member named Oscar first, and then Jim. (Tr. October 22, 2014, at 111.) Savage asked why Etokhana "would deliberately not want to relieve me after [she] just left the nurses' station with . . . a report that says I'm 16 hours." (Id. at 112.) First, Etokhana put linen on the back of Oscar's chair, causing Oscar to point out that Savage had been working sixteen hours. Then, because Oscar is directing her, Etokhana approached Savage. The appellant recalled telling her, "The patient is fine, the patient is asleep. There is no incident. Here is the clipboard," because Etokhana's hands were full of

linens. With this, Savage said, she initialed the form, and signed off. "They said I had not signed off and left at 11:45. That never happened. They said I left the patient unattended. That never happened." (Ibid.) She added that while she and Etokhana were standing there, Jim told her, "Shirley, she doesn't want to relieve you because of linen." (Ibid.) She also recalled him saying, "Shirley, just help her out by removing the linen. That's all she wants you to do." (Tr. October 22, 2014, at 153.) Savage contended that the relief procedure had nothing to do with linen, and that by allowing Etokhana to relieve him instead of her, Jim was violating the procedure mandating that sixteen-hour employees had priority for relief. (Id. at 113.)

Savage said she again asked for the camera record to be pulled because she was tired of being accused of doing something she had not. However, she said the video offered by the respondent could not actually be the one from that date because it shows her and Jim coming from the break room, which is not in the area of the dorms where the incident occurred. Rather, she and the patient were stationed across from Oscar, as was Jim. (Id. at 116.) Having re-reviewed it with another staff member on August 31, 2015, Savage amplified the reasons she did not believe the tape to be accurate. Both she and Jim had patients that night, and the tape shows them coming from an area in which it is not possible for both to have been watching patients, in part because one side has a fire door and the day room. (Tr. September 1, 2015, at 11.) Further, she and Jim were sitting across the hall from Oscar, who is shown sitting alone on the tape. (Id. at 13.) Savage also says one of the patients on the tape was not present at the facility in 2013; he was there in 2012. (Tr. October 22, 2014, at 117.) As regards to Savage drinking soda, Savage said that she did not have any, and that earlier in the evening another staff member had been drinking soda, but it was nowhere near where the can was supposed to have been located by her chair. (Id. at 120–21.)

Edmund Dillon, section chief at Ancora Hospital for twenty-nine years, was working in the office of employee relations at the time of both incidents. He explained that at shift change, staff members who are not on one-to-one assignments meet at the nurses' station to discuss what happened in the shift leaving and what might be expected during the coming shift. (Id. at 49.) If a staff person is assigned to relieve someone doing a one-to-one, that person goes to the patient and employee, briefly asks

about what he or she should know, then takes a clipboard and signs off the outgoing person. "The person who is now going home signs the final time," and the incoming person signs the bottom of the sheet showing they've taken on that responsibility, and then the other person leaves. (Id. at 49, 50.) Dillon explained that the reason staff members cannot leave a one-to-one is that a patient left unattended could do anything. In one instance, an aggressive patient was left unguarded, and an employee was stabbed as a result. (Id. at 50.) He said that under the shift-change policy, outgoing staff will advise the incoming staff as to who has worked a double shift, because they should be relieved first. (Id. at 62.)

As the parties offer divergent views of what occurred during the two evenings, the determination of factual findings requires a weighing of the credibility of the witnesses, i.e., an overall assessment of the story of a witness "in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence." Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (citation omitted), certif. denied, 10 N.J. 316 (1952).

Adetutu Ogunleye, the charge nurse, testified credibly that on the disputed October 13, 2012, night, she assigned Remi Etokhana to relieve a pool nurse that had been working sixteen hours. As it happened, Ogunleye was in error regarding the pool nurse, who I **FIND** was at that point starting the first portion of a two-shift night. So, Savage was correct in asserting that under the shift relief policy, she was the person who should have been relieved. The testimony from various parties made clear that there was some fluidity in the assignments, as staff members often took responsibility for the first person they saw. I **FIND** that Etokhana told Savage she was not assigned to relieve her, but Savage forced the issue by leaving anyway. I **FIND** that when Savage was told to go back and check the patient, she did so, and that by the time of her arrival, Greer had assumed responsibility for the patient.

With regard to January 11, 2013, I **FIND** that the fluidity in assignments was even more in play. Etokhana testified credibly both that she had been assigned to relieve Jim, and that she had a conversation with Savage about relieving her instead, due to the fact that Savage had worked sixteen hours. The various comments regarding whether linen did or did not belong on chairs and who was supposed to do what in relation to it remains somewhat confused, except for the obvious fact that some staff members attached more significance to it than others did. Jim Ronchetti testified credibly that Etokhana gave the impression that she would have relieved Savage if Savage had pulled the cover off the chair, but Savage instead left. This harmonizes with Savage's recollection that she recalled him telling her, "Shirley, just help her out by removing the linen. That's all she wants you to do." I **FIND** that Savage left, that Etokhana did not relieve her, and that no one was assigned to the patient when Greer arrived. I also find credible Ronchetti's testimony that he yelled after Savage that no one had relieved her.

The facility also charged Savage with neglect of duty in relation to signing a sheet up to 11:45 p.m. when she left at 11:40 p.m. As the time on the video (11:43) speaks for itself, the notation made beside the 11:45 time slot on the monitoring schedule must have been made earlier. Therefore, I **FIND** that the entry was not accurate.

LEGAL ANALYSIS AND CONCLUSION

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

Here, the appellant is charged with conduct unbecoming and other sufficient cause, namely, violating various administrative policies and orders. Conduct

unbecoming is a term that encompasses actions adversely affecting the morale or efficiency of a governmental unit or having a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). While Savage's frustration with not getting relieved promptly after sixteen hours of work is understandable, it does not negate her duty to ensure that patients who are a threat to their own safety and to others are being watched in accordance with a physician's orders. The time to take the error up with higher level staff was after Savage had been relieved. In October 2012, Remi Etokhana had been directed to relieve someone else. While the fluidity suggested that Etokhana did have some latitude to relieve Savage first, Savage walked away without confirming that this had occurred. There is some truth in Savage's argument that Etokhana is the one that opened the possibility of harm coming to the patient by deciding to go ahead and relieve the other nurse, thereby creating the gap in coverage. But two failures do not create a positive result. Therefore, I **CONCLUDE** that Savage violated the policy against leaving a one-on-one patient before another has signed onto the responsibility for that patient, and that in doing so she also exhibited conduct unbecoming by opening the patient and others to a risk of harm.

The January 2013 incident is worse because not one but two people—Etokhana and James Ronchetti—told Savage she had not been relieved. Further, even if Etokhana's linen-removal demand was unreasonable (which is not clear), it involved a minor effort that would not have significantly delayed Savage's departure. For whatever reason, Savage again placed her right to first relief above the patients' and other staff members' rights to a safe environment. Thus, I **CONCLUDE** that this action also amounted to conduct unbecoming and other sufficient cause in the form of violating facility-safety policies.

The facility also charged her with neglect of duty in relation to signing a sheet up to 11:45 p.m. when she left at 11:40 p.m. Since she left before 11:45 p.m., the entry was not accurate, and this action also amounted to conduct unbecoming.

The remaining issue is penalty. In her ten-year history at Ancora Psychiatric Hospital, Savage has received a three-day suspension in May 2008, a five-day suspension in April 2009, a reprimand in September 2010, a thirty-day suspension in 2010, and a five-day suspension in July 2012. The general rule for civil service cases is progressive discipline. W. New York v. Bock, 38 N.J. 500 (1962). Typically, the Civil Service Commission considers numerous factors, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Nonetheless, progressive discipline is not a fixed and immutable rule to be followed without question. Carter v. Bordentown, 191 N.J. 474, 484 (2007). Some infractions are serious enough on their own to warrant termination. In re Herrmann, 192 N.J. 19, 33 (2007).

In Herrmann, our Supreme Court affirmed the removal of a worker from the Division of Youth and Family Services (now known as the Division of Child Protection and Permanency) who had waved a lit lighter in front of a child's face while asking about how the child set a fire. The Court noted the Division's need to rely on the demonstrated good judgment of its workers to protect the integrity of its system. Here, although Savage was correct in believing that the facility's policy prescribed relieving people who had worked sixteen hours first, her elevation of that right above the safety of the patients and staff marked a very serious lapse in judgment. For that reason, I **CONCLUDE** that termination is the appropriate penalty.

ORDER

The appointing authority's action terminating appellant is hereby **AFFIRMED** and her appeal **DISMISSED** with **PREJUDICE**.

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, P.O. 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.

August 24, 2017
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: August 24, 2017

Date Mailed to Parties: August 24, 2017

/caa

WITNESSES

For Appellant:

Shirley Savage

For Respondent:

Edmund Dillon
Remi Etokhana
Patricia Greer
Adetutu Ogunleye
James Ronchetti

EXHIBITS

Joint Exhibits

J-1 Stipulated documents showing disciplinary history of Shirley Savage

For Appellant, Shirley Savage

P-1 Employee Statement Form, signed by Shirley Savage, dated September 18, 2012; Employee Statement Form, signed by Shirley Savage, dated September 20, 2012; and Employee Statement Form, signed by Shirley Savage, dated September 26, 2012

P-2 Employee Statement Form signed by Shirley Savage, dated October 13, 2012

P-3 Employee Statement Form, signed by Shirley Savage, dated January 11, 2013

For Respondent, Department of Human Services, Ancora Psychiatric Hospital

R-1 Final Notice of Disciplinary Action dated July 8, 2013

R-2 Ancora Psychiatric Hospital Nursing Policy and Procedure, Change of Shift, reviewed and revised July 10, 2012

R-3 Ancora Psychiatric Hospital Executive Policy and Procedure Manual, Special Observation, approved February 18, 2011

R-4 Ancora Psychiatric Hospital Nursing Policy and Procedure, Special Observation Monitoring, revised and reviewed May 21, 2012

R-5 Ancora Psychiatric Hospital Confidential Unusual Incident Report Form, dated October 13, 2012

R-6 Ancora Psychiatric Hospital Employee Statement Form, signed by Remi Etokhana, dated October 14, 2012

R-7 No exhibit

R-8 Ancora Psychiatric Hospital Employee Statement Form signed October 14, 2012, by Adetutu Ogunleye

R-9 Special Observation Monitoring log dated October 13, 2012

R-10 Special Observation Monitoring log dated October 14, 2012

R-11 No exhibit

R-12 No exhibit

R-13 No exhibit

R-14 Third-shift sign-in sheet for October 14, 2012

R-15 No exhibit

R-16 No exhibit

R-17 No exhibit

R-18 Final Notice of Disciplinary Action dated July 23, 2013

R-19 No exhibit

R-20 No exhibit

R-21 No exhibit

R-22 Sign-in sheets for January 11, 2013

R-23 No exhibit

R-24 Employee Statement Form signed by James Ronchetti, dated January 12, 2013

R-25 Employee Statement Form signed by Remi Etokhana, dated January 11, 2013

R-26 Employee Statement Form signed by Adetutu Ogunleye, dated January 12, 2013

R-27 Employee Statement Form signed by Patricia Greer, dated January 11, 2013

R-28 Confidential Unusual Incident Report Form dated January 11, 2013

R-29 No exhibit

R-30 No exhibit

R-31 No exhibit

R-32 Employee Disciplinary History for Shirley Savage

R-33 Surveillance video of January 11, 2013

9-20-17

STATE OF NEW JERSEY

In the Matter of Mattie Thomas, New Jersey Veterans Memorial Home Vineland, Department of Military and Veterans Affairs

CSC DKT. NO. 2016-3524
OAL DKT. NO. CSV 05863-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05863-16

AGENCY DKT. NO. 2016-3524

IN THE MATTER OF MATTIE THOMAS, NEW JERSEY VETERANS MEMORIAL HOME VINELAND, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS.

William A. Nash, Esq., for appellant, Mattie Thomas (Nash Law Firm, LLC, attorneys)

Rimma Razhba, Deputy Attorney General, for respondent, South Woods State Prison (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 16, 2017 Decided: August 21, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on April 15, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

8-21-17
DATE

JEFFREY WILSON, ALJ

Date Received at Agency: 8/24/17

Date Mailed to Parties: 8/24/17

/dm

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law and placed on the record on August 16, 2017

OAL DKT. NO. CSV 05863-2016S
AGENCY DKT. NO. 2016-3524

IN THE MATTER OF
MATTIE THOMAS

AND

DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, NEW JERSEY VETERANS MEMORIAL HOME, VINELAND

SETTLEMENT AND LAST CHANCE AGREEMENT

J-1

The parties in this appeal, Appellant Mattie Thomas ("Appellant") and Respondent Department of Military and Veterans Affairs, New Jersey Veterans Memorial Home, Vineland ("Respondent") have voluntarily resolved all disputed matters and enter into the following Settlement and Last Chance Agreement ("Agreement"), which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated **March 22, 2016** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C.4A:2-2.3(a)6 – Conduct unbecoming a public employee – Removal effective 2/24/16.
2. N.J.A.C.4A:2-2.3(a)7 – Neglect of duty – Removal effective 2/24/16.
3. N.J.A.C.4A:2-2.3(a)11 – Other sufficient cause – Removal effective 2/24/16.
4. B-2 – Neglect of duty, loafing, idleness, or willful failure to devote attention to tasks which could result in a danger to persons or property – Removal effective 2/24/16.
5. C-8 – Falsification – Removal effective 2/24/16.

6. C-20 – Discourtesy to public, visitors, patients, residents or clients – Removal effective 2/24/16.
7. D-7 – Violation of administrative procedure and/or regulations involving safety and security – Removal effective 2/24/16.
8. E-1 – Violation of a rule, regulation, policy, procedure, order, or administrative decision – Removal effective 2/24/16.

B. The parties have agreed to the following:

1. Appellant shall be reinstated to the position of Certified Nurse's Aide ("CNA") at New Jersey Veterans Memorial Home at Vineland.
2. The Final Notice of Disciplinary Action dated March 22, 2016 shall be modified as follows: six (6) months consecutive suspension without pay (time already served).
3. Appellant waives any and all claims for back-pay or attorney's fees from Respondent.
4. Any other days from the time of the last suspension day until reinstatement shall be recorded as Approved Leave of Absence Without Pay.
5. This settlement constitutes a final warning and last chance agreement arising from Appellant's conduct in this matter. Appellant shall be subject to discharge and/or removal by Respondent for any future conduct that results in violation of <u>any</u> of the regulations, policies or procedures cited in Paragraph A of this Agreement, including any violations of Respondent's policies regarding resident abuse and neglect.
6. Upon the parties' signing of this Agreement, and only after the Civil Service Commission approves this Agreement, Respondent shall begin procedures for reinstatement of Appellant.
7. After her reinstatement, Appellant shall be re-trained with regard to her job duties and responsibilities and applicable Departmental policies and procedures, including training on resident abuse and neglect.

8. After her reinstatement, Appellant's performance shall be monitored for a period of two (2) weeks in accordance with the New Jersey Veterans Memorial Home at Vineland's Resident Safety Policy and Procedures.
9. The parties acknowledge that there is a pending New Jersey Department of Health investigation of Appellant with regard to the incidents dated February 12, 2016. The parties agree that, if after the conclusion of the Department of Health investigation, the Department of Health revokes Appellant's nurse's aide license, Appellant shall be immediately discharged from her employment as a Certified Nurse's Aide with Respondent.

C. Appellant agrees to withdraw her appeal and request for a hearing.

D. The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

E. Respondent shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

F. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

G. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed

to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

H. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, Department of Military and Veterans Affairs, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of this Agreement shall be fully enforceable.

J. The parties waive the right to file exceptions and cross exceptions.

K. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/16/17
DATE

Matthew Thomas

8/16/17
DATE

Susan C. Sweeney
ON BEHALF OF NJ Department of Military + Veterans Affairs - Admin. Det.

8/16/17
DATE

ON BEHALF OF Appellant William A. Nash, Esq.

8/16/17
Date

Rumin Rawan, DAG
on behalf of Respondent

CERTIFICATION

I, Mattie Thomas, being the moving party in this matter, hereby certify that I have reviewed this Settlement and Last Chance Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement and Last Chance Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement and Last Chance Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement and Last Chance Agreement voluntarily.

I also understand that if this Settlement and Last Chance Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/16/17 Mattie Thomas.

DATE

9-20-17

STATE OF NEW JERSEY

In the Matter of Latoya Young, City of Newark, Police Department

CSC DKT. NO. 2016-1541
OAL DKT. NO. CSV 19738-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 19738-15
AGENCY DKT. NO. 2016-1541

IN THE MATTER LATOYA YOUNG,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Esq., for appellant, (Fusco & Macaluso, LLC, attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent, (Kenyatta K. Stewart, Acting Corporation Counsel for the City of Newark)

Record Closed: August 22, 2017 Decided: August 28, 2017

BEFORE **EVELYN J. MAROSE**, ALJ:

On November 30, 2015, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. After numerous telephone settlement conferences, a settlement was agreed upon by the parties. A Settlement Agreement indicating the terms of settlement was signed by the parties and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** my initial decision settlement 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.

8/28/17
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: 8-31-17

Date Mailed to Parties: AUG 31 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

LEG 13 x LIA 3-4

OAL DOCKET NO. CVS 19738-2015N

LATOYA YOUNG,	:	**STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
v.	:	**OAL DOCKET NO. CVS 19738-2015N**
CITY OF NEWARK,	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Latoya Young ("Young" or "Appellant"), Newark Fraternal Order of Police, Lodge 12 ("Union") and the City of Newark ("City "or "Respondent") (collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Young by the City. This Agreement is made and entered into by the Parties in full settlement of Young's appeal regarding the above matter.

On September 8, 2015, the Newark Department of Public Safety, Police Division ("Department of Public Safety") brought departmental disciplinary charges against Young in the form of a Preliminary Notice of Disciplinary Action ("PNDA") stemming from her actions on August 26, 2015 in handling a prisoner. Young pled not guilty, waiving her opportunity for a Hearing before the Trial Board. On September 15, 2015, Final Notice of Disciplinary Action and Specifications (hereinafter referred to as "FNDA") were issued with the following charges: Safekeeping of Prisoners, in violation of Newark Police Department Rules and Regulations Chapter 18:20; Neglect of Duty (2 counts), in violation of Newark Police Department Rules and Regulations Chapters 18:6; New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3(a). A copy of the September 15, 2015 FNDA is attached herein as Exhibit A. Based on these charges, the Department of Public Safety suspended Young for seven (7) days beginning August 31, 2015 to September 7, 2015 pursuant N.J.A.C. 4A:2-2.4 (e).

OAL DOCKET NO. CVS 19738-2015N

After further negotiations, the Parties have agreed to resolve this matter as follows:

1. The charges listed in the FNDA are upheld.
2. Young's suspension is reduced from seven (7) to five (5) days. The City will amend her FNDA to reflect a five (5) day suspension.
3. The City will pay Young two (2) days and make the appropriate adjustments to her pension and seniority.
4. Young waives any and all right or claim which she has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
5. Young and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
6. Young and the Union each further agree that there is no consideration due Young, her counsel and/or Union, including, but not limited to, any claim for additional back pay and/or counsel fees, arising from her employment and/or the execution of this Agreement, except as otherwise provided herein.
7. Except for the assessment of Young's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Party.
8. Young and the Union acknowledge that this Agreement precludes them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.
9. Young is bound by this Agreement. Anyone who succeeds to Young's rights and responsibilities, such as heirs or the executor of her estate, shall also be bound.
10. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees or the Union.

11. Young and the Union each agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
12. This Agreement contains the sole and entire agreement between Young, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Young specifically represents and acknowledges that in executing this Agreement, she has not relied upon any representations, with regard to the subject matter in this Agreement, which are not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
13. Young agrees and acknowledges that she has been fully and fairly represented by her Union and counsel in this matter, and she is satisfied with that representation and with the terms and conditions of this Agreement.
14. Young agrees and acknowledges that she has had a full opportunity to review this Agreement with her counsel and/or union representative and she enters into this Agreement knowingly and voluntarily.
15. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
16. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION.** Any disapproval by the Civil Service Commission shall not interfere with the rights of either Party to pursue the matter further.
17. By signing this Settlement Agreement, Young states that:

a) She has read it;

b) She understands it and knows that she is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;

OAL DOCKET NO. CVS 19738-2015N

c) She agrees with everything in it;

d) Her representative negotiated this Agreement with her knowledge and consent;

e) She has been advised to consult with her attorney prior to executing this Agreement, and has in fact done so;

f) She has been given at least twenty-one (21) days within which to review and consider this Agreement, although she may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) She understands that for a period of seven (7) days following the execution of this Agreement, she may revoke this Agreement; the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) She has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

8/9/17
Date

BY: _____
City of Newark
Department of Public Safety, Police
Division

8/14/17
Date

BY: _____
Union Representative/Attorney

8/14/17
Date

Latoya Young
Latoya Young

Approved as to Form and Legality:

8/14/17
Date

Joyce Clayborne, Asst. Corp. Counsel
City of Newark Law Department

OAL DOCKET NO. CVS 19738-2015N

CERTIFICATION

I, Latoya Young, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement and General Release by signing below. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement and General Release voluntarily.

I also understand that if this Settlement Agreement and General Release are approved by the **CIVIL SERVICE COMMISSION**, then my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/14/17
DATE

Latoya Young
Latoya Young

EXHIBIT A

CIL #. 16-00039

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five working days less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or certified or registered mail.

FROM:	Employing Agency Name Newark Police Department – Second Precinct	Address/Phone Number 920 Broad Street, Nwk 973-733-6147	Date 09/15/15
	Attorney representing your agency should this matter be appealed Corporation Counsel-Law Department	Address/Phone number/Email address 920 Broad Street/973-733-3880/parkerw@ci.newark.nj.us	
TO	Employee Name Latoya Young	Permanent Civil Service Title Police Officer	Social Security Number 154 74 2075
	Address/Phone Number 94 Prince Street, Newark, New Jersey 07103 973-991-2447		

On 09/08/15 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ You requested a hearing which was held on September 15, 2015 CAP 2015-108 IOP 2015-440

☐ You did not request a hearing.

☐ - You requested a hearing and did not appear at the designated time and place.

Sustained Charges:	Incident(s) giving rise to the charge(s) and the date(s) on whic
Plea: Not Guilty- PO Young waived her opportunity for Hearing before Trial Board. Her Attorney, Mr. Fusco advised the Trial Board of Young's intension to file an Appeal from the discipline with the NJ Civil Service Commission (Office of Administrative Law).	it/they occurred:
☐ Disposition: Guilty If checked, charges are continued on attached page	☐ If checked, specifications are continued on attached page

The following disciplinary action has been taken against you:

☑ Suspension for 7 days, beginning Time served under indefinite suspension. and ending

☐ Indefinite suspension pending criminal charges effective (date)

☐ Removal, effective (date)

☐ Demotion to position of effective (date)

☐ Resignation not in good standing, effective (date)

☐ Fine $ (Amount) which is equal to (Number) days pay ☐ other disciplinary action:

Appointing authority or authorized agent's signature and title.

SIGNATURE Eugene Venable TITLE POLICE DIRECTOR

This form must be personally served on the employee or sent by certified or registered mail.

☑ Certified or Registered Mail ☑ Receipt Number 7015 1520 0003 5444 3857

☑ Signature of Server ☑ Date of Personal Service 10/2/15

APPEAL PROCEDURE TO THE EMPLOYEE: You have a right to appeal Within 20 Days From Receipt of this form. All appeals must include a copy of this form and must be sent to the Civil Service Commission, 44 S. Clinton Avenue, PO Box 312, Trenton, NJ 08625-0312. Your appeal cannot be processe until a copy of this form is received. DO NOT GIVE YOUR APPEAL TO YOUR PERSONNEL OFFICE FOR FORWARDING TO THE CIVIL SERVICE COMMISSION. ANY APPEAL POSTMARKED AFTER THE 20 DAY STATUTORY TIME LIMIT WILL BE DENIED. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at WWW.state.nj us/csc.

DPF-31 B / Revised 07-09-09 Distribution: Employee, Union Representative or Attorney, Management, Civil Service Commission.

POLICE DEPARTMENT

Newark, N. J., August 26, 2014

To the Honorable, the Police Director,

Sir:

I Hereby Charge **POLICE OFFICERS CAREEM YARBOROUGH AND LATOYA YOUNG, SECOND PRECINCT, OFFICE OF THE CHIEF OF POLICE**

CAP 2015-108 **IOP 2015-440**

CHARGES MAY BE ADDED OR AMENDED AT A LATER DATE

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 18:20 – SAFEKEEPING OF PRISONERS – Police Officers shall be responsible for maintaining the safekeeping of any prisoner and preventing his escape. Police Officers shall be responsible for maintaining the safe custody of any prisoner during such time as the prisoner is in their personal charge, whether such prisoner is confined to a cell, hospital room, detention room, court room or building, or whether such person is in transit. The escape of a prisoner from a police officer shall be considered prima facie evidence of gross neglect of duty.

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 18:6 – NEGLECT OF DUTY – Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IIB: Violation of Civil Service Rule: 4A:2-2.3{a} 7.
An employee may be subject to discipline for:
7. Neglect of duty;

SPECIFICATION: On August 26, 2015, at approximately 5:15 a.m., at 150 Bergen Street, Newark, New Jersey, University Hospital, Police Officers Careem Yarborough and Latoya Young, did neglect their duty when they failed to diligently carry out all of the duties, responsibilities and functions of their position and/or employment, in that being responsible for maintaining the safekeeping and custody of a male prisoner, to wit: Michael Majette, who was in their personal charge, did fail to maintain the safe custody of said prisoner and did thereby also neglect their duty when the prisoner managed to escape custody.

CHARGE III: Violation of Newark Police Department Rules and Regulations, Chapter 18:6 – NEGLECT OF DUTY – Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IIIB: Violation of Civil Service Rule: 4A:2-2.3{a} 7.
An employee may be subject to discipline for:
7. Neglect of duty;

POLICE DEPARTMENT

Newark, N. J., August 26, 2014

To the Honorable, the Police Director,

Sir:

I Hereby Charge **POLICE OFFICERS CAREEM YARBOROUGH AND LATOYA YOUNG, SECOND PRECINCT, OFFICE OF THE CHIEF OF POLICE**

CAP 2015-108 **IOP 2015-440**

SPECIFICATION: **On August 26, 2015, at approximately 5:15 a.m., at 150 Bergen Street, Newark, New Jersey, University Hospital, Police Officers Careem Yarborough and Latoya Young, did neglect their duty when they failed to notify Communications that the prisoner: Michael Majette managed to escape custody. Instead Communications Supervisors heard a broadcast via radio on the State Police Emergency Network from Rutgers Police that a prisoner had escaped Newark Police.**

EUGENE VENABLE
POLICE DIRECTOR

9-20-17

STATE OF NEW JERSEY

In the Matter of Victor Zamora, City of Newark, Department of Neighborhood and Recreational Services

CSC DKT. NO. 2017-1813
OAL DKT. NO. CSV 01465-2017

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: SEPTEMBER 20, 2017 JM

The Civil Service Commission, at its meeting of September 20, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
SEPTEMBER 20, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 01465-2017

AGENCY REF. NO. 2017-1813

IN THE MATTER OF VICTOR ZAMORA, CITY OF NEWARK, NEIGHBORHOOD & RECREATIONAL SERVICES,

---

Lynsey Stehling, Esq., for appellant (Law Offices of Daniel J. Zirrith, LLC)

France Casseus, Esq., for respondent (Willie Parker, Corporation Counsel)

Record Closed: August 18, 2017 Decided: August 23, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on January 31, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted wherein the parties agree on a hearing date. The matter was scheduled for hearings on September 21, 2017. Prior to that date, the parties resolved all issues in dispute and submitted the fully executed settlement agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

8-23-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

8-25-17
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: AUG 25 2017
ljb

VICTOR ZAMORA, Appellant, -v- CITY OF NEWARK, Respondent,	:	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 01465-2017** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is made and entered into between Victor Zamora ("Zamora" or "Appellant"), Newark Council 21 ("Union") and the City of Newark ("City" or "Respondent") (Zamora, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from Zamora's removal from the City's Department of Neighborhood and Recreational Services ("NRS") on or about September 30, 2016.

In consideration of the promises contained herein, the parties have agreed to resolve all issues and herein referenced as follows:

1. Zamora hereby retires and resigns from his position with the City effective February 28, 2017. The City agrees Zamora's records will reflect a retirement effective date of March 1, 2017. Zamora's records will also reflect an approved leave of absence without pay from January 1, 2017 through February 28, 2017.
2. Zamora is entitled to all contractual and City benefits stemming from retirement, including but not limited to payments for accrued vacation leave and sick leave.
3. Zamora agrees he will receive payment of fourteen (14) vacation days. He also agrees pursuant to City policy and contractual agreement

between the Union and the City, he is not entitled to any payment for accrued sick leave.

4. In consideration for the Settlement and General Release and other undertakings contained herein, the City agrees to pay to Zamora, as full and complete settlement and final satisfaction of all of Zamora's claims, Zamora's salary at the time that he was removed from NRS on or about September 30, 2016 through December 31, 2016.

5. The City will make its best efforts to ensure any payment that is due pursuant to this Agreement is made within forty-five (45) days from the date of signature from all parties.

6. In consideration of Zamora's retirement and resignation, the City shall withdraw the disciplinary charges and reverse Zamora's removal from the City's NRS on or about September 30, 2016.

7. In consideration for the payment, Zamora agrees to release and give up any and all claims and rights which he may have against the City, including those of which he is not aware and those not mentioned in this release.

8. Zamora agrees to release any and all claims of any type, nature or description, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the releasor now has or which may hereinafter accrue on account of or in any way arising out of any and all known and unknown, foreseen and unforeseen damages which allegedly occurred beginning on or about October 18, 2016 and which is the subject matter of the appeal filed in the Office of Administrative Law, Docket No. CSV 01465-2017.

9. Zamora further waives any and all rights and/or claims which he has and/or may have to: 1) A hearing on the merits of the removal and/or this Agreement; 2) To challenge the removal and/or this Agreement; 3) Initiate and/or partake in Grievance procedures; and/or 4) Initiate, pursue and/or partake in any and all litigation against the City in State, Federal and/or Administrative Courts.

10. Zamora and the Union each further agree that there is no consideration due Zamora, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

11. Zamora and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

12. Zamora and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to this disciplinary action, , except to the extent necessary to enforce the terms of this Agreement, or as required by law.

13. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Zamora's estate, and purchasers and/or assignees of Zamora's, the City's and/or the Union's interests shall also be bound.

14. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

15. Zamora and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

16. Zamora and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

17. This Agreement contains the sole and entire agreement between Zamora, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Zamora specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in

writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

18. Zamora agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

19. Zamora agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

20. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

21. By signing this Settlement Agreement, Zamora states that:

    a. He has read it;

    b. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of

the United States, the State of New Jersey, or any other State;

c. He accepts everything contained in this Agreement;
d. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;
e. He consulted with his Attorney prior to executing this Agreement;
f. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

8/15/17
Date

BY: _____
Patrick Council, Director
Neighborhood and Recreational Services

8/15/2017
Date

BY: _____
Victor Zamora

8/15/17
Date

_____
Lynsey A. Stehling, Esq.
Attorney for Victor Zamora

Approved as to Form and Legality:

8/15/17

Date

France Casseus, Esq.
Law Department, City of Newark

CERTIFICATION

I, Victor Zamora, hereby certify that I have reviewed this Settlement Agreement and General Release. I fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/15/2017

DATE

Victor Zamora

9-28-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

October 18, 2017

Timothy Rudolph
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *William Green v. Woodbine Developmental Center, Department of Human Services* (CSC Docket Nos. 2018-97; 2018-98; 2018-99 and OAL Docket Nos. CSV 10785-17; 10787-17and 10790-17) - **SETTLEMENTS**

Dear Mr. Rudolph and Ms. Pinkas:

The appeals of William Green, a Motor Vehicle Operator 1 at Woodbine Developmental Center, Department of Human Services, of his 10 working day, 20 working day and 20 working day suspensions, on charges, were before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decisions on October 4, 2017 indicating that the parties had reached settlements.

The Civil Service Commission (Commission) received these matters on October 5, 2017. Accordingly, the time frame for the Commission to make its final decisions expires on November 19, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide these matters by that date, it would normally secure initial 45-day extensions of time to render its final decisions. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on these particular matters, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, these matters ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that these matters were settled by the parties and a review of the settlements by staff indicate that they are in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in these matters. Thus, the Commission has determined not to

seek any extensions on these matters and, per *N.J.S.A.* 52:14B-10(c), they are to be considered deemed adopted, effective November 20, 2017.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachments

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10785-17

AGENCY DKT. NO. 2018-97

IN THE MATTER OF WILLIAM GREEN,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Timothy Rudolph, President, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 28, 2017 Decided: October 4, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of William Green from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 31, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 4, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 10/5/17

Date Mailed to Parties: 10/5/17

/vj

OAL DKT. NO. CSV 10785-2017
18787-2017
18790-2017
AGENCY DKT. NO. 20 – 2018-97
2018-99
SETTLEMENT AGREEMENT 2018-98

IN THE MATTER OF

William Green

AND

WOODBINE DEVELOPMENTAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/22/2017 (att 3) contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	C.9.1	10 days suspension	Not Yet Served
2.	C.7.1 + C.25.1	20 days suspension	Not yet Served
3.	E.1.2	20 days suspension	Not yet served
4.			
5.			

B. The Appellant William Green withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	C.9.1	Sustained	Official Reprimand →
2.	C.7.1 + C.25.1	Sustained	5 days suspension
3.	E.1.2	Sustained	5 days suspension

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None. Appellant shall be scheduled to serve 10 days suspension.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of William Green 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall be referred and scheduled to attend Employee Advisory Servd and is required to follow all recommendations.

J. Appellant understands he must conduct himself at all times in a professional and respectful manner. Any concerns he may have should be directed to his supervisor or through the proper chain of command.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-28-17
DATE

Appellant

9/28/17
DATE

Respondent

9/28/17
DATE

Steve Pinto
ON BEHALF OF LOCAL 195

9/28/17
DATE

ERC
ON BEHALF OF
WOODBINE DEV CENTER.

CERTIFICATION

I, William Green, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9.28.17
DATE

NAME

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10790-17

AGENCY DKT. NO. 2018-98

IN THE MATTER OF WILLIAM GREEN,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Timothy Rudolph, President, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 28, 2017 Decided: October 4, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of William Green from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 31, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 4, 2017 _____
DATE

_____
LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 10/5/17

Date Mailed to Parties: 10/5/17

/vj

OAL DKT. NO. CSV 10785-2017
10787-2017
10790-2017
AGENCY DKT. NO. 20 – 2018-97
2018-99
SETTLEMENT AGREEMENT 2018-98

IN THE MATTER OF

William Green

AND

WOODBINE DEVELOPMENTAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/22/2017 (all 3) contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. C.9.1	10 days suspension	Not Yet Served
2. C.7.1 + C.25.1	20 days suspension	Not yet served
3. E.1.2	20 days suspension	Not yet served
4.		
5.		

B. The Appellant William Green withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. C.9.1	Sustained Official Reprimand	→
2. C.7.1 + C.25.1	Sustained	5 days suspension
3. E.1.2	Sustained	5 days suspension

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None. Appellant shall be scheduled to serve 10 days suspension.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of William Green 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall be referred and scheduled to attend Employee Advisory Servd and is required to follow all recommendations.

J. Appellant understands he must conduct himself at all times in a professional and respectful manner. Any concerns he may have should be directed to his supervisor or through the proper chain of command.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-28-17
DATE

Appellant

9/28/17
DATE

Respondent

9/28/17
DATE

Steve Pinto
ON BEHALF OF LOCAL 195

9/28/17
DATE

ERC
ON BEHALF OF
WOODBINE DEV. CENTER

OAL DKT. NO. CSV 10785, 10787, 10790-2017

CERTIFICATION

I, William Green, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9.28.17
DATE

NAME

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 10787-17

AGENCY DKT. NO. 2018-99

IN THE MATTER OF WILLIAM GREEN,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Timothy Rudolph, President, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 28, 2017 Decided: October 4, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of William Green from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on July 31, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 4, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 10/5/17

Date Mailed to Parties: 10/5/17

/vj

OAL DKT. NO. CSV 10785-2017
18787-2017
18790-2017
AGENCY DKT. NO. 20 – 2018-97
2018-99
SETTLEMENT AGREEMENT 2018-98

IN THE MATTER OF

William Green

AND

WOODBINE DEVELOPMENTAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

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	Charge	Discipline	Dates Effective
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2.	C.7.1 + C.25.1	20 days suspension	Not yet served
3.	E.1.2	20 days suspension	Not yet served
4.			
5.			

B. The Appellant William Green withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	C.9.1	Sustained Official Reprimand	→
2.	C.7.1. + C.25.1	Sustained	5 days suspension
3.	E.1.2.	Sustained	5 days suspension

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None. Appellant shall be scheduled to serve 10 days suspension.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of William Green 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant shall be referred and scheduled to attend Employee Advisory Service and is required to follow all recommendations.

J. Appellant understands he must conduct himself at all times in a professional and respectful manner. Any concerns he may have should be directed to his supervisor or through the proper chain of command.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-28-17
DATE

Appellant

9/28/17
DATE

Respondent

9/28/17
DATE

ON BEHALF OF LOCAL 195

9/28/17
DATE

ON BEHALF OF ERC
WOODBINE DEV. CENTER

OAL DKT. NO. CSV 10785, 10787, 10790-2017

CERTIFICATION

I, William Green, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9.28.17
DATE

NAME

STATE OF NEW JERSEY

In the Matter of Neal Armstrong
Cumberland County,
Department of Corrections

CSC DKT. NO. 2016-1367
OAL DKT. NO. CSV 199-16

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2017 BW

The appeal of Neal Armstrong, County Correction Officer, Cumberland County, Department of Corrections, 10 working day suspension, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on August 25, 2017 reversing the 10 working day suspension. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 4, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

In adopting the initial decision, the Commission notes that it is not in any way persuaded by the appellant's contentions regarding "inattentional blindness." Regardless, the Administrative Law Judge's findings and conclusions are otherwise supported in the record.

Since the penalty has been reversed, the appellant is entitled to 10 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to 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, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning counsel fees are finally resolved.

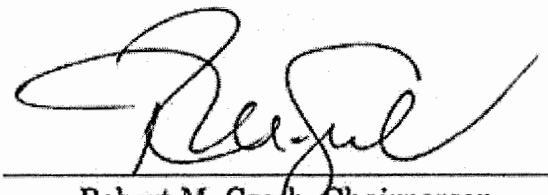
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Neal Armstrong. The Commission further orders that appellant be granted 10 days back pay, benefits, and seniority. 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 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 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:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to 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
OCTOBER 4, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 199-16
AGENCY DKT. NO. 2016-1367

IN THE MATTER OF NEAL ARMSTRONG,
CUMBERLAND COUNTY
DEPARTMENT OF CORRECTIONS.

Daniel Rosenberg, Esq., for Neal Armstrong, appellant (Daniel M. Rosenberg & Associates, LLC, attorneys)

Theodore E. Baker, Esq., County Counsel, for Cumberland County Department of Corrections, respondent

Record Closed: July 14, 2017 Decided: August 25, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

Respondent, Cumberland County Department of Corrections (hereinafter Appointing Authority), suspended appellant Neal Armstrong for ten working days. The Appointing Authority alleges that appellant, a corrections officer, falsified an official document by not properly documenting the use of force on an inmate by another officer after an incident that occurred in the Cumberland County Jail on February 25, 2015.

Appellant was charged with violation of N.J.A.C. 4A:2-2.3(a)(12), "Other Sufficient Charges; Falsification of an Official Document" (J-8).

PROCEDURAL HISTORY

On July 15, 2015, the Appointing Authority issued a Preliminary Notice of Disciplinary Action setting forth the charges and specifications made against appellant. After a departmental hearing on September 9, 2015, the Appointing Authority issued a Final Notice of Disciplinary Action (J-8) on September 16, 2015, sustaining the charges in the Preliminary Notice and assessing a suspension of ten working days. Appellant appealed, and the matter was filed at the Office of Administrative Law on December 30, 2015, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on April 24, 2017. The parties submitted post-hearing brief and the record closed on July 14, 2017.

FACTUAL DISCUSSION

Neal Armstrong has been employed by the Appointing Authority as a Corrections Officer since 2008. He received training during the first three weeks of his employment but has never received training on how to write a use of force report. He drafts five to ten use of force reports every day. His understanding is that he is only responsible for documenting his actions and not force used by other officers. He has never before documented another officer's conduct in a use of force report and prior to this February 25, 2015 incident, has never been advised that he was incorrectly drafting his use of force reports. Armstrong did not prepare an incident report for the incident on February 25, 2015.

On February 25, 2015, Armstrong was called to C dorm in the old jail for assistance with a fight between inmates. Upon arrival, one inmate was observed to have visible signs of having been involved in a physical altercation. This inmate was handcuffed and taken to the medical wing. The other inmate involved in the fight was in the shower. Armstrong ordered him out of the shower and noticed his face was bleeding and swollen. Several other officers were also called to assist. The inmate

took his time coming out of the shower and called the officers names. Although the inmate's bunk was inspected and no weapons were found, another inmate handed him something before he was handcuffed and taken to the medical wing. The inmate initially refused to comply when instructed to place his hands behind his back to be cuffed. Armstrong was standing in front of the inmate and was head butted by the inmate. The officers took him to the ground, handcuffed him and escorted him to the medical wing without further incident. Approximately ten minutes later, Armstrong prepared his use of force report (J-3). J-3 makes no reference to the head butt and only describes the actions taken by Armstrong and not the other officers involved.

A video of the incident was recorded and entered into evidence (J-1). It is clear from a review of the surveillance video that another officer struck the inmate during the altercation. There were a total of four officers involved in the incident and no one told Armstrong that the other officer struck the inmate. The inmate made a complaint to the Cumberland County Prosecutor's office and they investigated. The Prosecutor's Office declined to prosecute three of the four officers involved, including appellant (J-5).

When Armstrong prepared the use of force report, he followed the order of his supervisor and training officer to "write what you did". This has always been the instruction he has received when drafting use of force reports. He did not lie to protect the other officer and asserts that he did not observe the other officer strike the inmate. Appellant was aware at the time of the incident that there were surveillance cameras in C wing and he knew that the incident was being recorded. He did not view the surveillance video until his interview at the prosecutor's office. It was not until he viewed the video that he became aware that the other officer struck the inmate.

FINDINGS OF FACT

The record in this matter includes documentary evidence and the testimony of the individuals who prepared the documents or had knowledge of the incidents they described. After carefully reviewing the exhibits and documentary evidence presented and after having had the opportunity to listen to testimony and observe the demeanor of the witness, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

On February 25, 2015, Armstrong was called to C dorm in the old jail for assistance with a fight between inmates. Upon arrival, one inmate was observed to have visible signs of having been involved in a physical altercation. This inmate was handcuffed and taken to the medical wing. The other inmate involved in the fight was in the shower. Armstrong ordered him out of the shower and noticed his face was bleeding and swollen. Several other officers were also called to assist. Although the inmate's bunk was inspected and no weapons were found, another inmate handed him something before he was handcuffed and taken to the medical wing. The inmate initially refused to comply when instructed to place his hands behind his back to be cuffed. Armstrong was standing in front of the inmate and was head butted by the inmate. The officers took him to the ground, handcuffed him and escorted him to the medical wing without further incident. Approximately ten minutes later, Armstrong prepared his use of force report, makes no reference to the head butt and only describes the actions taken by Armstrong and not the other officers involved. Armstrong did not prepare an incident report. It is clear from a review of the surveillance video that another officer struck the inmate during the altercation. There were a total of four officers involved in the incident. The Cumberland County Prosecutor's office declined to prosecute three of the four officers involved, including appellant.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling

Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.) "In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Appellant's status as a corrections officer subjects him to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v.

Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Appellant was charged with "Other Sufficient Charges; Falsification of an official Document," N.J.A.C. 4A:2-2.3(a)(12)." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Here, the Appointing Authority asserts that on February 25, 2015, appellant completed and submitted an incident report regarding an incident involving excessive use of force on an inmate by an officer. On June 19, 2015 appellant was interviewed regarding the incident and his verbal account was not consistent with his written account.

Appellant asserts that he did not falsify his use of force report and that he did not observe the other officer strike the inmate. In support of this assertion, appellant introduced two reports from Catherine M. Barber, Ph.D. (J-9a and J-9b). These reports contend that appellant's assertion that he did not see the other officer strike the inmate is consistent with the phenomenon of inattentional blindness, a known aspect of how the human visual perceptual process works. This phenomenon, according to Dr. Barber, is the failure to consciously perceive an otherwise salient object or event when attention and expectation are otherwise engaged; in other words, it is a failure to visually experience the appearance of an object or event that is easily seen once

noticed. Inattentional blindness typically occurs when attention is diverted, such as when the observer engages in an attentionally demanding task elsewhere, and does not expect the appearance of the object or event. Respondent objects to the reliance upon inattentional blindness because it is a net opinion and appellant's attention should have been focused upon the inmate. The incident occurred directly in front of him, yet he asserts that he did not see the other officer strike the inmate.

"Falsification of an official Document" is not defined in either the Cumberland County Department of Corrections Policy regarding Agency Training (J-6) or the Basic Course for County Corrections Officers prepared by the Division of Criminal Justice Police Training Commission (J-7). Falsification has been defined by Merriam Webster to be similar to misrepresentation or to give a false or misleading representation of an event, usually with an intent to deceive or be unfair. I do not **FIND**, nor can I **CONCLUDE** that appellant intentionally made a false statement in his use of Force Report. Appellant testified that he prepares five to ten Use of Force Reports each day and has never included actions of other officers. He also testified that he had always been instructed by his supervisor to "write what you did" in Use of Force Reports. This is what he did in the incident.

Respondent asserts that the deficiencies in appellant's report are serious enough to warrant a suspension. In support of this assertion, appellant relies, in part, on an unreported Appellant Division decision in the matter of Michael Biazzo, et al, Docket No. A-3537-13T1, decided September 22, 2016. In that case officers appear to have omitted information and delayed reporting an altercation involving an off-duty police officer. The ALJ in that case concluded that the appellants violated operating procedures and engaged in conduct inappropriate for an officer and neglectful of duty. In the case before me, however, Armstrong is not charged with conduct unbecoming or neglect of duty. Rather, he is charged with Other Sufficient Cause; Falsification of an Official Document.

Pursuant to N.J.A.C. 4A:2-2.5(a), an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges and afforded an opportunity for a hearing prior to the imposition of major discipline. Perhaps if appellant

were charged with conduct unbecoming or neglect of duty or a violation of a specific operating procedure or rule major discipline would be warranted.

I **CONCLUDE** that the Appointing Authority has not met its burden of proof that appellant falsified an official document. Appellant admittedly put the bare minimum in his use of force report but there is no evidence that other use of force reports, whether written by appellant or any other corrections officer, are more comprehensive.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause. Appellant's conduct was not such that he violated this standard of good behavior. As such, I **CONCLUDE** that the Appointing Authority has not met its burden of proof on this issue.

DISPOSITION

I **CONCLUDE** that the Appointing Authority has not sustained its burden of proof as to the charge of violations of N.J.A.C. 4A:2-2.3(a)(12), "Other Sufficient Cause; Falsification of an Official Document."

Based upon the foregoing, it is hereby **ORDERED** that the determination to suspend the appellant in this matter be and hereby is **REVERSED.**

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.

August 25, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: August 25, 2017

Date Mailed to Parties: August 25, 2017.

/lam

APPENDIX

LIST OF WITNESSES

For Appellant:

Neal Armstrong, Appellant

For Respondent:

None

LIST OF EXHIBITS

Joint Exhibits:

J-1	Surveillance video of February 25, 2015 incident
J-2	IA interview of Appellant
J-3	Appellant's Use of Force Report
J-4	SIU Report of Sergeant Ortiz
J-5	Harold Shapiro Declination Letter
J-6	Policy 5.1 regarding training
J-7	Agency Training Manual
J-8	FNDA dated September 16, 2015
J-9a	Dr. Barber's August 21, 2016 Report
J-9b	Dr. Barber's October 21, 2016 Report
J-10	CV of Dr. Barber
J-11a	Still photos from incident
J-11b	Still photos from incident
J-11c	Still photos from incident
J-12	Appellant's disciplinary record SEALED

10-4-17

STATE OF NEW JERSEY

In the Matter of Lawrence Bolden, Willingboro Township, Department of Parks and Recreation

CSC DKT. NO. 2016-2156
OAL DKT. NO. CSV 00363-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 4, 2017 JM

The Civil Service Commission, at its meeting of October 4, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 00363-16

AGENCY DKT. NO. 2016-2156

IN THE MATTER OF LAWRENCE BOLDEN, WILLINGBORO TOWNSHIP, DEPARTMENT OF PARKS AND RECREATION.

Mark A. Fury, Esq., apprearing for appellant, Lawrence Bolden (Law Offices of Mark A. Fury, P.C., attorneys)

Kames K. Grace, Esq., appearing for respondent, Wilingboro Township, of Parks and Recreation (Long Mermero and Associates, LLP, attorneys)

Record Closed: August 28, 2017 Decided: September 12, 2017

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on January 18, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Confidential Settlement Agreement and General Release (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

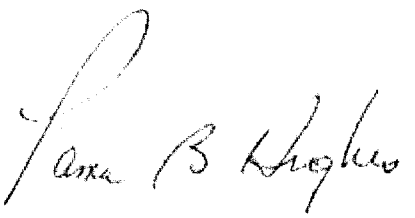
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.



September 12, 2017
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 9/12/17

Date Mailed to Parties:

/vj

LIST OF EXHIBITS

Jointly Submitted:

J-1 Confidential Settlement Agreement and General Release

J-1

CONFIDENTIAL SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Confidential Settlement Agreement and General Release (the "Agreement and Release") is made by and between Lawrence Bolden (hereinafter "Bolden") and Willingboro Township (hereinafter "The Township") and/or collectively "The Parties."

BACKGROUND

WHEREAS, Bolden was employed by the Township in the capacity of a Truck Driver and has elected to resign from his position with the Township effective May 2, 2017 ("Effective Date"); and

WHEREAS, the Township has accepted Bolden's resignation as outlined above; and

WHEREAS The Parties wish to completely release and forever discharge with prejudice any and all claims or potential claims, disputes or causes of action which Bolden has or may have against the Township and/or any other Released Party (as defined in Paragraph 2.3 below);

NOW, THEREFORE, in mutual consideration of the promises and covenants that hereinafter follow, The Parties agree that Bolden's wishes to end and extinguish any existing or potential disputes that Bolden has or may have against the Township which arose on or before the "Effective Date" of this Agreement and Release, in exchange for the valuable Consideration tendered by the Township (as set forth in Paragraph 1.1 below) solely and exclusively on the terms and conditions set forth below.

TERMS

1. Consideration in Exchange for Release

1.1 In exchange for and in consideration of Bolden's promises as set forth above and below, the Township, on behalf of all Released Parties, agrees as follows:

a) The Township shall tender a payment to Bolden in the lump sum of $50,000.00. The Township shall issue the appropriate IRS Forms 1099 in connection with this payment.

Bolden agrees that, to the extent that any federal, state or local taxes may be or becomes due or payable by him as a result of any of the above payment, Bolden shall be solely responsible for paying them. Bolden further agrees that he has not relied upon any representation made by the Township or any of its representatives concerning the tax treatment of said payment. Bolden shall indemnify the Township from, and hold it harmless against, any claims made by administrative agencies or courts of competent jurisdiction for such unpaid taxes.

Releases of Bolden's Existing or Potential Disputes

2.1 Bolden agrees that the consideration set forth above is adequate and valuable in exchange for his promises herein. Bolden furthermore acknowledges and expressly agrees that he shall not be entitled to any payment or other benefit from the Township or any of the Released Parties except that which has been outlined above in Section 1 entitled "Consideration in Exchange for Release," including but not limited to any wages, severance pay, benefits or benefit contributions, retirement plans, deferred compensation plans, bonuses, commissions, or any other remuneration, and that neither the Township or any other Released Party shall ever be required to make any further payment or provide any benefit to him or any other person or entity regarding other than normal pension if found as eligible any claim, right or status he may have arising on or before the Effective Date of this Agreement and Release. Bolden expressly warrants and represents that: (1) he has not assigned any interest in any claim or potential claim released by this Agreement and Release (2) he has not filed or caused to be filed or has otherwise participated in any claims, suits, charges, or other proceedings regardless of forum against the Township or any other Released Party other than the action pending before the Office of Administrative Law under Docket Number CSV 00363-2016 S and the action pending before the New Jersey Division on Civil Rights under Docket Number EC38WM-65704, and (3) he fully indemnifies and holds the Township and the Released Parties harmless from any such claims or damages, including attorney's fees, fines, costs, liquidated or

punitive damages, asserted or awarded against the Township or any of the Released Parties where such claim was assigned by him or was otherwise based on his hiring, employment or separation from employment with the Township or any Released Party.

2.2 Bolden acknowledges that he has not been provided any legal or other advice by the Township, the Released Parties or anyone on behalf of the Township and/or the Released Parties including but not limited to legal counsel or advice regarding the tax or withholding consequences of this Agreement or Release, or the consideration he may receive hereunder, pursuant to any federal, state or local tax or withholding laws or regulations. Bolden also agrees to make no individual or class claims against the Township or other Released Party for payment of any taxes, including costs, attorney's fees or applicable interest or penalties.

2.3 In exchange for the benefits described in Section 1.1 above, Bolden, for full consideration as recited above, forever waives, releases, discharges and gives up any claim, demand, cause of action or damage that he, his spouse, family members, heirs, executors, administrators, successors and/or assigns may have against the Township, its employees, its managers, its elected officials, and its appointed officials, as well as all of their employee benefits plans and the trustees, fiduciaries, administrators and parties-in-interest of those plans, and any of the present or past employees, managers, elected officials, appointed officials, officers, directors, administrators, shareholders, agents, attorneys, insurance carriers and contractors of each of the foregoing person(s) or entity/entities along with the predecessors, successors, and assigns of each of them and including their families, estates, and executors (together "the Released Parties" as used throughout this Agreement and Release), based upon his recruitment, hiring, employment or separation from that employment, including but not limited to: any waivable claims for salary, bonuses, commissions, severance pay, vacation pay or any benefits under the Fair Labor Standards Act of 1938, 29 U.S.C. 201, *et seq.*, ("FLSA"), the ~~Employee Retirement Income~~

other than retirement/pension, liability for which is not effected by this agreement

Security Act of 1974, as amended, 29 U.S.C. 1001, *et seq.* ("ERISA"), the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161 *et seq* ("COBRA"), the New Jersey Discrimination in Wages Law, N.J.S.A. 34:11-56.1, *et seq.*; the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1, *et seq.*; the New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a, *et seq.*, the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.*, any waivable claims of harassment, discrimination or retaliation based upon, *inter alia*, race, color, ethnicity, national origin, sexual orientation, ancestry, religion, marital status, age, sex, gender, citizenship status, handicap, medical condition or disability under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e), *et seq.* ("Title VII"), the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq., the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* ("ADA"), the Sarbanes-Oxley Act of 2001, 15 U.S.C. §§7201, *et seq.*, the Civil Rights Act of 1991, 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988, or any other federal, state, or local law prohibiting discrimination, harassment or retaliation in employment, including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12, *et seq.* ("NJLAD"); any claims of breach of implied or express contract, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, intentional or negligent infliction of emotional distress, violation of public policy, wrongful or constructive discharge, or any other tort or claim, including but not limited to claims arising under the New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-25, *et seq.*, including as amended by the New Jersey Paid Family Leave Act; the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1, *et seq.*, the New Jersey Family Leave Act, N.J.S.A. 34:11B-1, *et seq.*; the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, N.J.S.A. 34:21-2, *et seq.* and the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, *et seq.*, and any and all other claims for costs, fees or other expenses,

specifically including but not limited to attorney's fees, expenses and expert fees; and all claims under any other federal, state, or local law, regulation, ordinance or judicial decision, or under the United States or New Jersey Constitutions, relating to any alleged violation of public policy, wrongful, retaliatory or constructive discharge, non-payment of wages, retaliation, assault, battery, defamation, or any other statutory, common law, or employment-related claim or tort. Bolden's release expressly includes a waiver of all claims existing on or before the date he signs this Agreement and Release as well as those he may not know about, and specifically includes the unconditional waiver of the right to proceed with any discovery concerning any such claim in any future litigation or proceeding between Bolden and the Township or other Released Party. Bolden acknowledges and affirms that he has been fully paid any wages owed to her including any overtime wages, and also acknowledges and affirms that as of the date of his execution of this Agreement and Release that he has been afforded all required periods of family or medical leave as well as any right to reinstatement upon conclusion of any leave taken.

2.4 Notwithstanding the release and waivers set forth in Paragraph 2.3 above, Bolden acknowledges that this Agreement and Release in no way waives or limits his right to take part in any investigation conducted by a state, federal, or local government agency. Nonetheless, Bolden understands and acknowledges that by signing this Agreement and Release, he has completely waived his right to receive monetary damages or other individual relief in connection with any charge he may file with any administrative agency that relates to a claim waived under this Agreement and Release and, if he is awarded monetary damages, hereby unconditionally assigns to the Township and Released Parties any right or interest he may have to receive such relief or damage.

3. Confidentiality

3.1 Bolden promises and agrees that he has not and will not disclose the terms of this Agreement and Release, that he received any payments from the Township or any allegations of alleged wrongdoing by the Township or any other Released Party, to any person or entity except (1) his attorney, (2) his professional tax advisors, the Internal Revenue Service ("IRS") or other taxing authorities, (3) his spouse and/or immediate family; or (4) in response to a formal order from any judicial, governmental, regulatory, or self-regulatory agency or organization having competent jurisdiction. Bolden further agrees that if he does disclose the terms of this Agreement and Release to his spouse, immediate family, attorney, or to his professional tax advisors, he will insure that they will not further disclose the terms of this Agreement and Release. Bolden understands and agrees that he may, pursuant to subpoena or other legal process, be asked to provide testimony, documents and other information regarding his former employment with the Township. If Bolden receives a subpoena, formal order or other legal process from any judicial, governmental, regulatory, or self-regulatory agency or other organization as set forth in Paragraph 2.4 above, Bolden agrees to provide the Township, c/o Eric Berry – Township Manager, and/or his successor, with prompt notice of any such subpoena or process, hereby consents to the Township's intervention in any such proceeding to prevent the requested disclosure, and to cooperate with the Township in seeking to avoid the disclosure or, if ordered by the court, by giving truthful and complete testimony and information in response to such subpoena or legal process.

3.2 Notwithstanding anything else contained in this Agreement and Release, Bolden understands and agrees that the Township and the Released Parties will remain free to internally communicate, to those with a business or governmental need to know, any and all information concerning his employment history with the Township.

4. Reference-Related Communication

Bolden understands and acknowledges that, should he or any prospective employer wish to make any inquiries of the Township or any other Released Party into his employment history with the Township ("Reference Inquiries"), such Reference Inquiries must be directed exclusively to Eric Berry - Township Manager, and/or his successor. Bolden further agrees that the Township retains the absolute right, in its sole discretion, not to respond to Reference Inquiries in any other form. Bolden agrees that in the event the Township responds to Reference Inquiries properly directed to the Township Manager, the Township Manager will provide only Bolden's (1) dates of employment with the Township; and (2) his last position title. Bolden voluntarily consents to the Township's response to Reference Inquiries, and fully indemnifies and holds the Township and the Released Parties harmless from any and all claims, causes of action, damages and attorney's fees/costs in any way related to the Township's proper response to Reference Inquiries as described in this Section.

5. No Admission of Liability

Bolden also agrees that he is barred from seeking to introduce this Agreement and Release into evidence in any federal, state, or administrative proceeding or during any arbitration because this Agreement and Release is not in any way an admission by the Township or the Released Parties that they breached any legal duty owed to him, or are liable to him in any way. Bolden acknowledges that, by settling any and all actual or potential disputes and entering into this Agreement and Release, the Township and the Released Parties do not admit that they owe him any money, breached any duty they owed to him, have done anything wrong, or have treated him unlawfully or unfairly in any way. In fact, Bolden acknowledges that the Township and the Released Parties specifically deny that they have violated or abridged any federal, state, or local law, regulation or ordinance, or any right or obligation that they owe or may have owed to him.

No findings of fact have been made or issued by any administrative agency or court of law, and Bolden agrees that he is not the prevailing party in this cause of action involving the Township or the Released Parties.

6. Entire Agreement

6.1 Bolden also warrants and agrees that this Agreement and Release constitutes the entire agreement between himself and the Township or any other Released Party. Bolden understands and acknowledges that no other promise or agreements have been made to or with him or with any other person or entity on his behalf other than those set forth herein, and that there is no written or oral understanding or agreement between Bolden and the Township or any other Released Party which is not specifically recited or referenced herein. In deciding to sign this Agreement and Release, Bolden has not relied on any statement by anyone associated with the Township or any other Released Party that is not specifically and expressly set forth in this Agreement and Release. In fact, Bolden specifically acknowledges that he had the opportunity to review this Agreement and Release with his attorney prior to executing same.

7. Severability and Construction of Terms

Bolden agrees that the terms of this Agreement and Release are severable, and that if any provision of this Agreement and Release (other than the General Releases in Paragraph 2.3 above) is held to be illegal, invalid or unenforceable, that provision shall not be a part of this Agreement and Release but all other terms shall remain in full force and effect at the sole option of the Township. The legality, validity and enforceability of the remaining provisions of this Agreement and Release shall not be affected by a determination that any provision of this Agreement and Release (other than the General Releases in Paragraph 2.3 above) is illegal, invalid or unenforceable. The parties also agree that because Bolden was given an opportunity to be represented by counsel of his own choosing at his own cost to negotiate this Agreement and

Release, the terms of this Agreement and Release shall not be construed against the Township or the Released Parties in any respect.

8. Assignment

This Assignment and Release shall not be assigned by Bolden but it shall be binding upon his heirs, executors, administrators, agents, and legal representatives. This Agreement shall be freely assignable by the Township without restriction, and shall be deemed automatically assigned by the Township with Bolden's consent. This Agreement and Release shall be binding upon, and shall inure to the benefit of, the Township's successors and assigns.

9. Governing Law

This Agreement is governed by, and shall be construed and enforced, in all respects, in accordance with the laws of the State of New Jersey, exclusive of any choice of law rules. Any dispute concerning this Agreement and Release shall be brought in, and the parties hereby consent to the personal jurisdiction of, the Superior Court of New Jersey

10. Acknowledgement

Bolden acknowledges that (1) he has carefully read this Agreement and Release; (2) he has had the opportunity to have his attorney explain the contents of the terms of this Agreement to him; (3) he fully understands what this Agreement and Release means; (4) he is physically and emotionally competent and of sound mind to execute this Agreement and Release; and (5) he is signing this Agreement and Release knowingly and voluntarily, of his own free will, act and deed.

IN WITNESS WHEREOF, of sound mind and intending to be forever legally bound hereby, the parties have executed this Confidential Settlement Agreement and General Release, being ten (10) pages in length, and on the date(s) set forth below.

Bolden:

Lawrence O Bolden Date: 5-18-2017
LAWRENCE BOLDEN

STATE OF NEW JERSEY)
ss.
COUNTY OF Burlington)

SWORN TO and SUBSCRIBED before me by Lawrence Bolden, who is personally known to me or has produced (Driver license) as identification.

DATED this 18th day of May, 2017.

NOTARY PUBLIC, State of New Jersey
Kim DiGregorio
Signature of Notary Public
Kim DiGregorio
Typed or Printed Name of Notary Public

KIM DiGREGORIO
NOTARY PUBLIC OF NEW JERSEY
ID # 2437665
My Commission Expires 8/21/2018

The Township:

Willingboro Date: May 3, 2017

By:
WILLINGBORO TOWNSHIP

Angiulo, Nicholas

From: James Grace <jgrace@longmarmero.com>
Sent: Tuesday, September 19, 2017 1:25 PM
To: Angiulo, Nicholas
Cc: furylaw@hotmail.com
Subject: Re: In the Matter of Lawrence Bolden - Settlement

Mr. Angiulo,

In an effort to be as fair as possible to Mr. Bolden, we will allow the time you reference to be considered an approved leave without pay. If there is anything else you need please don't hesitate to contact me.

Regards,

Jim Grace

On Tue, Sep 19, 2017 at 9:56 AM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov> wrote:

Mr. Fury and Mr. Grace:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Lawrence Bolden from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Mr. Bolden agrees to resign his position effective May 2, 2017 in exchange for, *inter alia*, a $50,000 lump sum payment. However, the settlement does not reflect how to record the time period from his original September 23, 2015 removal date to his May 2, 2017 resignation date. Before the matter can be acknowledged by the Commission, we require all periods of time to be accounted for in an employee's personnel record. In this regard, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo

Deputy Director

Division of Appeals & Regulatory Affairs

New Jersey Civil Service Commission

10-4-17

STATE OF NEW JERSEY

In the Matter of Thomas Caraccio,
Hudson County

CSC Docket No. 2016-4060
OAL Docket No. CSR 07931-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCT 19 2017 (DASV)

The appeal of Thomas Caraccio, a County Correction Officer with Hudson County, of his removal, effective May 13, 2016, on charges, was heard by Administrative Law Judge Ellen S. Bass (ALJ), who rendered her initial decision on September 5, 2017. Exceptions were filed on behalf of the appellant, and cross exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 4, 2017, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the recommendation of the ALJ to uphold the appellant's removal.

DISCUSSION

The appellant was served with a Final Notice of Disciplinary Action, removing him from employment on charges of incompetency, inefficiency or failure to perform duties; insubordination; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. Specifically, the appointing authority asserted that the appellant committed a willful act of insubordination by failing to comply with verbal and written orders from Kevin Dille, a County Correction Sergeant, to complete all of his outstanding Power Directive Management System (Power DMS) assignments by the end of his shift on September 27, 2015. The appointing authority alleged that while the appellant completed most of his assignments by 9:30 a.m. on September 26, 2015, the appellant failed to sign two documents, as

required, until he was ordered to do so by John Geoghegan, a County Correction Lieutenant, on September 28, 2015. Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In the initial decision, the ALJ set forth that Power DMS is an electronic system which informs staff of policy adoptions and revisions. It also serves to train staff on the performance of their duties and as an e-mail system to allow staff to communicate with each other. In 2012, a revised "Written Directive System" policy was issued that all employees were to log into Power DMS "preferably at the beginning of his/her tour, on each scheduled work days." Employees were to digitally sign for each document which was posted on the site within 10 days of issuance of the document. If a directive was not understood by the employee, the policy indicates that the employee should contact his or her immediate supervisor for clarification. The ALJ found that the appellant received and reviewed this policy. However, the record revealed that the appellant, as well as many other officers, did not comply with signing posted documents within the required time period. As a result, Geoghegan had a protocol in place for follow-up with noncompliant officers. In the present case, Geoghegan delegated the task to Dille, who was not the appellant's regular supervisor, to follow-up with the appellant as to his compliance with the policy. On Saturday, September 26, 2015, by way of verbal order and written memorandum, Dille advised the appellant that he must complete outstanding assignments in the Power DMS by the end of his shift the next day. The appellant had eight outstanding assignments, which included documents to review, courses to take, and messages to read. The appellant completed six of the assignments, but did not acknowledge that he received and reviewed the policy on body armor nor complete an assignment regarding "GPS Programs Violations and Escapes." On Monday, Geoghegan discovered that the appellant did not complete the two assignments and contacted the appellant. The appellant indicated that he intended to call Geoghegan because he was unclear as to whether the two policies applied to him. Geoghegan told him that he was required to complete all eight assignments, which he then completed by noon that day. Thereafter, disciplinary charges were sought against the appellant for his untimely completion of the two assignments. At the OAL, the appellant "implied that retaliation was behind the decision to discipline him for this small infraction."

However, the ALJ found the appellant's testimony "not [to] hold together" and his excuses for noncompliance were unpersuasive. The ALJ indicated that the appellant had more than one opportunity to raise questions regarding his assignments to Geoghegan and Dille. Additionally, some of the six assignments he completed did not apply to his daily duties but yet he timely completed them. Thus, the ALJ determined that the appellant "willfully and knowingly failed to comply with the order." Moreover, the ALJ concluded that the appellant's failure to complete the two Power DMS assignments rose to insubordination, neglect of duty,

and unbecoming conduct. The ALJ did not find persuasive evidence that the charges against the appellant were motivated by anti-union animus or that the appointing authority was "out to get him" given that the appellant was successful in a prior removal attempt. The ALJ noted that the prior removal was irrelevant as to whether the appellant was guilty of the present charges as that removal action "rose and fell on in its own merits."

Regarding the penalty, the ALJ reviewed the appellant's disciplinary history which revealed the following infractions: a three-day suspension in March 2006, a two-day suspension in July 2006, a three-day suspension in May 2010, a fine in May 2010, a fine in November 2011, a 20 working day suspension in January 2012, and a 120 working day suspension and demotion in December 2014. Based on the foregoing, the ALJ recommended upholding the removal. The ALJ stated that over 10 years, the appointing authority had attempted to redirect the appellant's conduct by steadily increasing the level of discipline. However, the appellant failed to comply with the rules of his workplace. Therefore, the penalty of removal was deemed appropriate.

In his exceptions, the appellant asserts that the ALJ's initial decision should be rejected, since the ALJ ignored and/or mischaracterized facts as to the appointing authority's burden of proof and her credibility determinations. Specifically, the appellant argues that the evidence presented cannot substantiate that he violated Civil Service law and rules by "seeking clarification with his immediate supervisor prior to acknowledging two policies." Rather, he alleges that the appointing authority violated the Civil Service Act in its "continued attempt to arbitrarily dismiss" him from employment. The appellant notes that the ALJ restricted the testimony of two appointing authority directors relating to anti-union activities, union leadership, and the appellant. He also contends that the ALJ "turned a blind eye" to Geoghegan's interactions with the appellant regarding union issues.

Moreover, the appellant maintains that the ALJ "was shockingly silent" regarding the credibility of Geoghegan. The ALJ ignored that Geoghegan attempted to place blame on Dille, asserting that it was Dille who brought the appellant's alleged noncompliance to his attention when in fact the charges were sought by Geoghegan. The appellant states that the "credibility issue is compounded by Dille's false report." In that regard, the ALJ noted that the report erroneously indicated that Dille reviewed the Power DMS list and noticed the appellant's noncompliance. Further, the appellant takes exception to the finding that Geoghegan had a "routine protocol" regarding Power DMS assignments. In that regard, the ALJ failed to address Geoghegan's lack of credibility in justifying why the appellant was never previously notified of his alleged noncompliance over the years when the appellant was under Geoghegan's direct supervision and why there was an "urgency of immediate compliance and the extreme sanction" against

the appellant. In addition, the appellant contends that Geoghegan had no credible explanation as to why officers were not sanctioned over the years for noncompliance of the Power DMS policy. The appellant also argues that he did not intentionally disobey Dille's order to complete the outstanding assignments. He notes that he "was left on his own" and expected to complete the assignments while he performed his duties. Other officers were being supervised by Dille and received their orders to comply on the Wednesday prior to the appellant's order on Saturday. The appellant emphasizes that, although the ALJ indicted that the appellant could have reached out to Dille for clarification, Dille was not the appellant's direct supervisor and he was unaware as to which Power DMS assignments the appellant was required to complete. Additionally, the appellant asserts that the "Written Directive System" policy allowed for leniency. Geoghegan was not at work on Saturday or Sunday when the appellant was presented with the memorandum from Dille. The appellant stresses that it would not have been appropriate to communicate with Geoghegan when he was off duty nor to involve Dille because he was not his immediate supervisor. Moreover, the appellant emphasizes that less than 12 hours later, he immediately completed his assignments when his questions were addressed. He reiterates that the appointing authority was "looking for a reason to terminate" him and this was its first opportunity when he was reinstated back to work and was isolated in his unit.

In addition, the appellant maintains that he credibly testified as to what had occurred and why the two policies/assignments remained unsigned. He notes that the signing of the Body Armor and GPS policy had not been an issue over the years. Moreover, the ALJ disregarded witness testimony that if an officer does not understand a policy, "he is not blindly suppose[d] to sign the documents to just be done." The appellant submits that his alleged infraction should not be considered an egregious violation which warrants termination, especially given that he needed clarification from his immediate supervisor. His action also did not rise to insubordination, neglect of duty, or unbecoming conduct. Further, the appellant asserts that the charge of other sufficient cause should be dismissed as the appointing authority failed to provide any substance to that charge.

Furthermore, the appellant takes exception to the Commission's determination to decline interlocutory review regarding the ALJ's order to dismiss the appellant's civil rights complaint and recognize that anti-union animus was the motivation behind the "overzealous charges" against him. In regard to the former, the ALJ found, among other things, that the validity of the appellant's removal was the sole issue that could be reviewed in the OAL proceeding and the OAL was without jurisdiction to review claims pertaining to anti-union animus. Consequently, the appellant states that he was not given the opportunity to fully develop his anti-union animus claims and defenses pursuant to *Winters v. North Hudson Fire and Rescue,* 212 *N.J.* 67 (2012). Thus, he requests that the Commission order a new hearing.

Lastly, the appellant alleges that the Commission has taken a "pro-management position" as evidenced by its decisions relating to disciplinary matters since 2013. The appellant is allowed to defend against his removal in the disciplinary appeal by demonstrating that the disciplinary action was brought against him in retaliation for his exercise of legally protected speech or conduct as an employee. As such, he requests that the Commission take "the unprecedented action of decreasing" the penalty imposed and expanding the "1%" of cases where the Commission has reversed an employee's removal. Alternatively, the appellant requests that his discipline be reduced in accordance with progressive discipline principles. In that regard, the appellant maintains that he is a long-term employee of 23 years[1] and his alleged minor infraction should justify a penalty reduction. While the ALJ set forth his prior disciplinary history, the appellant notes that those violations did not involve insubordination and were "generally" during the years of his union activities. He stresses that five of the violations were minor disciplines. The 120 working day suspension and demotion related to a DWI violation and since that event, the appellant states that he has "turned his life around." Therefore, he requests that a suspension and remedial training of the Power DMS policy be imposed instead. He notes that the testimony at OAL revealed that no other officer was disciplined for their Power DMS delinquency.

In reply, the appointing authority contends that the appellant's exceptions to the Commission's determination to decline interlocutory review should be rejected. It indicates that the appellant raised an anti-union animus claim as part of his defense at the OAL hearing, and the ALJ correctly determined that the appellant's discipline was not motivated by such animus. Notably, the appointing authority states that the appellant did not testify as to anti-union animus by Dille, who initially recommended disciplinary action against the appellant. Moreover, the appointing authority submits that to the extent that the appellant seeks to claim harassment and discrimination, he should have filed such claims in the appropriate forum. Additionally, the appellant's allegation that the Commission is "pro-management" and biased "is nothing more than [the appellant's] attempt to avoid accountability for his conduct." As to the charges, the appointing authority maintains that the appellant had two days to complete his Power DMS assignments and to contact Dille or Geoghegan. However, he "unilaterally determined to 'pick and choose'" which assignments to complete even though he was given both a verbal and written order to complete all assignments by September 27, 2015. Furthermore, the appointing authority notes that the appellant's own witness testified that all officers were required to complete the Power DMS assignment regardless of their particular post since an officer could be reassigned to another post. In addition, it points out that the appellant on cross examination admitted that officers must comply with a superior officer's order. Thus, the appellant's

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[1] Agency records indicate that the appellant was appointed provisionally pending open competitive examination procedures, effective June 13, 1994, as a County Correction Officer with Hudson County. He received a regular appointment on April 29, 1996.

"smoke screen" arguments that Dille was not his immediate supervisor should be rejected. The Commission should also disregard the appellant's challenge to the ALJ's credibility determinations, as the ALJ correctly found that the other assignments the appellant completed did not pertain to his unit. Thus, considering that noncompliance with a superior officer's order is a significant violation and the appellant has a prior disciplinary history, the appointing authority maintains that removal is the only appropriate penalty.

Upon its *de novo* review, the Commission agrees with the ALJ's assessment of the charges. There is no dispute that the appellant did not complete all of the outstanding Power DMS assignments in a timely manner. He was given a verbal and written order to do so by a certain date and failed to do so. While the appellant argues that he needed clarification from his supervisor pursuant to policy, the ALJ correctly evaluated that the appellant's excuses were not credible. In that regard, it is emphasized that 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 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 the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations.

The ALJ explicitly delineated her credibility findings as to the appellant's implausible testimony. The appellant could have raised his questions with Dille, who gave the direct order, or he could have contacted Geoghegan if he believed that only the latter could have answered his questions prior to the due date of the assignments. The appellant also did not contact Geoghegan on Monday, when they were both at work. Rather, it was Geoghegan who called the appellant regarding his delinquency. Moreover, the appellant's excuse that the two assignments did not pertain to his daily duties is clearly not credible, as he completed other assignments that did not apply. Further, although the appellant asserts that the ALJ restricted and disregarded testimony, it is clear that the ALJ took the appellant's claims of anti-union animus into consideration but did not find his claims persuasive given that the appellant committed the infraction as charged. Nothing in the record demonstrates that Geoghegan was untruthful as to the infraction, and which,

contrary to the appellant's exceptions, would deem his testimony not credible. It is also of no consequence as to who actually discovered the appellant's noncompliance. The appellant's arguments in that regard are overreaching. Moreover, the appellant does not raise a meritorious claim with respect to the Commission's determination to decline interlocutory review of the ALJ's dismissal of his civil rights complaint. The ALJ correctly found that although the appellant could present claims of retaliation and discrimination as part of a defense to the disciplinary charges at issue, which he did, he cannot seek relief pursuant to the New Jersey Civil Rights Act because a civil rights cause of action is not within the scope of the OAL's jurisdiction in a disciplinary appeal. Moreover, there was not a procedural basis for the ALJ to have adjudicated the causes of action raised in the civil rights complaint in the context of the appellant's disciplinary appeal. In that regard, it is noted, that, under *Winters, supra,* the pursuit of such a defense during disciplinary proceedings would not automatically bar an appellant from separately pursuing a cause of action based upon retaliation or discrimination in a judicial forum, notwithstanding that the administrative determination on that issue could preclude the parties from rearguing the question of whether the disciplinary action was the product of discrimination or retaliation in a subsequent litigation. Accordingly, the ALJ correctly dismissed the appellant's complaint and there is no basis to remand this matter to the OAL for further proceedings.

Therefore, the Commission finds that the charges against the appellant have been sustained. It is noted that, even assuming, *arguendo*, that the charge of other sufficient cause was dismissed for lack of substance or deemed a duplicative charge, the appellant's infraction clearly rose to insubordination, neglect of duty, and unbecoming conduct and is worthy of discipline. *See In the Matter of Alex Siniavsky* (CSC, decided May 2, 2012) *aff'd on reconsideration* (CSC, decided March 6, 2013) (Appellant's admitted refusal to comply with his supervisor's direct order did not excuse his disobedience since employees are not permitted to select which orders to follow and which to ignore).

With regard to the penalty, the Commission's review is also *de novo.* In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In the instant matter, while the Commission acknowledges that the appellant's infraction is not sufficiently

egregious in and of itself to warrant his removal, the appellant possesses an abysmal prior disciplinary record. In that regard, the Commission emphasizes that a County Correction Officer is a law enforcement officer who, by the very nature of his job duties, is held to a higher standard of conduct than other public employees. *See Moorestown v. Armstrong*, 89 *N.J. Super.* 560 (App. Div. 1965), *cert. denied*, 47 N.J. 80 (1966). *See also, In re Phillips*, 117 *N.J.* 567 (1990). Moreover, the Commission is mindful that:

> The appraisal of the seriousness of [the appellant's] offense and degree which such offenses subvert discipline . . . are matters peculiarly within the expertise of the corrections officials. The appraisal is subject to de novo review by the [Commission] . . . but that appraisal should be given significant weight. *Bowden v. Bayside State Prison*, 268 *N.J. Super.* 301, 306 (App. Div. 1993), *cert. denied*, 135 *N.J.* 469 (1994).

The appellant clearly has not learned his lesson, despite that the appointing authority has progressively disciplined him through the years. Moreover, although the appellant indicates that no other officer had been disciplined for their Power DMS delinquency, he has not identified any specific individual nor has he presented that these unnamed officers have similar appalling disciplinary records. The Commission emphasizes that while career service employees are protected from arbitrary disciplinary actions and possess tenure rights, employment remains a privilege and not an absolute right, especially in the appellant's case where he has consistently not followed the rules of his workplace. Therefore, the Commission finds that the appropriate course of action is to remove the appellant from employment.

As a final comment, the Commission takes umbrage with the appellant's accusation that it is "pro-management" and biased. Each disciplinary appeal is reviewed on its own merits. The Commission carefully evaluates whether an employee has committed the violation as charged and if that violation is worthy of the employee's discipline, considering the seriousness of the offense and the employee's disciplinary history. In the present case, the appointing authority has met its burden of proof. The appellant has had ample opportunity to correct his behavior and has failed to do so. His removal is therefore necessary.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Thomas Caraccio.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF OCTOBER, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT.NO. CSR 07931-16

IN THE MATTER OF THOMAS CARACCIO, HUDSON COUNTY CORRECTIONS DEPARTMENT.

Charles J. Sciarra, Esq., and **Deborah Masker Edwards**, Esq., for Appellant (Sciarra & Catrambone, attorneys)

Sean Dias, Esq., for Respondent (Scarinci and Hollenbeck, attorneys)

Record Closed: August 30, 2017 Decided: September 5, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Thomas Caraccio, a Correctional Officer formerly employed by the Hudson County Department of Corrections (the County), appeals from the termination of his employment. The County asserts that Caraccio failed to timely obey a written order directing that he complete on-line assignments related to policy review and training. Caraccio replies that he misunderstood the scope of the order, and completed the work expected of him once he obtained clarification.

PROCEDURAL HISTORY

On November 5, 2015, Hudson County served Caraccio with a Preliminary Notice of Disciplinary Action; an amended notice was served on November 9, 2015. Following a departmental hearing conducted on May 9, 2016, the County served Caraccio with a Final Notice of Disciplinary Action dated May 13, 2016, sustaining charges of failure to perform duties, insubordination, conduct unbecoming a public employee, and other sufficient cause, and removing Caraccio from his position of employment.

Caraccio filed an appeal with the Office of Administrative Law (OAL) on May 23, 2016. Hearing dates were scheduled for August 22 and 26, 2016, but were adjourned at the request of the County, and with appellant's consent, due to witness unavailability.[1] The hearing was rescheduled for September 26 and 27, 2016. On September 16, 2016, Caraccio filed a complaint directly with me in which he asserted various civil rights and unfair labor practice claims. He indicated that he was asserting his rights under Winters v. North Hudson Regional Fire and Rescue, 212 N.J. 67 (2012). Via letter dated September 20, 2016, the County raised objections to this newly filed complaint, and asked to adjourn the hearing dates so that it could more fully articulate its concerns.

I conferred with counsel, and with their mutual consent, adjourned the hearing until January 18 and January 25, 2017. Via letter dated September 23, 2016, counsel for Caraccio agreed to waive the 180-day provisions of N.J.S.A. 40A:14-201(a), and any back-pay entitlement for the period of the adjournment.[2] Via letter dated December 1, 2016, the County filed a Motion to Dismiss the Civil Rights complaint. Caraccio replied via letter dated December 23, 2016. Via Letter Order dated January 5, 2017, I granted the County's motion.

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[1] Per N.J.S.A. 40A:14-201(b)(4), "[i]f the officer and the agency. . . agree to any postponement or delay of a hearing before the 181st calendar day, the calendar days that accrue during that postponement or delay shall not be used in calculating the date upon which that officer . . . is entitled to receive his base salary pending a final determination on his appeal . . ."

[2] December hearing dates were discussed and are referenced in counsel's letter, but were never scheduled as they proved to not be workable dates, again due to witness availability issues. Both parties agreed to schedule the hearing in January 2017.

Thereafter, via letter dated January 9, 2017, counsel for Caraccio again sought to adjourn the hearing so that he could appeal my January 5, 2017 Order interlocutorily to the Civil Service Commission. Counsel again stipulated that this adjournment was requested with the understanding that Caraccio would waive back pay until the next scheduled hearing date. With the consent of the County, the matter was adjourned until April 17, 2017. By letter dated January 19, 2017, the Civil Service Commission declined to review the interlocutory appeal.

Due to a substitution of attorney, the matter was again adjourned at the request of the County, with Caraccio's consent, until April 27, 2017, and July 11, 2017; with an ongoing agreement to waive the 180-day provisions of the statute. After the hearing concluded on July 11, 2017, the parties sought leave to file written submissions. Caraccio agreed to continue to waive back pay until the filing of these submissions on August 30, 2017, at which time the record closed. Ninety-one days countable toward the 180-day provision of N.J.S.A. 40A:14-201 elapsed between the filing of the appeal and closing of the record.

FINDINGS OF FACT

Caraccio has been employed by the County as both a Correctional Officer and a Sergeant, having worked for the Department of Corrections for over twenty years. The charges against him arise from the events of the weekend of September 26, 2015, and his failure to timely comply with an order that he complete eight assignments on an on-line system known as Power DMS. Caraccio was then serving as a correctional officer.[3] After returning to work after a period of disciplinary suspension, he had been assigned to the surveillance center at the Juno Unit, where his role was to observe activity on monitors and report concerns. Caraccio reported to Lieutenant John Geoghegan; this was the superior to whom Caraccio generally directed questions about training, time off, or vacation day requests. [4]

[3] Caraccio had previously been demoted from the rank of Sergeant. The circumstances of that demotion are irrelevant, except as part of an analysis of progressive discipline.
[4] Geoghegan testified at the hearing; he has since been promoted to Captain.

Power DMS is an electronic system designed to keep staff up-to-date on policy adoptions and revisions, and is used to train staff on information essential to the proper performance of their duties. Per the Deputy Director of the Department of Corrections, the intent behind the system is to ensure that all staff are well-versed in important local and state policies that govern the safe and efficient operation of the correctional facility. Power DMS includes an intranet system that functions like email and allows staff to communicate with each other. It is the subject of a policy revised on January 22, 2012, and entitled "Written Directive System." The policy specifies, quite unequivocally, that

> it is the responsibility of each employee to log into the Power DMS system, preferably at the beginning of his/her tour, on each of their scheduled work days. All employees must digitally sign for each document posted to the site within ten (10) days of issuance and comply with any other directions as instructed to do so, i.e. provide feedback, complete tests, etc.

The policy moreover specifies that if "for some reason employees do not understand a particular directive, the employees should consult with their immediate supervisor for proper clarification." The policy was shared with staff, and I **FIND** that Caraccio received and reviewed it. The testimonial and documentary evidence made it clear, however, that the requirement to timely access Power DMS and sign for policies was observed more in the breach. I **FIND** that many officers did not fulfill this obligation; Caraccio did not do so either. And this noncompliance was confirmed in a report that summarized officer signatures for receipt of policies. This document revealed that on more than one occasion many months, sometimes even a year, would elapse between issuance of a policy, and evidence that the officer signed for it.

In 2015, some six sergeants reported to Geoghegan, which include Sergeant Kevin Dille. Noncompliance with the Power DMS requirements was so commonplace that Geoghegan had a protocol in place for follow-up. He would regularly print-out a log of unfinished work and direct his sergeants to address compliance with offending officers. The Wednesday prior to the weekend of September 26, 2015, Geoghegan received word from his Captain that several officers again were late in acknowledging receipt of policies. Per his normal protocol, Geoghegan delegated the task of following

up to his Sergeants; Dille was directed to follow-up with Caraccio. Dille was not Caraccio's regular supervisor, nor was he his supervisor that day; although Caraccio was accountable to anyone of a higher rank. Generally, it was Geoghegan who was responsible for monitoring Caraccio's his compliance with requirements like signing into Power DMS.

Dille did as directed. On Saturday, September 26, 2015, he verbally advised Caraccio that he must complete his outstanding assignments on Power DMS, and do so by the end of his shift the next day, at about 1:45 p.m. Dille confirmed this order by memorandum dated September 26, 2015. Dille arranged for other derelict officers to be relieved of their duties so that they could have access to a computer, and have the needed time to complete any unfinished Power DMS assignments. But he suggested to Caraccio that he do the work at his post, as a computer was available to him there. Dille also gave Caraccio the option of going to the Computer Learning Center to complete his assignments. Dille's memorandum confirmed that Caraccio had eight outstanding assignments, which included documents to review, courses, and messages. It is uncontroverted and I **FIND** that Caraccio completed all but two: an acknowledgement that he had received and reviewed a policy on body armor, and an assignment pertaining to "GPS Programs Violations and Escapes." As for why there was a lag of some three days after the Captain spoke with Geoghegan before Caraccio was directed to comply, Geoghegan and Dille both noted that either they were not at work, or Caraccio was not, during the intervening days.

Geoghegan was not at work over the weekend, but on his return that Monday he discovered Caraccio's failure to complete two of the tasks assigned to him. Geoghegan contacted Caraccio, who told him that he had intended to call because he was unclear whether he needed to review these two policies since they had no relevance to his then current work responsibilities. Geoghegan told him that he was required to complete all eight assignments, and Caraccio complied; both uncompleted assignments were done by noon that day, and less than twenty-four hours after the deadline imposed by Dille. Importantly, Geoghegan agreed that Caraccio was not belligerent, rude or defiant during their conversation.

Dille confirmed that he did not have access to that aspect of Power DMS that would allow him to monitor the efforts of the correctional officers in completing assigned tasks. He checked with the officers he directly supervised before they left for the day on Sunday, but he did not do so with Caraccio. Hence, he learned from Geoghegan that Caraccio had not completed all eight assignments that Monday. At 10:30 a.m. that day, Dille drafted a report in which he noted the noncompliance, and asked for corrective action.[5] On October 1, 2015, Geoghegan completed a request for disciplinary action form, charging Caraccio with insubordination and neglect of duty, among other charges, and recommending major discipline, to include termination.

Caraccio readily acknowledged that Dille, although not his regular supervisor, directed him to complete his eight Power DMS assignments. And Caraccio promptly proceeded to complete all but two of the assignments. As for the two that he omitted, Caraccio explained that he was confused regarding whether these were applicable to him. One pertained to inmate work release programs, an area irrelevant to his current post. The second pertained to body armor; Caraccio explained that having never been issued body armor he did not believe that he needed to review training materials about its proper use. Caraccio insisted that he did not intend to be insubordinate. He indicated that he fully intended to reach out to Geoghegan on Monday, and could not do so sooner because Geoghegan was not at work on weekends. But it is concerning that Caraccio did not try Geoghegan at home; discuss his concerns with Dille; or email Geoghegan to alert him that he had a question that needed to be promptly discussed on Monday.

Caraccio reported for work on Monday at 5:45 a.m., and testified that he fully intended to contact Geoghegan about his need to complete the controverted assignments. He was simply waiting for Geoghegan to report to work and get settled. But as of 11:30 a.m., Caraccio still had not done so, and Geoghegan initiated contact himself. Caraccio's version of the conversation echoed Geoghegan's; Caraccio did not

[5] The report erroneously stated that Dille himself reviewed the Power DMS list and noticed Caraccio's noncompliance. Caraccio appears to view this error as significant in some way; I cannot agree. Regardless of who discovered the noncompliance, the record is clear that the two controverted assignments were not timely completed.

think that the controverted trainings were applicable to him; Geoghegan advised that they should be completed; and Caraccio promptly complied.

Caraccio shared the history of his work as a union leader, and implied that retaliation was behind the decision to discipline him for this small infraction. In late 2010, when he was serving as Vice-President of the Supervisors Local, a dispute arose about promotions; the County had proposed promoting some eleven individuals but asked to freeze their salaries at a lower level for a year. The union was adamantly opposed; Geoghegan was one of the effected individuals. Apparently, the Director and Deputy Director clandestinely signed an agreement to proceed with the promotions and salary freeze over the union's objections. The union was often at odds with the prison administration; Caraccio stressed his lack of respect for management and took pains to note that the then Deputy Director ultimately was convicted of wiretapping and sent to prison.

Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1998). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Caraccio's testimony did not hold together. His excuses for noncompliance were unpersuasive. Caraccio had more than one opportunity to timely raise questions about the need to complete the two controverted assignments. He could have emailed Geoghegan and at least registered his concern within the time frame for completion. Caraccio could have called Dille, who was not his regular supervisor but was the superior who issued the order, and received the clarification he sought. Moreover, Caraccio completed several outstanding assignments that day that were equally inapplicable to his daily duties in the Juno Unit. He is not involved with the transportation of inmates, but completed a module on that subject. He does not supervise inmates in their cells, but completed a suicide prevention module. I thus do not deem credible the explanation that Caraccio perceived that the two final modules, and only these two, were somehow inapplicable to him.

As for Caraccio's true motivation for completing all but two modules that day, the record offers no clear explanation. But the record is clear, and I **FIND** that he willfully and knowingly failed to comply with an order; and failed to timely seek clarification of any aspect of that order that he ostensibly misunderstood.

CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is designed to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, a Civil Service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be removed or subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing before an administrative law judge are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, to be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. N.Y. v. Bock, 38 N.J. 500 (1962). The appointing authority bears the burden of proving its charges by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Correctional facilities operate through a rigidly hierarchical, almost "paramilitary," structure. Lockley v. Dep't of Corr., 177 N.J. 413, 425 (2003). Maintenance of strict discipline is critical in military-like settings such as police departments, prisons and correctional facilities. City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). While insubordination is always a serious matter, it is especially so in a paramilitary context. Our courts have held that "[r]efusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Dictionary definitions have been utilized by our courts to define "insubordination" where it is not specifically defined in contract or regulation, explaining as follows:

> we are obliged to accept [the term "insubordination's"] ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient."

"Neglect of duty" can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty, as well as, from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

"Conduct Unbecoming a Public Employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Such misconduct need not necessarily "be

predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that Caraccio's failure to timely complete the two Power DMS modules rose to insubordination, neglect of duty, and conduct unbecoming a correctional officer. He was presented with an unequivocal order that contained clear timelines; he failed to comply. In the event an order is unclear or confusing to a subordinate, it is the subordinate's duty to seek clarification prior to the expiration of the time frame for completion of the assignment at issue. Caraccio failed to do so here.

I **CONCLUDE** that Caraccio has not presented persuasive evidence that the charges against him were motivated by anti-union animus. Caraccio also pointed out that a prior attempt to remove him, in 2014, was overturned by the Civil Service Commission, thus urging that the County is essentially "out to get him." This argument is equally unpersuasive; and indeed, that prior disciplinary incident rose and fell on its own merits, and is irrelevant to the case presently before me. Caraccio urged that the County failed to produce certain policies both at the local hearing and before me; but even if true, this did not evidence that the charges here were motivated by anything other than Caraccio's conduct. Moreover, the sought-after policies could have been obtained through an Open Public Record Act (OPRA) request; or via a discovery motion before me. Neither avenue appears to have been pursued here. And any failure by the County to provide discovery at the local hearing was cured by Caraccio's opportunity for a de novo hearing before me. See: Ensslin v. Tp. of N. Bergen, 275 N.J. Super. 352 (App. Div., 1994); In re Darcy, 114 NJ. Super. 454 (App. Div., 1971).

Finally, Caraccio raises for the first time in his post-hearing submission the somewhat novel argument that the Civil Service Commission is biased toward management, and that this should somehow factor into my decision making. In support of this contention, counsel attaches data and a certification, none of which was presented at hearing; and accordingly, none of which, will I consider or make a part of

this record. And Caraccio's argument misapprehends my role, which is to make a recommendation to the Civil Service Commission in this specific case, and based on the facts developed at this hearing. It is not my role to comment or rule on how the Commission reaches its final decisions.

PENALTY

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. When determining the appropriate penalty to be imposed, the appointing authority must consider an employee's past record, including reasonably recent commendations and prior disciplinary actions. W. New York v. Bock, supra. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24.

I have reviewed Caraccio's disciplinary record to determine whether the penalty of removal, as sought by the County, is reasonable under the totality of the circumstances. Clearly, standing alone, this minor infraction would not warrant termination of employment. But the law requires that I examine Caraccio's record in its entirety, and it reveals a troublesome record of disciplinary infractions:

1. In March 2006, Caraccio failed to report for a training session and received a three-day suspension.
2. In July 2006, Caraccio was late in reporting for duty and received a two-day suspension.
3. In May 2010, he was suspended for three days for using profanity and yelling at a co-worker.
4. Later that month, he was fined for lateness.
5. In November 2011, Caraccio was fined for altering a line-up without conferring with his superior.

6. In January 2012, disciplinary charges arising from use of profanity were settled with the parties agreeing to a twenty-day suspension, with five days to be held in abeyance.
7. And while Caraccio correctly pointed out that a prior attempt to remove him was overturned by the Civil Service Commission, an appeal of a demotion and a 120-day suspension for driving while intoxicated when off-duty was upheld by the Commission in December 2014.

This is an employer who has redirected Caraccio's conduct for over ten years, steadily increasing the level of discipline from fines and minor disciplinary suspensions, to major disciplinary suspensions of increasing length and duration. Caraccio nonetheless continues to fail to comply with the rules of his workplace. Our courts have recognized that "there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006). I **CONCLUDE** that the penalty of removal should be upheld.

ORDER

Therefore, it is hereby **ORDERED** that the charges against Caraccio are **SUSTAINED**, and for the reasons set forth above, the penalty of removal is likewise **SUSTAINED**.

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. 40A:14-204.

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

September 5, 2017

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: September 5, 2017

Date Mailed to Parties: SEP 6 2017

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Appellant:

Ron Edwards

Sergei Duda

Thomas Caraccio

For Respondent:

John Geoghegan

Kevin Dille

EXHIBITS

For Appellant:

A-1 Report

A-2 Prior decisions

For Respondent:

R-1 Written Directive System Policy

R-2 General order

R-3 Request for Disciplinary Action

R-4 Report

R-5 Report

R-6 Body Armor Policy

R-7 Home Confinement (GPS) Policy

R-8 PNDA

R-9 Excerpts from Rules and Regulations Manual

R-10 Memorandum

R-11 Supplemental Report

R-12 Prior disciplinary record

In the Matter of Felicia Johnson-Still, City of Newark, State Operated School District

CSC DKT. NO. 2017-2410
OAL DKT. NO. CSV 03301-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 4, 2017 JM

The Civil Service Commission, at its meeting of October 4, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03301-17

AGENCY DKT. NO. 2017-2410

IN THE MATTER OF FELICIA JOHNSON-STILL, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK.

Lesley Sotolongo, Esq., for appellant Felicia Johnson-Still (DeCotiis, Fitzpatrick, Cole & Giblin, attorneys)

Bernard Mercado, Esq. for respondent State-Operated School District of the City of Newark

Record Closed: September 5, 2017 Decided: September 5, 2017

BEFORE **MARGARET M. MONACO**, ALJ:

Appellant Felicia Johnson-Still filed an appeal from a Final Notice of Disciplinary Action dated January 17, 2017, issued by respondent State-Operated School District of the City of Newark. The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on March 8, 2017, for determination as a contested case. Prior to the hearing scheduled for September 28, 2017, the parties

reached an amicable resolution and counsel for respondent submitted the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

September 5, 2017
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency:

Date Mailed to Parties: SEP 11 2017
jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NEWARK PUBLIC SCHOOL DISTRICT
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Attorneys for Respondent State-operated
School District of the City of Newark

FELICIA JOHNSON-STILL, Appellant, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV 03301-2017N AGENCY REF. NO.: 2017-2410 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Felicia Johnson-Still ("Appellant" or "Johnson-Still") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, her appeal and request for a hearing filed under OAL Docket No. CSV03301-2017N, Agency Ref. No.: 2017-2410 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other claims or suits that she may have previously filed against the District that are still pending in any and all other courts and/or before any and all other agencies, with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the District and Appellant up to this point in time.

3. In exchange, the parties agree that the charges set forth in the Final Notice of Disciplinary Action dated January 17, 2017 are sustained but that Appellant's twenty (20) day suspension will be reduced to an ~~eighteen (18)~~ seventeen (17) day suspension. The ~~2~~ three (3) day reduction in suspension time shall be converted to and recorded as an "Administrative Leave Without Pay". The Final Notice of Disciplinary Action will be amended accordingly.

LS BM LS BM

Further, the only charge sustained will be sec. B 2. of the Neglect of Duty charge.

4. Appellant will not receive any back pay as part of this Agreement.

5. This Agreement shall not constitute a precedent in any matters involving other employees.

6. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including fees, back pay, front pay or any other monetary relief.

7. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that she may have against the District and the Released Parties relating to his employment with the District up to this point in time. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with the District up to this point, including but not limited to any and all rights or claims he may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on his employment with the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should same become necessary.

8. Notwithstanding Paragraph 7 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving her rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 7, Appellant agrees not to seek or accept any resulting relief whatsoever.

9. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

10. Appellant understands, agrees to and acknowledges that she is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

11. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

12. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party. DM LS JS

13. Appellant agrees that ~~he~~ she has been fully and fairly represented by her Union, International Union of Operating Engineers Local 68.

14. This Settlement Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey Law.

15. This Settlement Agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective on the District upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

16. This Settlement Agreement is subject to the final approval of the New Jersey Civil Service Commission and will only become binding on the parties upon the final approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: 8/18/2017

FELICIA JOHNSON-STILL
Appellant

Dated: 8/18/17

LESLEY SOTOLONGO, ESQ.
Attorney for Appellant

Dated: 8/18/17

SAL COSTANZA,
IUOE Local 68

Dated: 9/29/17

CHRISTOPHER CERF
State District Superintendent

Dated: 8/18/17

~~BERNARD~~ MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, FELICIA JOHNSON-STILL, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the Civil Service Commission, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: 8/15/2017

Felicia Johnson-Still

FELICIA JOHNSON-STILL

STATE OF NEW JERSEY

In the Matter of Marjorie Londregan
Passaic County,
Preakness Healthcare Center

CSC DKT. NO. 2015-2336
OAL DKT. NO. CSV 4716-15
(ON REMAND CSV 05916-17)

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2017 BW

The appeal of Marjorie Londregan, Graduate Nurse, Passaic County, Preakness Healthcare Center, removal effective January 15, 2015, on charges, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on September 1, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 4, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Marjorie Londregan.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
October 4, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05916-17

IN THE MATTER OF MARJORIE J. LONDREGAN, PASSAIC COUNTY PREAKNESS HEALTHCARE CENTER,

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Samuel Wenocur, Esq. on behalf of appellant (Oxfeld Cohen, PC)

Jose Santiago, **Esq.** on behalf of respondent (Assistant County Counsel)

Record Closed: August 28, 2017 Decided: September 1, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Appellant, Marjorie Londregan, appeals her termination as a graduate nurse by respondent, the Passaic County Preakness Healthcare Center, by Final Notice of Disciplinary Action dated January 22, 2015.

Appellant requested a hearing on the matter, and it was transmitted as a contested case to the Office of Administrative Law (OAL), and filed on April 7, 2015 under OAL Docket Number CSV-04716-15. N.J.S.A. 52:14B-2(b); N.J.A.C. 4A:2-2.8. Hearings were scheduled and adjournments were requested by appellant as follows: for

adjournment of the September 24, 2015 hearing date for medical reasons; adjournment of the February 16, 2016 hearing date and waived back pay; adjournment of the May 2, 2016 hearing date because she was ill; adjournment of the September 21, 2016 hearing date because she would be out-of-state; the January 10, 2017 hearing date was adjourned because the parties reached a settlement; on February 16, 2017, a telephone conference was conducted requesting status of the settlement. No settlement was reached and on March 2, 2017 another telephone conference was conducted to obtain the status of settlement. No settlement was reached and appellant requested an adjournment of the March 16, 2017 hearing date because she was out-of-state and her home needed emergency repair. A peremptory date was scheduled for March 31, 2017 and appellant failed to appear at the peremptory hearing.

The matter was remanded to me April 28, 2017, "to allow the parties to explore further efforts at settling the mater." The Commission stated that if the appellant failed to appear on the next hearing date, "the appellant ***will not*** be afforded another opportunity".

On May 2, 2017, OAL sent a notice to the parties, including appellant, of a telephone prehearing scheduled for June 5, 2017 and hearing dates on July 10 and 12, 2017. The June 5, 2017 prehearing was rescheduled to June 23, 2017 at 3:00p.m. During the pendency of the conference counsel advised that the July 12, 2017 hearing was not needed. A new notice went out on June 23, 2017 with the July 10, 2017 peremptory hearing date only.

On June 27, 2017 appellant's counsel requested that the July 10, 2017 hearing be cancelled. He indicated that he informed appellant that her failure to appear at the hearing could result in the dismissal of her appeal. In response appellant reiterated that she would be unavailable to attend because she will be out of state for her reiki healing training and she would not accept a settlement. Appellant's adjournment request was denied.

On July 10, 2017 the hearing proceeded without appellant's presence. The undersigned offered July 12, 2017 for an additional hearing date to allow appellant time to travel to New Jersey for the hearing. The parties agreed that the July 12 date was not necessary. It was agreed by the attorneys that this matter will be decided on the papers rather than having appellant constantly not appear for the hearings. It was also confirmed at the hearing that appellant refused the settlement offer of returning to work because she chose to stay out of state to complete the reiki healing training ending sometime in the fall. The parties requested to submit post-hearing briefs.

Appellant, a registered nurse employed by respondent since December 9, 2011, was charged with chronic or excessive lateness and absenteeism, failure to follow leave of absence procedure and abandonment. She was removed from her position as a Graduate Nurse effective January 15, 2015 by Final Notice of Disciplinary Action dated January 22, 2015. Appellant was afforded a hearing at Preakness Healthcare Center on January 15, 2015.

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Grounds for discipline include, among other things, insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, and neglect of duty. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (7). An employee may also be subject to termination for resignation not in good standing. If an employee is absent from duty for five or more consecutive business days, or has not returned to work for five or more business days following an approved leave of absence, without the approval of his superior, he shall be considered to have abandoned his position and shall be recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b)(c).

Although the Commission remanded the matter to me for the sole purpose of continuing settlement negotiations, I am going to address and decide on the merits of the appeal as agreed by counsel.

Based upon the Final Notice of Disciplinary action dated January 22, 2015, appellant was charged with chronic or excessive lateness or absenteeism because she failed to comply with producing documentation in support of her request for family leave effective December 30, 2014 through February 9, 2015. Appellant did not come to work and was therefore absent without authorization on December 30, 2014; January 2, 3, 4, 5 and 7, 2015. Appellant had also used her eligible sick days for 2014 through May 14, 2014 and then used an additional twenty-two uncompensated sick time days for the remainder of the year. Appellant asserts that she was not aware that she needed to call out sick after December 30, 2014, the date of her request for Family Leave. This contradicts her assertion that she followed the call-out procedures between December 25 and 29, 2014 when she obviously knew what procedure to follow when not coming to work. Appellant was also previously aware of policy and procedure when she took an extended leave of absence from November 10th through November 28, 2014. Her request for Family Leave was not approved and appellant failed to follow policy and procedure to call in when not reporting for work.

An employee may be subject to discipline for chronic or excessive absenteeism. N.J.A.C. 4A:2-2.3(a)4. While there is no precise number that constitutes "chronic," it is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. Northern State Prison, 97 N.J.A.R.2d (CSV) 529, 531. Appellant was absent without authorization for five consecutive days in January 2015. She had received verbal warnings for lateness on March 5 and May 12, 2012 as well as written warnings on March 5 and June 7, 2012. Appellant received a one-day suspension and subsequently received a three-day and five-day suspension for chronic or excessive absenteeism or lateness which were converted into fines.

Courts have consistently held that excessive absenteeism need not be accommodated, and that attendance is an essential function of most jobs. See, e.g.,

Muller v. Exxon Research and Engineering Company, 345 N.J. Super. 595, 605-06 (App. Div. 2001) (under the LAD, excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act.); Svarnas v. AT&T Communications, 326 N.J. Super. 59, 79 (App. Div. 1999) ([a]n employee who does not come to work cannot perform any of her job functions, essential or otherwise). See, also, Dudley v. Calif. Department of Transportation, 2000 W.L. 328119 (9th Cir. 2000) (a diabetic with frequent absences who failed to provide adequate medical documentation and could not provide a definite return to work date was not a qualified individual).

Furthermore, in Hatcher v. Northern State Prison, 2002 W.L. 31731008 (N.J. Adm.) at p. 4, the court held that:

> [T]here is no way to reasonably accommodate the unpredictable aspect of an employees sporadic and unscheduled absences. Svarnas v. AT&T Communications, 326 N.J. Super. 59, 77 (App. Div. 1999). As noted by the New Jersey Supreme Court, 'just cause for dismissal can be found in habitual tardiness or similar chronic conduct.' West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, 'numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty.' Ibid. . Especially in times of budgetary constraint, it is important that management utilize existing staff efficiently and effectively. 'We do not expect heroics', but 'being there,' i.e., appearing for work on a regular and timely basis is not asking too much. State Operated Sch. Dist. Of Newark v. Gaines, 309 N.J. Super. 327, 333 (App. Div. 1998).

Appellant had been excessively absent from work sufficient to warrant disciplinary charges, and I so **CONCLUDE**. Appellant's employer had a right to expect that she would be present at work, willing and able to work. Certainly respondent is not obligated to continue to employ a person who either cannot or will not perform her job duties on a regular basis. Frequent absences cause disruption in the public work place

and create a hardship for the remaining employees, who must absorb the job duties of a person who cannot or will not perform them. I therefore **CONCLUDE** that the respondent has met its burden of proof regarding excessive absenteeism. Furthermore, appellant failed to comply with policy and procedure by not providing the requested medical documentation for a family leave request. She failed to appear for her hearing as well as for all scheduled dates before me.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against appellant. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/csv9122-99.pdf>. The FNDA states that the charge for other sufficient cause is sustained for failure to follow leave of absence procedures. Because I find the respondent to have proven the above-named charges by a preponderance of the credible evidence, I therefore **CONCLUDE** that respondent has satisfied its burden of proving, by a preponderance of the credible evidence of other sufficient cause.

Based upon all of the foregoing, including the evidence and certifications submitted, I **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the credible evidence, the charges against appellant. Furthermore, based upon the Commissioner's instruction that this matter be remanded for the sole purpose of appellant to appear for further settlement discussion, to which she refused, also warrants dismissal of this matter.

ORDER

It is hereby **ORDERED** that the removal of appellant is hereby **AFFIRMED** and her appeal is **DISMISSED**.

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

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

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

September 1, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: SEP 5 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JOINT EXHIBITS

J-1 January 12, 2015 Preliminary Notice of Disciplinary Action (31-A) December 30, 2014 Memo concerning Ms. Londregan Certified Mail Receipt of January 12, 2015 Employee Monthly Schedule

J-2 December 30, 2014 E-mail from Renee Peterman to Tawanda Sangster and Mariene Williams, Archived Time Card Report for Marjorie J. Londregan

J-3 January 7, 2015 e-mail from Ibelise Grullon to Director Lucinda Corrado, Renee Peterman and Adelaida Sanchez concerning Ms. Londregan Time Card Report for Marjorie J. Londregan

J-4 Employee Attendance Records- 2014/Londregan, Marjorie

J-5 Employee Attendance Records- 2014/Londregan, Marjorie

J-7 Sick Call Log- May 23, 2014 – The Call Out Sick Book with call outs for days for Marjorie J. Londregan

J-8 County of Passaic Personnel Policies & Procedures Manual

J-9 December 12, 2011 Acknowledge/Receipt for Personal Policies and Procedures

J-13 Marjorie Londregan Grievance History

In the Matter of Earl Polhamus,
Woodbine Development Center,
Department of Human Services

CSC DKT. NO. 2016-895
OAL DKT. NO. CSV 19398-15

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 4, 2017 JM

The Civil Service Commission, at its meeting of October 4, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 19398-15

AGENCY DKT. NO. 2016-895

IN THE MATTER OF EARL POLHAMUS,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant, Earl Polhamus (Nash Law Firm, LLC, attorneys)

Elizabeth Davies, Deputy Attorney General, for respondent, Department of Human Services, Woodbine Development Center (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: September 5, 2017 Decided: September 12, 2017

BEFORE **JEFFREY WILSON**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on November 25, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

9-12-17 _____

DATE **JEFFREY WILSON**, ALJ

Date Received at Agency: 9/15/17

Date Mailed to Parties: 9/15/17

/jdw

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on September 5, 2017

OAL DKT. NO. CSV 19398-15

SETTLEMENT AGREEMENT

J-1

IN THE MATTER OF
EARL POLHAMUS
AND
WOODBINE DEVELOPMENTAL CENTER,
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated August 4, 2015 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-2 Neglect of duty, loafing, idleness, or willful Failure to devote attention to tasks which Could result in anger to person or property.	Removal	August 1, 2014
2. Admin. Order 4:08 C-3 Physical or mental abuse of a patient, client, resident or employee.	Removal	August 1, 2014
3. Admin. Order 4:08 C-8 Falsification: Intentional misstatement of Material fact in connection with work, Employment, application, attendance or in Any record, report, investigation, or other Proceeding.	Removal	August 1, 2014

The Amended Preliminary Notice of Disciplinary Action dated February 26, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6	Removal	To be determined
Conduct unbecoming a public employee.		
2. N.J.A.C. 4A:2-2.3(a)12	Removal	To be determined
Other sufficient causes.		
3. Admin. Order 4:08 C-19	Removal	To be determined
Conviction of a criminal offense		

The Amended Preliminary Notice of Disciplinary Action dated February 26, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6	Removal	To be determined
Conduct unbecoming a public employee.		
2. N.J.A.C. 4A:2-2.3(a)12	Removal	To be determined
Other sufficient causes.		
3. Admin. Order 4:08 E-1	Removal	To be determined
Violation of a rule, regulation, policy		
Procedure, order, or administrative		
Decision.		

B. The parties have agreed to the following:

The Appellant, Earl Polhamus withdraws his appeal for a hearing and the Respondent Appointing Authority, Department of Human Services agrees that the following result will occur with regard to each charge:

The Final Notice of Disciplinary Action dated August 4, 2015:

Charge	Disposition
1. Admin. Order 4:08 B-2	6 month suspension effective August 1, 2014.
2. Admin. Order 4:08 C-3	Withdrawn

3. Admin. Order 4:08 C-8 Withdrawn

The Amended Preliminary Notice of Disciplinary Action dated February 26, 2016:

4. Admin. Order 4:08 C-19 6 month suspension effective February 1, 2015.
5. N.J.A.C. 4A:2-2.3(a)6 Withdrawn.
6. N.J.A.C. 4A:2-2.3(a)12 Withdrawn.

The Amended Preliminary Notice of Disciplinary Action dated February 26, 2016:

7. Admin. Order 4:08 E-1 60 day suspension effective August 1, 2015.
8. N.J.A.C. 4A:2-2.3(a)6 Withdrawn.
9. N.J.A.C. 4A:2-2.3(a)12 Withdrawn.

C. The parties have agreed to the following:

The Appellant agrees to two 6 month suspensions and one 60 day suspension and shall not receive any back pay as a result of this agreement.

1. To date, appellant has served a total of 12 months and 60 days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: No back pay .
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: voluntary leave of absence without pay .
4. Appellant will be reassigned to the position of Senior Laundry Worker.
5. Appellant agrees never to bid on or hold any direct care position (i.e., Human Services Assistant, Cottage Training Technician, Senior Cottage Training Technician, and Cottage Training Supervisor) or to bid on or hold the positions of Therapy Aide, Therapy Program Assistant, or Senior Therapy Program Assistant at Woodbine Developmental Center or in any facility under the care and control of the Department of Human Services. Appellant further agrees that by virtue of this agreement, he is waiving his right to accept promotional, lateral, and demotional opportunities to any of the aforementioned titles in lieu of layoff.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers

Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims. or prior workers compensation claims

BN EAP SK EWF

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9-5-17
DATE

Earl W Polhamus
Earl Polhamus, Appellant

9-5-17
DATE

William A. Nash, Esq.
ON BEHALF OF Appellant

9/5/17
DATE

Steven Katz
ON BEHALF OF Respondent

9/5/17

DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Earl Polhamus, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-5-17

DATE

Earl W Polhamus Jr

Earl Polhamus

In the Matter of Shirley Shay,
Sussex County,
Department of Human Services

CSC DKT. NO. 2016-3834
OAL DKT. NO. CSV 08198-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 4, 2017 JM

The Civil Service Commission, at its meeting of October 4, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 08198-17

AGENCY DKT. NO. 2016-3834

IN THE MATTER OF SHIRLEY SHAY, SUSSEX COUNTY, DEPARTMENT OF HUMAN SERVICES,

---

Gary A. Kraemer, Esq. for appellant (Daggett & Kraemer, attorneys)

James T. Prusinowski , Esq., for respondent (Trimboli & Prusinowski, LLC)

Record Closed: September 18, 2017 Decided: September 18, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on June 9, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 and assigned initially to ALJ Leland McGee. When reassigned to me, a telephone prehearing was conducted wherein the parties agreed on dates for hearing. During the pendency of the September 7, 2017 hearing, the parties resolved all issues in dispute. The parties prepared and submitted a Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

September 18, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

9-21-17

Date Received at Agency: Sept. 18, 2017

Date Mailed to Parties: SEP 21 2017
ljb

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

LOCAL

OAL DKT. NO. CSV ~~201~~ 06715-16 08198-17

AGENCY DKT. NO. 2016 -3834

SETTLEMENT AGREEMENT

IN THE MATTER OF

Shirley Shea

AND

Sussex County

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated May 4 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. 1A Competency, 1efficiency or failure to perform duties	Termination	
2. 1A Ability to Perform Duties	Termination	
3. Conduct Unbecoming	Termination	
4. Neglect of Duty	Termination	
5. Misuse of Public Property	Termination	
6. Other Sufficient Cause	Termination	

B. The Appellant Shirley Shea withdraws his/her appeal and request for a hearing, and the Respondent appointing authority Sussex County agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. 1A Competency, 1efficiency or failure to perform duties	withdrawn	
2. 1A Ability to Perform Duties	withdrawn	
3. Conduct unbecoming	withdrawn	
4. Neglect of Duty	withdrawn	
5. Misuse of Public Property	withdrawn	

OAL DKT. NO. CSV 05188-17

C. The parties have agreed to the following:

~~For Suspensions, Complete the Following:~~

~~1. To date, appellant has been suspended for a total of _____ days based upon the~~ above charges.

2. The total number of days of back pay, ~~if any~~, to be paid by the appointing authortiy to the Appellant is as follows: _____.

3. Any ~~other days~~ from the time of last suspension day until return to work shall be treated ~~as follows:~~ _____.

For Removals, Complete the Following

~~1. To date, appellant has served a total of _____ days without pay based upon the~~ above charges.

2. The total number of days of back pay, ~~if any, to be~~ paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other ~~days~~ from the time of last suspension day until reinstatement shall be treated ~~as follows:~~ _____.

4. (Strike if not applicable) The appellant agrees to a

✓ resignation in good standing

____ general resignation

which shall be effective May 4 2017[date]. ~~Any days from the effective date of removal to the effective date of resignation shall be treated as follows:~~

_____

_____.

She is withdrawing the appeal based upon her physical inability to perform her job duties as an omnibus driver for the County of Sussex and the County's withdrawal of

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Sussex County (Respondent) shall amend Appellant's personnel records to ~~conform~~ to the terms of the settlement. All internal records of the Appointing Authority Sussex County will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. ~~Except for the assessment of _____'s disciplinary record in any subsequent personnel disciplinary hearing,~~ Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, Sussex County, their employees, agents, or assigns, including ~~but~~ not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims. Nothing in this provision is to be construed as a waiver of Shay's right to apply for a retirement application, including a disability retirement, which Sussex County will not oppose

H. The parties agree that if ~~any~~ portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Shay waives her right to future employment with the County of Sussex, and the County can remove Shay from any employment lists based upon this Agreement.

OAL DKT. NO. CSV 08198-17

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

September 7, 2017
DATE

Shirley Shay
Appellant Shirley Shay

September 11, 2017
DATE

Respondent

September 7, 2017
DATE

~~ON BEHALF OF~~ Gary Kraemer, Esq.
Atty for Appellant

September 11, 2017
DATE

Natalia Shishkin, Esq.
Attorney for
ON BEHALF OF Respondent

OAL DKT. NO. CSV 08198-17

CERTIFICATION

I, Shirley Shay, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

September 7, 2017
DATE

Shirley Shay
NAME Shirley Shay

Angiulo, Nicholas

From: James T. Prusinowski <jprusinowski@trimprulaw.com>
Sent: Monday, September 25, 2017 1:35 PM
To: Angiulo, Nicholas
Cc: gkraemer@kandclaw.com; Kamilah Massaquoi
Subject: Re: Shirley Shay v. Sussex County - SETTLEMENT

Importance: High

April 8, 2016 through May 4, 2017 should be designated as an approved unpaid leave of absence.
Thanks.

Jim

Trimboli & Prusinowski LLC
www.trimprulaw.com

268 South St.
Morristown, NJ 07960
973-660-1095 973-349-1307 (fax)
---
576 Fifth Ave
Suite 903
New York, NY 10036

On Sep 25, 2017, at 12:04 PM, Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov> wrote:

> Mr. Kraemer and Mr. Prusinowski:
>
> I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Shirley Shay. from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.
>
> Specifically, while the settlement indicates that Ms. Shay agrees to resign in good standing effective May 4, 2017, the record does not specifically reflect how to record the time period from the original date of removal (April 8, 2016) and the date of her resignation should be recorded in her personnel record. In this regard, before a matter can be acknowledged by the Commission, we require all periods of time to be accounted for in an employee's personnel record. For example, is that time period to be recorded as an approved leave of absence without pay, or something else?
>
> Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.
>
> Sincerely,
>
> Nicholas F. Angiulo

Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

In the Matter of Olea Woodard,
Camden County Health Services
Center

CSC DKT. NO. 2013-2075
OAL DKT. NO. CSV 02213-13

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 4, 2017 JM

The Civil Service Commission, at its meeting of October 4, 2017, acknowledged the attached settlement, as clarified, in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 2213-13
AGENCY DKT. NO. 2013-2075

IN THE MATTER OF OLEA WOODARD, CAMDEN COUNTY HEALTH SERVICES CENTER.

Joseph Waite, Union Representative, AFSCME Council 71, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anne E. Walters, Assistant County Counsel, for respondent (Christopher A. Orlando ,County Counsel)

Record Closed: September 14, 2017 Decided: September 18, 2017

BEFORE **MARY ANN BOGAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on February 15, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

September 18, 2017
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 9/19/17

Date Mailed to Parties: 9/19/17

/cb

SETTLEMENT AGREEMENT & RELEASE

THIS SETTLEMENT AGREEMENT & RELEASE, is made on the 28 day of August June, 2017, between the **CAMDEN COUNTY HEALTH SERVICES CENTER (CCHSC)** (hereinafter referred to as "Employer") and **OLEA WOODARD** (hereinafter "Former Employee").

WHEREAS, Olea Woodard ("Former Employee") was previously employed by Camden County Health Services Center (CCHSC) as a Certified Nurse's Aide; and

WHEREAS, on or about August 12, 2012, Former Employee was involved with an incident while working for CCHSC, which lead to a disciplinary matter under Docket No. CSV-2213-13 and licensing matter under Docket No. HLT-11361-2013S; and

WHEREAS, on or about September 23, 2012, Camden County Health Services Center (CCHSC) issued a Preliminary Notice of Disciplinary Action to Former Employee; and

WHEREAS, Camden County Health Services Center (CCHSC) subsequently issued a Final Notice of Disciplinary Action, dated January 25, 2013, to Former Employee; and

WHEREAS, because Camden County Health Services Center (CCHSC) ceased doing business as a health care facility in 2014, Former Employee was laid off on April 30, 2014; and

WHEREAS, The New Jersey Department of Health and Senior Services Online Public Registry indicates that Former Employee's Nurse's Aide license is active and there are no substantiated findings for Former Employee; and

WHEREAS, Former Employee has been represented throughout these proceedings by her Union Representative; and

WHEREAS, the parties by and through their respective representatives, have negotiated a resolution of all issues in controversy between them.

NOW THEREFORE, IT IS AGREED:

1. The consideration supporting this Settlement Agreement shall be the mutual covenants and terms contained herein.

2. Camden County Health Services Center (CCHSC) agrees that it will rescind the Final Notice of Disciplinary Action dated January 25, 2013.

3. Former Employee agrees to waive any and all claims for back pay and withdraw her appeal in this matter.

4. Former Employee agrees to withdraw her appeal at the Office of Administrative Law under Docket CSV-2213-13 upon the execution of this Settlement Agreement & Release and voluntarily agrees not to appeal the discipline/penalty in any other forum.

5. Each party acknowledges they have read this Settlement Agreement and that each of them fully understands all terms and provisions contained herein.

6. The Parties agree that they are voluntarily entering into this settlement agreement and release of their own free will without an duress or coercion and with no other representations of any kind having been made to induce either party to enter into this settlement agreement and release.

7. This settlement agreement and release constitutes the entire agreement between the Parties. No representations have been made by any party other than those set forth herein. This settlement agreement cannot be modified or amended except by written instrument executed by all the Parties to this settlement agreement and release.

Karyn Gilmore

Karyn Gilmore, CEO
Camden County Health Services Center (CCHSC)

Dated: 9/6/17

Olea Woodard

Olea Woodard, Former Employee

Dated: 8/30/17

Joseph Waite, Union Rep. AFSCME

Date: 8/30/2017

Angiulo, Nicholas

From: Anne E. Walters <Anne.Walters@camdencounty.com>
Sent: Monday, September 25, 2017 8:43 AM
To: Joe Waite; Angiulo, Nicholas
Subject: RE: Olea Woodard v. Camden County Health Services Center - SETTLEMENT

Good morning, yes I am fine with citing that period as a leave of absence without pay.
Thank you.

Anne

Anne E. Walters
Assistant County Counsel
Office of County Counsel
Courthouse, 14th Floor
520 Market Street
Camden, NJ 08102
Phone: (856) 225-5543
e-mail: awalters@camdencounty.com

From: Joe Waite [mailto:jwaite@afscmenj.org]
Sent: Friday, September 22, 2017 4:44 PM
To: Angiulo, Nicholas <Nicholas.Angiulo@csc.nj.gov>; Anne E. Walters <Anne.Walters@camdencounty.com>
Subject: RE: Olea Woodard v. Camden County Health Services Center - SETTLEMENT

Thank you for the query. In past settlements that I have been involved the period of August 22, 2012, through January 13, 2013, should be cited as a Leave of Absence without pay for that period.
Ann is this how you have settled these matters in the past? I am satisfied with the above period as a Leave of Absence without pay. Let me know. Thank you

---

From: Angiulo, Nicholas [mailto:Nicholas.Angiulo@csc.nj.gov]
Sent: Friday, September 22, 2017 10:46 AM
To: Joe Waite; anne.walters@camdencounty.com
Subject: Olea Woodard v. Camden County Health Services Center - SETTLEMENT
Importance: High

Mr. Waite and Ms. Walters:

I am the Deputy Director in charge of this agency's hearing unit. We have received the settlement regarding Olea Woodard from the Office of Administrative Law. However, prior to forwarding it to the Civil Service Commission for acknowledgment, clarification is required.

Specifically, the settlement indicates that Ms. Woodard agrees to withdraw her appeal in exchange for Camden County's rescission of the 104 day suspension (from August 22, 2012 to January 13, 2013). However, while the settlement indicates that Ms. Woodard will not receive back pay, it does not specifically reflect how to record the time period from August 22, 2012 to January 13, 2013. Before the matter can be acknowledged by the Commission, we require all periods of time to be specifically accounted for in an employee's personnel record. In this regard, is that time period to be recorded as an approved leave of absence without pay, or something else?

Please let me know the intention of the parties as soon as possible. An e-mail reply is sufficient so long as agreed upon by the parties.

Sincerely,

Nicholas F. Angiulo
Deputy Director
Division of Appeals & Regulatory Affairs
New Jersey Civil Service Commission

STATE OF NEW JERSEY

In the Matter of Francisco Ponce
Township of North Bergen,
Department of Public Safety

CSC DKT. NO. 2017-2242
OAL DKT. NO. CSV 01327-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2017 BW

The appeal of Francisco Ponce, Police Officer, Township of North Bergen, Department of Public Safety, removal effective June 19, 2015, on charges, was heard by Administrative Law Judge Jude-Anthony Tiscornia, who rendered his initial decision on September 5, 2017. No exceptions were filed.

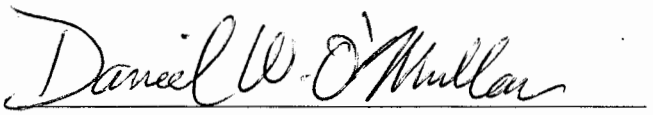
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 4, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Francisco Ponce.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017



Daniel W. O'Mullan
Member

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSR 01327-17

IN THE MATTER OF FRANCISCO PONCE,
TOWNSHIP OF NORTH BERGEN.

Charles J. Sciarra, Esq., for appellant Francisco Ponce (Sciarra & Catrambone, LLC, attorneys)

Joseph E. Santanasto, Esq., for respondent Township of North Bergen (Chasan Lamparello Mallon & Cappuzzo, PC, attorneys)

Record closed: August 3, 2017 Decided: September 5, 2017

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

Francisco Ponce (Ponce or appellant) was removed from his position as a police officer with respondent Township of North Bergen because he failed a random drug test. Ponce asserts that the test conducted at the New Jersey State Toxicology Laboratory was flawed and that the corresponding results are not reliable.

PROCEDURAL HISTORY

On May 5, 2015, appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) seeking a temporary suspension pending removal effective May 18, 2015. (R-1.) Appellant was charged with violating the following Department Rules and Regulations, in addition to the New Jersey Administrative Code:

1. Department Drug Screening For Law Enforcement (General Order 13-15);

2. Incompetency, inefficiency or failure to perform duties (N.J.A.C. 4A:2-2.3(a)(1))

3. Inability to perform duties (N.J.A.C. 4A:2-2.3(a)(3))

4. Conduct unbecoming a public employee (N.J.A.C. 4A:2-2.3(a)(6))

A departmental hearing was conducted on August 11, 2016, at which time all charges were sustained. Appellant was served with a Final Notice of Disciplinary Action dated January 5, 2017, removing appellant from his position as a police officer. The incident that gave rise to the removal was Ponce's positive random drug test administered April 20, 2015.

The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on January 24, 2017. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

I heard this matter on April 26, 2017, and April 28, 2017. The record was kept open pending receipt of transcripts and closing arguments. Closing arguments were received on July 31, 2017, at which time the record was closed.

FACTUAL DISCUSSION

Undisputed Facts

The following facts are undisputed. I therefore **FIND** them to be the facts of this case.

Appellant was employed as a police officer for the Township of North Bergen (Township) in 2015. The Township has a random-drug-testing policy for all law-enforcement officers that was in effect in 2015. Appellant was selected to submit to a random drug test on April 20, 2015. Appellant provided a urine sample that was analyzed at the New Jersey State Toxicology Laboratory (State Lab). A second sample, known as a "split" sample, was also taken, but never analyzed.

The test results provided by the State Lab indicate that the Ponce urine sample tested positive for cocaine.

Testimony for Respondent

Dr. Robert Havier, Ph.D.

Dr. Robert Havier (Dr. Havier) is a forensic toxicologist and the acting director of the New Jersey State Toxicology Laboratory. He testified as an expert in toxicology. Havier oversaw the screening of the urine sample Ponce provided.

Havier testified that the State Lab is charged with conducting random drug tests for every law-enforcement authority statewide. Havier noted that the State Lab is the only such facility in New Jersey that provides toxicology testing for law-enforcement entities. The State Lab has been certified by the College of American Pathologists since October 2016, though it is not required to be certified by any governing body.

Dr. Havier first described the general procedure regarding receiving, identifying and processing an individual urine sample. Dr. Havier stated that each sample is given

an initial screening (an amino-acid analysis), which identifies the presence of various drugs in the urine. If a urine sample is screened and evidence of a drug exists in the urine, the urine sample is transferred to a secure law-enforcement-testing portion of the lab for further testing and analysis known as a confirmation test.

Dr. Havier described the confirmation test as a chemical extraction and analysis performed using gas chromatography and mass spectrometry. Dr. Havier stated that this is the procedure used by most labs doing this type of drug testing on urine samples. This process will identify the specific drug and provide the amount of the drug present in the sample based on the principle of mass fragmentation. Dr. Havier explained that an extract of the sample is injected into a column and is vaporized. The time it takes for the vapor of the drug to leave the column (the retention time) is one of the identifying characteristics of the drug. Once the vapor leaves the column it enters into the mass detector, where it encounters a high electronic beam that fragments the vapor. The machine measures the weight of these fragments and the identity of the drug is determined. The amount of the drug present in the sample is used to determine the "cut-off level." The cut-off level refers to the amount of a drug present in a given sample and whether that amount is enough for the sample to be considered positive. The cut-off level is established by federal guidelines.

Dr. Havier testified that the State Lab conducted a test on appellant's urine sample (the sample) in April 2015. Dr. Havier then read from a document dated April 20, 2015, marked as "Ponce 8," which Dr. Havier described as the results of the initial test performed on the sample. Dr. Havier testified that these results indicated that the sample had tested positive for cocaine. Dr. Havier then testified that the positive sample was transferred for a confirmation test (gas chromatography/mass spectrometry (GCMS) test).

Dr. Havier then read from a document dated April 23, 2015, marked as "Ponce 9," which he described as an internal chain-of-custody form relative to the tests performed on the sample. He testified that the confirmation test was performed over two days: April 21, 2015, and April 22, 2015. Two aliquots were tested on the first day and three on the second. An aliquot is a small portion of the sample that is inserted into

the GCMS machine for testing. He explained that each aliquot tested is diluted with a varying amount of neutral or "blank" urine. Certain dilutions will give a more accurate result based on the concentration of the drug in the original sample.

Dr. Havier stated that on the first day of testing the results were out of acceptable range due to a very large amount of cocaine present in the aliquots tested. The aliquots had to be further diluted to account for the large amount of cocaine present in the sample, and then re-tested.

Dr. Havier then read from documents marked as "Ponce 73" and "Ponce 74," respectively. He identified these as the results of the confirmation testing performed on the sample on April 22, 2015. He testified that the sample was found to contain cocaine, cocaethylene, and benzoylecgonine. He testified that cocaethylene is a metabolite formed in the body when cocaine is consumed in conjunction with alcohol, and that benzoylecgonine is the major metabolite of cocaine. Dr. Havier stated that there were 227 nanograms per milliliter of cocaine, 103 nanograms per milliliter of cocaethylene, and 3,662.4 nanograms per milliliter of benzoylecgonine present in the sample. He testified that the State Lab cut-off rate was 100 nanograms per milliliter for all three substances. Any sample found to contain 100 nanograms or more per milliliter is considered a positive result. The sample tested in the instant matter was found to contain well beyond the cut-off amount. Dr. Havier concludes that the sample was positive for cocaine. He stated that this conclusion was made within a reasonable degree of scientific certainty.

Testimony for Appellant

Dr. Lyle Hayes, Ph.D.

Dr. Lyle Hayes (Dr. Hayes) is a certified New York State forensic toxicologist. He testified as an expert in toxicology. Dr. Hayes reviewed the report and results of the test performed at the State Lab on the Ponce urine sample and he drafted a report based on his review. He did not conduct his own test on any urine sample.

Dr. Hayes testified that he reviewed the State Lab results in order to evaluate the standard operating procedures, chain of custody, operation of the instruments, and interpretation of the results. Dr. Hayes testified that the State Lab was not certified by any certifying agency at the time the test on the Ponce sample was performed, and that such certification is important to ensure proper testing.

Dr. Hayes testified that he found various procedural and reporting problems with the State Lab reports/results. Dr. Hayes drafted a report (A-1) based on his findings and conclusions.

Dr. Hayes then testified regarding Ponce 8 (previously described by Dr. Havier as the results of the initial test performed on the sample). He testified that this document showed that the corresponding sample screened positive for cocaine and its metabolites. Dr. Hayes testified that the date and time indicated on Ponce 8 is 13:49 (1:49 p.m.) on April 20, 2015. Dr. Hayes testified that according to another document he reviewed from the State Lab, the sample did not reach the State Lab until 1:56 p.m. Dr. Hayes concludes that this is a clear discrepancy with regards to the timing of the chain of custody, but notes that he failed to refer to this discrepancy in his report. (A-1.) Dr. Hayes does state in his report that there appear to be "a number of clerical and technical errors" in the State Lab records that call into question the reliability of the testing process.

Dr. Hayes then testified regarding the "unacceptable chromatographic results, as seen on pp. 378–380," and to "benzoylecgonine carryover in blank urine on p. 56" as described in his report. (A-1.) Dr. Hayes explained that pages 378–380 of the State Lab report (marked Ponce 378–80) reflect tests performed on March 24, 2015. He noted that the results did not have the proper ratios and were therefore questionable results. He added that remedial action would need to be taken to correct these flaws.

Ponce 56 indicates that on April 21, 2015, a test on blank urine detected benzoylecgonine at a concentration of -16.52. Dr. Hayes testified that he views two problems with this test. The first is that the concentration was a negative, which Dr. Hayes concludes is the result of the machine not being calibrated properly.

Dr. Hayes testified that this is not a major problem and can be corrected. The larger problem is that benzoylecgonine was found to be present at all in the blank urine tested. Dr. Hayes concluded that the testing column was "dirty" or contaminated when the test was conducted. A "dirty" column means there are residual elements of a prior sample remaining in the column. Dr. Hayes states that this is an issue that should be addressed by some sort of remedial action, and he saw no remedial action taken by the State Lab based on his review of the records.

Dr. Hayes then testified with regard to Ponce 9. He notes that on line three of the document the lab technician notes, "1:50, 1:20 & straight—qualifiers out." Dr. Hayes opines that this means that a test was performed on the Ponce sample at dilutions of 1:50, 1:20 and straight (meaning not diluted), and that the test did not return acceptable results. Dr. Hayes testified that under such circumstances the sample should be diluted further and retested for a more accurate result.

On cross-examination, Dr. Hayes testified that he has never been to the State Lab or inspected any of the equipment there. He testified that he had not conducted any of his own tests on either the sample tested at the State Lab or the split sample. Of the two labs he currently works at, neither perform such tests. He stated that the initial amino-acid test performed on the urine sample is not enough for a confirmation, and added that amino-acid tests will give a false positive approximately 20–40 percent of the time. He agreed that a confirmation test such as the one performed in this case is needed.

Dr. Hayes then testified to a series of documents included in the State Lab's report. He testified to a document identified as Ponce 133 and stated that he reviewed this document in preparing his report. Dr. Hayes agreed that this document shows the identification criteria for benzoylecgonine. He testified to a document identified as Ponce 130 and stated that he reviewed this document in preparing his report. Dr. Hayes agreed that this document shows the identification criteria for benzoylecgonine. Dr. Hayes testified to a document identified as Ponce 134 and stated that he reviewed this document in preparing his report. Dr. Hayes agreed that this document shows the identification criteria for cocaine. Dr. Hayes testified to a

document identified as Ponce 135 and stated that he reviewed this document in preparing his report. Dr. Hayes agreed that this document shows the identification criteria for cocaethylene.

Dr. Hayes testified that the result of the Ponce test as per the report is positive (for cocaine), and that he cannot testify within a reasonable degree of scientific certainty that the result of the test performed on the Ponce sample was a false positive. (See Transcript of April 28, 2017, at 97, lines 1–3.)

Dr. Hayes then testified that with regard to Ponce 9, the notation "qualifiers out" does not mean the test sample is negative for cocaine, nor does it mean the test sample should have come back negative. Dr. Hayes testified that in his opinion "qualifiers out" means the test result is unreliable because the qualifiers were not in the acceptable range. Dr. Hayes testified that diluting the sample further could remedy this issue. Dr. Hayes also testified that he believed that "qualifiers out" referred to the tests performed at the 1:50 and 1:20 dilutions on April 21, 2015.

Dr. Hayes testified that the qualifiers were within the acceptable range on the April 22 test performed, and that he saw no problem with the results from the April 22 test (the results upon which the subject removal is predicated).

Dr. Hayes testified that the errors he identified in his expert report (A-1) are not sufficient to negate the entire test performed at the State Lab, but are sufficient to call the results into question. He further testified that he does not know if the positive result on the Ponce sample is a false positive.

Dr. Robert Havier, Ph.D.

Dr. Havier was recalled to rebut Dr. Hayes' testimony. Dr. Havier testified that the notation "qualifiers out" in Ponce 9 referred to the tests performed on the Ponce sample with the wrong dilutions on April 21, 2015, and not to the tests on the Ponce sample with the proper dilutions on April 22, 2015. Dr. Havier reiterated his prior

testimony that certain dilutions will give a more accurate result based on the concentration of the drug in the sample tested.

With regard to the discrepancy between the time stamp on Ponce 1 and the time shown on Ponce 8, Dr. Havier explained that Ponce 1 is stamped with a Bates stamp by a receptionist at the front desk. He stated that this Bates stamp may be adjusted by the receptionist at any time and is not necessarily accurate. The time on Ponce 1 has no correlation to the functionality or times kept by any of the equipment in the State Lab. The time on Ponce 8 is the time recorded by the amino-acid testing machine and does not relate to the Bates stamp machine at the front desk. He testified that the difference in time between the Bates stamp on Ponce 1 and the time indicated on Ponce 8 in no way affects the outcome of either the amino-acid test or the confirmation test.

Arguments of the Parties and Additional Findings of Fact

Dr. Havier testified that the Ponce urine sample tested positive for cocaine, cocaethylene and benzoylecgonine, and that this conclusion was made within a reasonable degree of scientific certainty.

Appellant asserts that the test conducted on his urine sample at the State Lab was flawed and therefore produced a false positive. He relies on his expert's report (A-1) to illustrate these flaws. Exhibit A-1 was produced by Dr. Hayes, a forensic pathologist, who reviewed 480 pages of documents obtained from the State Lab (Ponce 1 through Ponce 480) and drafted a report based on this review.

Dr. Hayes first raises the issue that the State Lab is not certified by any governing body or institution, and argues that such certification is required to ensure proper testing. Dr. Havier testified that the Lab has been certified by the College of American Pathologists since October 2016, but noted that there is no law or regulation requiring the State Lab to be certified.

The issue of certifying the State Lab speaks to the internal policies and procedures of the lab as a whole, and calls into question the results of any and all tests

performed at the State Lab. I reject this argument, as petitioner has failed to show how certification would change or in any way affect the State Lab or its policies and procedures. The general policies and procedures of the State Lab are not on trial, and this tribunal is not in a position to evaluate whether all tests performed at the State Lab are flawed.

On page 2, paragraph 6, of the expert report Dr. Hayes points to "unacceptable chronographic results, as seen on pp. 378–380" and to "benzoylecgonine carryover in blank urine on p. 56." (A-1.) The testimony of both expert witnesses confirms that pages 378–380 as referred to by Dr. Hayes correspond to a machine-calibration test run on blank urine done on March 24, 2015, almost one full month before the Ponce sample was tested. Dr. Havier testified that this March 24, 2015, calibration test performed on blank urine has absolutely no bearing on the April 21 and 22, 2015, tests performed on the Ponce sample at the State Lab. Since the "unacceptable chronographic results, as seen on pp. 378–380" do not refer to tests actually performed on the Ponce sample, I find they are not relevant in determining the validity of the tests performed on the Ponce sample at the State Lab on April 21 and 22, 2015.

With regard to "benzoylecgonine carryover in blank urine on p. 56," Dr. Hayes testified that this was a "red flag" because it showed that the testing machine used by the State Lab found traces of benzoylecgonine in "blank" or "clean" urine. Dr. Hayes testified that this false positive is likely due to the machine being "dirty," meaning there is residual benzoylecgonine present in the machine from a prior test. Dr. Hayes testified that in such an instance remedial action needs to be taken to ensure a good result on future tests.

Dr. Havier testified that the test highlighted here by Dr. Hayes was a calibration test routinely performed to ensure that the machine is functioning correctly. Dr. Havier testified that it is common for residual substances to be present in the machine from a prior test. Dr. Havier testified that in order to remediate this issue the standard procedure is to run a test on blank urine through the machine prior to testing an actual donor sample. The blank urine sample clears out any residual substances from the prior donor sample tested and insures that the next test will not have any residual

substances present. Dr. Havier testified that this procedure was followed when testing the Ponce sample, and that there was therefore no residual cocaine or cocaine metabolite present in the testing column of the machine when the Ponce sample was tested.

Also regarding Ponce 56, Dr. Hayes notes that the benzoylecgonine concentration was recorded as -16.52. Dr. Hayes testified this reading was incorrect on its face since the machine recorded a concentration less than zero. Dr. Hayes subsequently testified that it was not a major problem and could be remediated by further dilution.

With regard to the test performed on the Ponce sample on April 21, 2015, Dr. Hayes testified that he understood "qualifiers out" as indicated on Ponce 9 to refer to a test performed at dilutions of 1:20 and 1:50 on April 21, 2015. As was explained in detail by Dr. Havier, "qualifiers out" as indicated on Ponce 9 referred to a 1:10 dilution performed on April 21, 2015, and was a notation made to show why the 1:10 dilution was insufficient and instructing further testing to be performed at 1:20 and 1:50. This further testing was performed on April 22, 2015, at the new dilutions. Dr. Hayes testified that this would constitute remedial action, and stated there is nothing wrong with the April 22, 2015, Ponce test results.

Dr. Hayes also testified that he does not know if the positive test result on the Ponce sample at the core of this case was a false positive.

Finally, appellant raises the issue of a discrepancy regarding the time recorded on the April 21, 2015, Bates stamp on Ponce 1 and the time recorded on the April 21, 2015, amino-acid-test computer-printout sheet (Ponce 8). While I find that there is a clear discrepancy between the two times indicated, I do not find that the discrepancy is a fatal flaw, nor do I find that the discrepancy tends to disprove the positive result of the confirmation test performed on April 22, 2015. The arguments against the validity of the test as presented by appellant fall into three general categories: 1) flaws in the testing procedures at the State Lab generally; 2) flaws regarding tests performed on the Ponce sample; and 3) flaws regarding tests performed on urine samples other than the Ponce

sample. I **FIND** that the general testing procedures of the New Jersey State Toxicology Laboratory are adequate to perform a valid test on a urine sample and procure a result within a reasonable degree of scientific certainty. I therefore reject any argument predicated upon scrutiny of those procedures generally.

Appellant argues that if any test performed in the lab was flawed, then the test performed on the Ponce sample may, too, be flawed. I reject this argument for two reasons. First, I do not find that appellant did, in fact, prove that any past test was flawed, and, second, even if some test given at the State Lab on some other date was flawed, this would not disprove the validity of the test performed on the Ponce sample on April 22, 2015, the test upon which the subject removal is predicated.

In the case at bar, appellant has stipulated that the only issue before me is the validity of the test performed on the Ponce urine sample and whether any such flaw resulted in a false positive. The Township of North Bergen has shown by a preponderance of the credible evidence that the test performed on the Ponce urine sample at the State Lab was a valid test, and I **FIND** the result of that test to be a valid result.

CONCLUSIONS OF LAW

The Civil Service Act and its associated regulations govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. Among the causes for major discipline are incompetency, inefficiency or failure to perform duties; inability to perform duties; and conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(1), (3), (6).

The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against him/her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

This case is particularly sensitive because it involves law-enforcement officials.

> [A] police officer is a special kind of public employee. His primary duty is to enforce and uphold the law. He carries a service revolver on his person and is constantly called upon to exercise tact, restraint and good judgment in his relationship with the public. He represents law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public . . . .
>
> [Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966).]

Even more troubling is the fact that illicit drugs may be involved. "Every police officer understands that an officer who uses or sells drugs is a threat to the public." Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 189 (1993).

In this matter, the Township bears the burden of proving the charges against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). Thus, it is my duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth. Jackson v. Delaware, Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958).

In the case at bar, appellant provided a urine sample that tested positive for cocaine. Appellant has attacked the general testing procedures of the State Lab and the results of a few isolated tests that his expert found to be "questionable" in order to raise a shadow of doubt over the test conducted on the urine sample. This tribunal is not swayed by the evidence presented by appellant. Appellant's own expert testified that he cannot opine within a reasonable degree of forensic certainty that Officer Ponce's positive test was a false positive. (See Transcript dated April 28, 2017, at 97,

lines 1–3.) The preponderance of the credible evidence weighs in favor of the respondent Township of North Bergen.

The only remaining issue left to address is whether termination is the appropriate form of discipline for appellant's actions. In making this determination one must consider the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Depending on the conduct complained of, major discipline may be imposed. Major discipline may include removal, disciplinary demotion, or a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. Nevertheless, the law is also clear that a single incident can be egregious enough to warrant removal without reliance on progressive-discipline policies. See In re Herrmann, 192 N.J. 19, 33 (2007) (Division of Youth and Family Services worker who snapped lighter in front of five-year-old), in which the Court stated:

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580, 410 A.2d 686 (1980).

In the case at bar, respondent argues that North Bergen's drug policies comport with the New Jersey Attorney General Guidelines, which provide for termination in instances of a positive drug test. Appellant agreed, and stipulated on the record that if I find that the test results are reliable, then by way of statute the only possible resolution of the case is termination. (See Transcript dated April 26, 2017, at 7, lines 2–4.) I therefore **CONCLUDE** that removal is the appropriate discipline for a law-enforcement officer who used illegal drugs. For purposes of this administrative disciplinary proceeding alleging incompetency, inefficiency or failure to perform duties; inability to

perform duties; and conduct unbecoming a public employee, I **CONCLUDE** that the North Bergen Police Department has proven by a preponderance of the credible evidence that its determination to remove appellant was proper.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action entered in the Final Notice of Disciplinary Action of the North Bergen Police Department against appellant Francisco Ponce is hereby **AFFIRMED**.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

September 5, 2017
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency:

Mailed to Parties: SEP 6 2017
id

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Appellant:

Dr. Lyle Hayes, Ph.D.

For Respondent:

Dr. Robert Havier, Ph.D.

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

Ponce 1 to 480	Appellant's Discovery Binder
A-1	Report of Dr. Lyle Hayes, Ph. D.

For Respondent:

R-1	Preliminary Notice of Disciplinary Action

STATE OF NEW JERSEY

In the Matter of Perry Wooding
New Jersey City University

CSC DKT. NO. 2016-734
OAL DKT. NO. CSV 16969-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 5, 2017 BW

The appeal of Perry Wooding, Security Officer, New Jersey City University, resignation not in good standing effective July 14, 2015, on charges, was heard by Administrative Law Judge Evelyn J. Marose, who rendered her initial decision on August 28, 2017. No exceptions were filed.

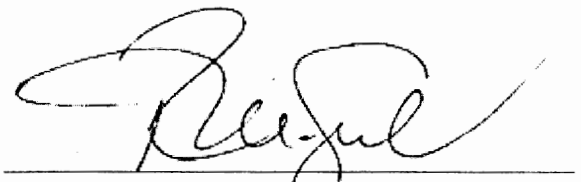
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 4, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in resigning the appellant not in good standing was justified. The Commission therefore affirms that action and dismisses the appeal of Perry Wooding.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 4, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16969-15
AGENCY DKT. NO. 2016-734

IN THE MATTER OF PERRY WOODING,
NEW JERSEY CITY UNIVERSITY.

Perry Wooding, appellant, pro se

Jennifer Hoff, Deputy Attorney General, for respondent New Jersey City University (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 12, 2017 Decided: August 28, 2017

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant Perry Wooding ("Wooding") appeals his termination from his position of security officer by respondent New Jersey City University ("University") for unauthorized absence and job abandonment.

The University mailed appellant a Preliminary Notice of Disciplinary Action ("PNDA") on July 6, 2015. The PNDA was sent to an address where Wooding never resided, and the PNDA was returned to the University marked "Unclaimed, Unable to

Forward." (R-3; R-5.) The University hand-delivered a Final Notice of Disciplinary Action ("FNDA") to Wooding on July 14, 2015. (R-4(a); R-4(b).)

In the FNDA, charges of unauthorized absence and abandonment of job as a result of absence from work as scheduled without permission for five consecutive days, in violation of N.J.A.C. 4A:2-6.2(b), were sustained, and Wooding was terminated effective July 14, 2015. On August 3, 2015, Wooding filed an appeal with the Civil Service Commission. Pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, the matter was transmitted to the Office of Administrative Law (OAL) on October 19, 2015. Hearings were conducted on March 9, 2016, June 15, 2016, and April 12, 2017. The record closed upon receipt of written summations on July 12, 2017.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Denise Gourdine, Robert Piaskowsky, Nancy Mitchell, and John Griffin testified on behalf of the University. Perry Wooding testified on his own behalf.

Denise Gourdine

Denise Gourdine ("Gourdine") has been employed by the University for approximately twenty-six years. For the last two years she has been the assistant director of public safety. As part of her position she is involved with training, officers' scheduling, management operations, special events, emergency management, and discipline. She also works closely with the unions, and counsels and consoles employees. Prior to being assistant director, Gourdine was assistant supervisor for about nine years. In that role, she oversaw shift operations and assisted the shift supervisor. Prior to being assistant supervisor, she was a shift supervisor, and prior to being a shift supervisor, for about six years, she was a security officer. When Gourdine was shift supervisor, she supervised Wooding for day and midnight tours. As part of those supervisory duties she reviewed and approved his attendance log and signed off on write-ups.

Gourdine has personal knowledge of the procedures that employees must use to "call out" of work. Per their union contract and per policy of the University and the Public Safety Department, public-security staff must call out at least two hours prior to the start of their shift, unless their absence is caused by an emergency that prevents such notice. Should two hours' notice not be possible, a telephone call regarding the absence must still be made, as soon as possible, so that the shift supervisor can either find a replacement or reassign duties. It is the shift supervisor's job to document an employee's absence and to note the employee's return back to duty. Employees receive training in absentee procedures at the start of their employment, and the procedures are also memorialized in their union contract.

Employee absenteeism is recorded on two forms. One form is completed when an officer "calls out" or if a family member "calls out" for the officer. A secretary maintains another form that is a matrix chart of the whole department's absenteeism. That matrix form is submitted monthly to the director of human resources for review, so that problematic attendance can be addressed with those employees. Gourdine identified a Disciplinary Action Matrix for Wooding, which was made by the secretary of the Public Safety Department, based upon information that the secretary received from the associate director, Joseph Rodriguez. (R-1.) After the first day of hearing, Gourdine reviewed the Disciplinary Action Matrix initially submitted and compared it to the documents contained in Wooding's personnel file. Thereafter, on March 24, 2016, Gourdine submitted a revised Disciplinary Action Matrix, which she certified was accurate and consistent with the documents in Wooding's personnel file. (R-6(a), Exhibit C.)

Gourdine described Wooding's job duties as a security officer as demanding. Since the job is to protect and serve, attendance is vital. Security officers must not only come to work, they must arrive on time. They patrol buildings, and respond to medical calls, incidents, slip-and-fall accidents, and emergencies, including fire emergencies. They write reports. Most recently, Wooding was assigned to the midnight shift. Gourdine noted that the midnight shift is <u>not</u> more laid back than the day shift; however, it does have some unique characteristics. An officer who is assigned to the midnight shift must be visible and alert at all times in order to prevent non-authorized persons

from entering the three residences halls where 262 students reside; to deter robberies and prevent transient persons from wandering the campus; and to handle emergency weather conditions. Since the midnight shift is staffed a little lighter, when someone is absent, especially without notice, it is "tough." Replacing a security officer on the midnight shift is especially problematic since overtime occurs on a voluntary basis, and some personnel find it difficult to stay awake all night, especially after their own eight-hour shift. The shift supervisor or another security guard might have to serve double duty if a replacement cannot be made.

Gourdine explained the duties of a tour supervisor. That staff person is in charge of a particular shift. He is responsible for officer training, attendance, scheduling, disciplinary issues, tour assignment, daily work assignment, vacation requests, and the review of his shift officers' reports.

If Wooding "called in" to provide the University with notice prior to being absent, an absenteeism form would have been created that would have included the anticipated number of days that Wooding would be absent, and his "rest days," for which no coverage would have been need. At the time of the "call-in" Wooding would have been asked to bring in supporting documents as to the reason for his absence. Since Alvin Agir and Robert Kline were Wooding's tour supervisors, it would have been their duty to complete an absenteeism report relating to any absent by Wooding.

In July 2015, Gourdine reviewed the documentation created by the University noting that Wooding had not reported to work for five days and had not "called in." She became concerned, and, on July 14, 2015, telephoned Wooding about his July absences. She was concerned since a five-day "no call" incident is usually automatic termination, and these July absences were not Wooding's first problem with absenteeism.

In their telephone conference, Wooding acknowledged that he did not come in to work. He said that he was not feeling well. Wooding told Gourdine that he realized that he had "messed up." He should have called or had someone call. He wanted to try to make it right. Wooding told Gourdine that he intended to come in and talk to the Human

Resources (HR), to see if he had any options. Gourdine did not discourage Wooding from "coming in" and trying to rectify his behavior and explain to HR the details of his absence. Still, Gourdine was surprised when shortly after their telephone conference Wooding arrived at Gourdine's office. Gourdine contacted Sherry Thomas, Wooding's union president, so that Wooding could have union support, and Robert Piaskowsky, the director of HR, and asked them to come to her office so that they could discuss whatever options and resources were available to Wooding. In both their telephone and office conference, Gourdine advised Wooding that his actions had subjected him to termination by the University.

Gourdine stated that Wooding "realized that his absenteeism had been a problem over the years." She described Wooding as emotional. Wooding told them that he had a lot of personal issues and medical issues, and that lots of things were taking a toll on him. Gourdine does not remember that Wooding said he was hospitalized, and Wooding never offered to bring, or brought in, medical documentation detailing a medical reason for his absences.

In lieu of termination, which would be more detrimental to Wooding's job opportunities, the option of Wooding resigning in good standing was discussed with him. Wooding was also advised that he had the option of bringing in medical documentation in support of his absenteeism. In Gourdine's opinion, by the end of the meeting in her office, Wooding seemed to agree to provide the University with a written resignation.

Gourdine has no memory of any discussion of a leave of absence as another option. Gourdine further stated that she was not certain that Wooding would have qualified for a leave of absence at that time, based upon his prior absentee record and past leaves of absence. Gourdine is aware that another meeting occurred that same day, in the HR office, though she did not attend that meeting. She was told that during that meeting, an FNDA was hand-delivered to Wooding.

Gourdine said that Wooding's missing five consecutive days as a no show/no call would definitely have had a negative impact on the University's public safety. An

absence of five days was difficult to cover with overtime and would have to have involved a tour supervisor taking a post and/or the doubling of post assignments.

Robert Piaskowsky

Robert Piaskowsky ("Piaskowsky") has been the director of HR since 1999. As part of his responsibilities he oversees all employee relations for classified staff, benefits, personnel records, and staffing. He is also familiar with the policies and procedures mandated for employees who want to request time off. Piaskowsky stated that all employees must call into their particular department should they require a day off. However, in accordance with the Health Insurance Portability and Accountability Act (HIPAA), if an employee requires any sort of medical treatment or hospitalization, the employee needs to submit a note to HR rather than to his department supervisor. The note should be from a medical practitioner, with a diagnosis and an approximate return-to-work date. These policies and procedures are memorialized in the union contract and the Administrative Code, and are also available on the University website and employee portal. Piaskowsky would only be aware of an employee's absenteeism were it to be associated with a disciplinary action.

In July 2015, Piaskowsky received a memorandum advising him that Wooding had been absent without "calling in" on July 1, 2015, July 2, 2015, July 4, 2015, July 5, 2015, and July 7, 2015. He did not receive copies of the daily Absentee Reports for those days.

Piaskowsky identified the PNDA, which he prepared on, after he received notice that Wooding had been absent without "calling in" for five consecutive days. He put the completed PNDA in his "outbox" on July 7, 2015, to be processed by the University mailroom for delivery via regular and certified mail. In accordance with the New Jersey Department of Personnel guide that describes disciplinary penalties, Piaskowsky noted the penalty of removal on the form for an unauthorized absence for five or more days. In accordance with normal University pattern and practice and union procedure, Piaskowsky also detailed a proposed time and date for a departmental hearing on the PNDA. Piaskowsky used a mailing address for Wooding on his PNDA that he obtained

from the PeopleSoft system. He noted that employees have an obligation to make sure that the University has the correct address for them on file.[1]

Piaskowsky stated that while in most cases an FNDA will issue after a PNDA, if an employee resigns or retires or there is a settlement before a hearing of the charges, an FNDA might not issue. (R-3.) However, in this case, Piaskowsky authored, issued, and delivered an FNDA to Wooding on July 14, 2015. Piaskowsky stated that, during meetings with Wooding that day, Wooding told him "that he knew that he did wrong" and that he did not want a departmental hearing. Wooding wanted a Final Notice so that he could go to unemployment. (R-4.) Wooding "unequivocally" did not tell Piaskowsky that he suffered any sort of medical issue or hospitalization in July 2015, and never provided medical documentation so indicating to the HR director. Piaskowsky has no knowledge of any other meeting that Wooding might have had with another HR staff member, including any meeting wherein the possibility of Wooding taking family medical leave might have been discussed.

Nancy Mitchell

Since February 8, 2016, Nancy Mitchell ("Mitchell") has been a medical clerk at the University. Previously, beginning on July 5, 2011, she worked in the Public Safety Department, first as a security officer and then as a dispatcher. Her duties when she was a dispatcher involved taking calls from security guards affirming their location, handling requests by the guards for assistance, handling emergency requests, handling non-emergency requests (such as calls from faculty that they needed certain doors opened or closed), and processing absentee "call-ins" from security staff.

Mitchell stated that absences have to be "called in" to the dispatcher before a security staff person is out sick. A security officer cannot tell the dispatcher that they will be out indefinitely. When a security officer intends to remain out the next day, he or she needs to "call in" their intended absence each day. When a "call-in" is received, the dispatcher logs it into a book and completes a document called an "Absentee Report."

[1] Wooding testified that he never lived at the address where the PNDA was mailed.

The call is then transferred to the security officer's supervisor. If the supervisor is not available to pick up the call, the dispatcher must continue to reach out to the supervisor and forward the information regarding the absence to him, so that the supervisor can be aware if the next shift will be short. The dispatcher cannot go home without passing on the information to the supervisor. The dispatcher also places the Absentee Report on top of a clipboard so that the next shift supervisor will know who, if anyone, is going to be absent from their shift.

Mitchell stated that once a security officer determines that he or she will have to be out for a "length of time," the security officer must call HR rather than just "call in" to a dispatcher. In those cases, HR will advise the department of the security officer of the employee's need for a lengthy absence. The department will then advise the dispatcher that he or she will not be getting a call from that security officer because he or she will be out for a "length of time."

Mitchell is familiar with Wooding, who trained her when she was initially hired as a security guard. At times, after Mitchell was assigned to be a dispatcher, Wooding "called in" to Mitchell to report that he would be absent.

Mitchell identified the Absentee Report that she completed on June 29, 2015, in response to a telephone call from Wooding reporting that he would be absent June 30, 2015, because of sickness. (R-7.) Mitchell did not recall Wooding telling her that he would be out indefinitely. Mitchell remembered transferring Wooding's telephone call to John Griffin, his supervisor. If Mitchell were not able to reach Griffin, she would have noted in the log she maintained that the supervisor was not available to take the call. In this case, Mitchell did not make any such notation in the log. (P-7 at 3.)

John Griffin

For the last twenty-nine years, John Griffin ("Griffin") has been employed by the University. Initially, he was a security officer, and then a senior security officer, until he was promoted to be assistant supervisor, a positon that he still holds. As assistant supervisor, Griffin is responsible for twelve employees on his shift and the safety of the

campus during that shift. Griffin has known Wooding since Wooding's initial employment by the University. During the period at issue, Griffin was responsible for supervising Wooding. Griffin opined that Wooding's attendance record was poor. He stated that, over the years, he had "received more than numerous calls from Wooding himself and also his wife stating that he would be out sick."

Griffin affirmed that if one of the employees that he supervised "called in" his intended absence to the dispatcher, after the dispatcher documented the call, the call would be transferred to him. Griffin would then confer with the employee regarding the absence. If appropriate, he would make notes on the Absentee Form of the information that he learned regarding the length or cause of the absence, such as that the security officer was really handling a household emergency rather than being sick or that a family member "called in" rather than the employee. Griffin defined a "timely call-in" as a call received at least an hour or two before a shift began. He affirmed that the security officer could not simply tell the dispatcher that the officer would be out "indefinitely." After the security officer informed his supervisor that he needed an extended absence, the officer would need to call HR, "because HR has to deal with everything that's going to be extended."

Griffin stated that he did not recall, since more than two years had passed, whether or not he spoke to Wooding on June 29, 2015. However, Griffin was certain that he was never advised by Wooding that he needed an extended absence. He was also never told by Mitchell, in accordance with her normal procedure, that Wooding had told her that he needed an extended absence. If Griffin had been so advised by Wooding, he would have directed Wooding to contact HR. If he learned that Wooding intended to be out several days, no matter how he obtained such information, he would have called or e-mailed that information to his assistant director, Joseph Rodriquez, and made notations on the Absentee Report regarding what he was advised and of any action he took, such as advising Wooding to contact HR. Griffin reviewed Exhibit R-7 and stated that he made no such notations on that form. It was also noted by Griffin that the Absentee Report indicated that Wooding would be out Tuesday, June 30, 2015. It did not indicate that Wooding intended to be out July 1, 2015, July 2, 2015, July 4,

2015, July 5, 2015, and/or July 7, 2017. It also did not indicate that Wooding would be out indefinitely.

Griffin also reviewed P-7, a copy of pages of the University log during the period at issue. He stated that he did not author any of those pages, which appeared to have been authored by Mitchell. Griffin again reviewed R-7, which he stated he would have seen at the end of his tour. Griffin noted that the Absentee Report was signed by the supervisor who supervised the midnight shift that night, in accordance with normal procedure. (P-7.) Griffin also acknowledged that the union book does not state that an employee has to "call in" every day if that employee already reported that he needed to be out for three days because of illness. However, he affirmed again that a daily "call-in" is required by Wooding's department unless that employee had processed a lengthy absence with HR.

Perry Wooding

The PNDA in this matter was addressed to Wooding at XX Virginia Terrace, Jersey City. However, Wooding never resided at XX Virginia Terrace. Accordingly, he was never served with a copy of the PNDA and had no knowledge that the PNDA indicated that if Wooding desired a departmental hearing, it would be held on July 16, 2015. (R-3.) Wooding acknowledged that he did receive a copy of the FNDA by hand delivery on July 14, 2015. (R-4(b).)

Wooding stated that he was an ideal employee of the University for over eleven years. (P-1.) He held numerous positions and received many promotions. Wooding stated that he had complained about other employees who came in late and fixed each other's schedules. He complained that those employees were not reprimanded, and based upon their supervisory positions, those employees were even able to reprimand other employees for the same infraction, coming in late. He speculated that he might have been terminated for whistleblowing rather than for the charges at issue.

Wooding personally telephoned the University dispatcher on July 29, 2015, and gave notice to the University that he would be out July 30, 2015, because of sickness.

He said that he told the dispatcher that he did not know when he would be able to return. He was having blurry vision, chest pain, dizziness, and numbness in his fingers at the time.

Since Wooding's doctor was not in the office, on July 1, 2015, Wooding went to Jersey City Medical Center, where he was admitted and retained overnight. (P-3.) Wooding asserts that, in accordance with University policy, he could not return to work after being out sick for three days or more without obtaining medical clearance. He could not obtain such clearance until July 16, 2015, when his doctor returned from vacation. (P-4.) Wooding acknowledged that he never provided the University with any medical documentation, or advised the University that such medical documentation existed in July 2015. (Transcript, dated June 15, 2016, page 115, lines 5–13.)

Wooding stated that on June 29, 2015, he was not only sick, he was going through a lot of "things in his personal life with his children." His personal circumstances, which were known by the administration, had caused him to take off work on numerous occasions. Among other things, his daughter had suffered burns and his grandson had brain surgery. At times, Wooding provided the University with documentation relating to him and/or his family. Wooding did not provide any documentation to the University relating to any family illness on the days at issue.

While Wooding completed an Application for Family Leave, he acknowledged that he had not yet confirmed with Trenton that he could be considered for family leave, based upon the timing of his last leave. Further, the asserted reason for his requested leave was to care for a family member, not because of any personal illness and not relating to the days when Wooding failed to "call in." (P-5.)

Wooding did not testify that he went to the University on July 14, 2015, relating to his Family and Medical Leave Application. He stated that he did not go to the University on July 14, 2015, to discuss a failure to "call in." He stated that he went to the University on July 14, 2015, as he was directed to do by Gourdine in a telephone conference that day, wherein she directed Wooding to bring in his equipment, his identification, his clothes, and his keys. Wooding denies going to the University to meet

Gourdine to discuss his options. He denies wanting to be terminated that day so that he could apply for unemployment benefits. He asserts that he was terminated that day by Piaskowsky and handed the FNDA.

FACTUAL DISCUSSION AND FINDINGS

Based upon the evidence presented at the hearing, and the opportunity to observe the witnesses and assess their credibility, I **FIND** the following pertinent **FACTS**:

The PNDA in this matter was addressed to Wooding at XX Virginia Terrace, Jersey City. However, Wooding never resided at XX Virginia Terrace. Accordingly, he was never served with a copy of the PNDA and had no knowledge that the PNDA indicated that if Wooding desired a departmental hearing, it would be held on July 16, 2015. (P-3.) Wooding acknowledged that he did receive a copy of the FNDA by hand delivery on July 14, 2015. (P-4.) Thus, while Wooding was not served with the PNDA, I **FIND** that upon appealing his FNDA he received a hearing on all charges against him, detailed in the PNDA and FNDA, at the OAL.

Wooding was employed by the University for more than eleven years. He was bound by the University attendance policies and the procedures in place in his department. Wooding personally telephoned the University dispatcher on July 29, 2015, and gave notice to the University that he would be out July 30, 2015, because of sickness. He said that he told the dispatcher that he did not know when he would be able to return. I **FIND** that Wooding acknowledged that he never "called in" his intent to be absent after July 29, 2015.

A careful analysis of credibility is necessary in order to make critical findings of fact. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. "'[T]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.) (citation omitted), certif. denied,

10 N.J. 316 (1952). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

After observing the testimony of the five witnesses and considering their interest, bias, and motivation, I **FIND** the University's witnesses' testimony as to the required procedure for "calling in" sick to be credible and Wooding's testimony to lack credibility. All four of the University's witnesses testified that an employee who intends to be out sick is obligated to call out at least one hour prior to the start of his work shift, every day that he intends to be out sick, unless the employee has processed his need for a lengthy absence through HR. The dispatcher, shift supervisor and assistant director of public safety all consistently testified that a daily "call-in" is essential in the Public Safety Department, where the absent employee's shift must be covered by another employee or by a doubling of duties of another security person. None of the University employees had anything to gain by incorrectly stating the "call-in" procedures. In contrast, Wooding is appealing his removal. He is an interested party, highly motivated to develop a factual basis to assert that he used proper procedure when he only "called in" sick one day to the dispatcher, and that based upon his conversation with the dispatcher he was able to remain out sick until he obtained a doctor's note clearing him to return to work. Accordingly, I **FIND** that Wooding's absence from work on July 1, 2015, July 2, 2015, July 4, 2015, July 5, 2015, and July 7, 2015, was not reported in accordance with the University Department of Public Safety's attendance policies. I further **FIND** that Wooding was absent from work as scheduled without permission for five consecutive days.

Wooding stated that on June 29, 2015, he was not only sick, he was going through a lot of "things in his personal life with his children." His personal circumstances, which were known by the administration, had caused him to take off work on numerous occasions. Among other things, his daughter had suffered burns and his grandson had brain surgery. At times, Wooding provided the University with documentation relating to him and/or his family. However, I **FIND** that Wooding did not

advise the University of any family issue or difficulty that excused his failure to "call in" his absences on July 1, 2015, July 2, 2015, July 4, 2015, July 5, 2015, and July 7, 2015.

While Wooding completed an application for family leave, no evidence was presented that he ever advised any University member that he was seeking medical leave. In addition, no evidence was presented that Wooding would have qualified for consideration for family leave, based upon the timing of his leave. To the contrary, Wooding acknowledged that he needed more information from Trenton regarding the timing of his last leave in order to determine if he qualified to apply for leave. Further, the asserted reason for his requested leave was to care for a family member, not because of any personal illness and not relating to the days when Wooding failed to "call in." (P-5.)[2] Accordingly, I **FIND** that Wooding's preparation of a Family and Medical Leave Application did not excuse his failure to "call in" his absences on July 1, 2015, July 2, 2015, July 4, 2015, July 5, 2015, and July 7, 2015.

Wooding did not testify that he went to the University on July 14, 2015, relating to his Family and Medical Leave Application. Wooding stated that he did not go to the University on July 14, 2015, to discuss a failure to "call in." He stated that he went to the University on July 14, 2015, as he was directed to do by Gourdine in a telephone conference that day, to bring in his equipment, his identification, his clothes, and his keys. In contrast, Piaskowsky and Gourdine said that the purpose of their meeting with Wooding that day was to discuss his failure to "call in" and the charges filed against him detailed on a PNDA for those actions. Again, I **FIND** Wooding's testimony to be less credible than Piaskowsky's and Gourdine's consistent testimony. Both witnesses said that they discussed Wooding's failure to call in, and that he acknowledged that "he did wrong." Both stated that there was no mention of any family leave application or medical documentation relating to Wooding's unapproved absences.

I **FIND** Piaskowsky's assertion that Wooding asked that he receive his FNDA by hand delivery the day of their meeting on July 14, 2015, so that he could apply for

[2] It should be noted that this application incorrectly states that Wooding's last day of work was July 11, 2015, a day that he never worked. It also notes that his leave should begin on July 14, 2015, the day he was terminated. In addition, the Family and Medical Leave Application does not reference any illness of Wooding, but rather requests "time off" for Wooding to care for a family member.

unemployment more credible than Wooding's denial of such a comment. I also **FIND** that Piaskowsky's testimony "hangs together" better than Wooding's testimony. Wooding is appealing the charge that he abandoned his job; it would not present him in a "favorable light" if it appeared that Wooding wanted to hurry the process of his termination so that he could get unemployment benefits. In contrast, Piaskowsky had no motivation to misrepresent Wooding's desire to use the FNDA to qualify for unemployment. Further, Wooding testified that he was "going through a lot of things in his personal life" and wanted time off to care for his family, which he believed that he might not qualify to receive because of the timing of his last family leave.

Wooding stated that he complained about University employees who were not reprimanded for coming in late, and who, based upon their supervisory positions, were even able to reprimand other employees for the same infraction, that is, coming in late. He speculated that he could have been terminated for whistleblowing rather than for the charges at issue. However, no credible evidence was presented that Wooding complained about anything or that he complained to Gourdine, Piaskowsky, Mitchell, or Griffin. Further, the Conscientious Employee Protection Act ("CEPA") protects an employee who objects to or refuses to participate in certain actions that the employee reasonably believes are illegal or in violation of public policy from retaliatory action. N.J.S.A. 34:19-1 to 34:19-14. A salutary limiting principle of CEPA is that the offensive activity must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee. Mehlman v. Mobil Oil Corp., 153 N.J. 163, 188 (1998). Accordingly, even if credible evidence was presented of Wooding's complaints, and no such evidence was presented, objecting to failure to reprimand supervisors who come in late and yet reprimand others for coming in late is not the kind of activity that would be protected by CEPA.

LEGAL ANALYSIS AND CONCLUSIONS

Employees of the State of New Jersey are governed by Title 11A of the New Jersey Statutes, known as the Civil Service Act. N.J.S.A. 11A:1-1 et seq.; N.J.A.C. 4A:1-1.1 et seq. The objectives of our civil service laws are articulated in N.J.S.A. 11A:1-2. They include rewarding employees for "'meritorious performance' and

'separat[ing]' others whose conduct of their duties is less than adequate." City of Newark v. Gaines, 309 N.J. Super. 327, 332 (App. Div. 1998). Any employee who is absent from duty for five or more consecutive business days without the approval of his or her supervisor shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. N.J.A.C. 4A:2-6.2(b).

As an employee for more than eleven years, Wooding had knowledge of the University's policies regarding absenteeism, and for the need to cover the duties of an absentee security officer for public safety. Nevertheless, Wooding failed, on numerous days, to advise the University in advance of the start of the work day that he would not be in to work, including on July 1, 2015, July 2, 2015, July 4, 2015, July 5, 2015, and July 7, 2015. Wooding did not have the approval of any supervisor for his absences on July 1, 2015, July 2, 2015, July 4, 2015, July 5, 2015, and July 7, 2015.

Based upon a preponderance of the credible evidence, I **CONCLUDE** that the University sustained its burden of proving the charges against Wooding of unauthorized absence and abandonment of job as a result of absence from work as scheduled without permission for five consecutive days. N.J.A.C. 4A:2-6.2(b).

PENALTY

Pursuant to N.J.A.C. 4A:2-1.4, the University bears of the burden of proving the appropriateness of the major disciplinary action taken against Wooding. Violations of N.J.A.C. 4A:2-6.2 constitute grounds for major discipline. Major discipline may include removal. N.J.S.A. 11A:2-6(a).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number, and proximity of prior disciplinary infractions, evaluated by progressively increasing penalties. W. New York v. Bock, 38 N.J. 500, 523 (1962).

Since being hired on February 26, 2004, Wooding has received verbal warnings, written warnings, and disciplinary charges relating to his absenteeism. Attached hereto and made a part hereof is a copy of the "University Action—Perry Wooding," detailing numerous incidents relating to absenteeism. In early 2009 Wooding was charged with job abandonment and found to have resigned not in good standing. For approximately one year after being reinstated in November 2009, Wooding's incident record was "clean." However, thereafter, beginning on December 14, 2010, he was disciplined on numerous occasions because of his absenteeism. Absenteeism was also addressed on Wooding's Performance Assessments. During his assessment dated June 2015, policies and procedures and absenteeism were areas identified as needing development. It was expressly noted that he needed to improve his attendance record and to inform the Department dispatcher prior to being absent. Wooding was further instructed to continuously review the Policies and Procedures Handbook. Wooding executed the June 2015 assessment and noted his agreement to "do his best to improve." (P-1.)

While removal is the ultimate discipline, Wooding was on notice of his need to improve his attendance and comply with policies and procedures. Yet less than a month after his 2015 assessment, Wooding failed to "call in" to his department Dispatcher prior to five absences. His actions indicate a willful disregard of his obligation to comply with University policies and procedures and a lack of respect for the disciplinary process. Accordingly, I **CONCLUDE** that removing Wooding from his position is warranted.

ORDER

It is **ORDERED** that the charges of unauthorized absence and job abandonment in violation of N.J.A.C. 4A:2-6.2 be **AFFIRMED**.

It is further **ORDERED** that the penalty of removal imposed by the University be **AFFIRMED**.

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.

August 28, 2017
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: Aug 29 2017

Date Mailed to Parties: AUG 31 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

APPENDIX

WITNESSES

For Wooding:

Perry Wooding

For the University:

Denise Gourdine

Robert Piaskowsky

Nancy Mitchell

John Griffin

EXHIBITS

For Wooding:

P-1 State of New Jersey, Performance Assessment Review, period from 11/1/14 to 10/31/15

P-2 T-Mobile telephone records

P-3 Jersey City Medical Center Records, dates of service July 1, 2015, to July 2, 2015

P-4 Letter from Dr. Narisety Chalapathy, dated July 16, 2015, medically clearing Wooding to return to work as of July 16, 2015

P-5 Application for family leave insurance benefits, noting last day worked as 7/11/15, and seeking family leave to care for a family member from July 14, 2015, to August 28, 2015

P-6 United States Post Office Tracking Form #70140510000010556079 3

P-7 Log Sheet

For the University:

R-1 History of Disciplinary Action

R-2 Absentee Reports

R-3 PNDA

R-4(a) FNDA

R-4(b) FNDA, with signature

R-5 United States Post Office Return Receipt, noting, "Return to Sender, Unclaimed, Unable to Forward"

R-6 Letter dated March 29, 2016, with attached documentation including:

(a) Certification of Denise Gourdine, dated March 24, 2016, who substantiated that the entries on Wooding's Disciplinary Action Record correspond with information in Wooding's personnel file, but detailing five corrected entries, with attached documentation

(b) Certification of Robert Piaskowsky, dated March 24, 2016, with documentation regarding mailing and disciplinary action records

(c) Certification of Sherry Thomas, dated March 24, 2016, as to verbally requesting an appeal in July 2015 of the PNDA issued to Wooding

(d) Certification of Service, dated 3/29/16

R-7 Absentee Report, date scheduled to work 6/30/15

10-18-17

STATE OF NEW JERSEY

In the Matter of Mary Ann Agyare,
Hunterdon Developmental Center,
Department of Human Services

CSC DKT. NO. 2016-2632
OAL DKT. NO. CSV 05033-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 18, 2017 JM

The Civil Service Commission, at its meeting of October 18, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 05033-16

AGENCY DKT. NO. 2016-2632

IN THE MATTER OF
MARYANN AGYARE,
HUNTERDON DEVELOPMENTAL
CENTER, DEPARTMENT OF
HUMAN SERVICES.

Edward Berger, Esquire, for appellant, Maryann Agyare

Elizabeth Davies, Deputy Attorney General, for respondent, Hunterdon Developmental Center (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: August 31, 2017 Decided: September 29, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on April 1, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Appellant appeals her removal as a practical nurse from the Hunterdon Development Center effective January 12, 2016. On August 31, 2017, the parties filed a fully executed Agreement in this matter. The Agreement is attached and fully incorporated herein. (J-1).

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures to J-1.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

September 29, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10/2/17

Date Mailed to Parties: 10/2/17

/dw

LIST OF EXHIBITS

J-1 Settlement Agreement

J-1

OAL DKT. NO. CSV 18283-16
OAL DKT. NO. CSV 05033-16

RECEIVED

2017 AUG 31 A 10: 26

OAL DKT. NO. CSV 18283-16
OAL DKT. NO. CSV 05033-16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT

IN THE MATTER OF
MARYANN AGYARE
AND
HUNTERDON DEVELOPMENTAL CENTER, DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated November 1, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-7.4 Serious mistake due to carelessness which Would result in danger and/or injury to persons Or property	Removal	January 12, 2016
2. Admin. Order 4:08 E-1.4 Violation of a rule, regulation, policy	Removal	January 12, 2016
3. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee	Removal	January 12, 2016
4. N.J.A.C. 4A:2-2.3(a)7 Neglect of duty	Removal	January 12, 2016
5. N.J.A.C. 4A:2-2.3(a)12 Other sufficient cause.	Removal	January 12, 2016

The **Final** Notice of Disciplinary Action dated January 12, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-7.3 Serious mistake due to carelessness which Would result in danger and/or injury to persons Or property	Removal	January 12, 2016
2. Admin. Order 4:08 E-1.3 Violation of a rule, regulation, policy procedure, order or administrative decision.	Removal	January 12, 2016

B. The parties have agreed to the following:

The Appellant agrees to a general resignation which shall be effective January 12, 2016. Appellant agrees not to seek or accept employment with the Department of Human Services or its subsidiaries at any time in the future.

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.

C. The Appellant Maryann Agyare withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages

and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8-21-17
DATE

M. Agyare
Maryann Agyare, Appellant

8/21/17
DATE

Rashida N. Hasan, Esq.
ON BEHALF OF Appellant

8/11/17
DATE

Kim M. Heft
Kim M. Heft
ON BEHALF OF Respondent

8/11/17
DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Maryann Agyare, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8-21-17
DATE

M. Agyare
Maryann Agyare

STATE OF NEW JERSEY

In the Matter of Terri Hannah
Vineland Developmental Center,
Department of Human Services

CSC DKT. NO. 2014-516
OAL DKT. NO. CSV 12708-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of Terri Hannah, Human Services Assistant, Vineland Developmental Center, Department of Human Services, removal effective July 9, 2013, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on September 14, 2017. No exceptions were filed.

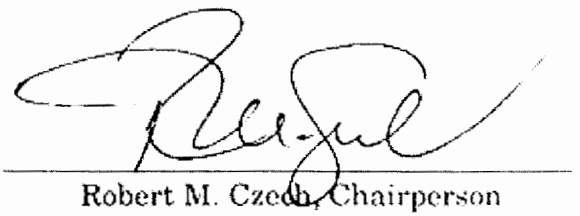
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeals of Terri Hannah.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 12708-13
AGENCY DKT. NO. 2014-516

IN THE MATTER OF TERRI HANNAH,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Joseph Waite, Jr., Associate Director, AFSCME Council 71, for appellant, Terri Hannah, appearing pursuant to N.J.A.C. 1:1-5.4(a)(6)

Christopher J. Hamner, Deputy Attorney General, for respondent, Department of Human Services, Vineland Developmental Center (Christopher Porrino, Attorney General of New Jersey)

Record Closed: September 12, 2017 Decided: September 14, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE

On December 6, 2012, Vineland Developmental Center (Respondent) issued a Preliminary Notice of Disciplinary Action (PNDA) against Terri Hannah (Appellant). Respondent charged appellant with violations of (1) Aggravated Assault, N.J.S.A. 2C:12-1B(1), (2) Possession of a Weapon for Unlawful Purpose, N.J.S.A. 2C:39-4d, (3)

N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; (4) N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; and (4) E.1 violation of a rule, regulation, policy, procedure or administrative order.

PROCEDURAL HISTORY

The matter was transmitted, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on September 5, 2013. The matter was initially assigned to the Honorable W. Todd Miller, Administrative Law Judge (ALJ). After Judge Miller's appointment to the Superior Court, the case was transferred to this ALJ. The matter was twice placed on the inactive list, first by Judge Miller on February 16, 2016, and again by the undersigned on November 14, 2016, because an appeal of the underlying criminal conviction had been filed. On May 17, 2017, appellant's representative advised the court that the criminal charge had not been overturned and no more appeals were pending. The respondent filed a Motion for Summary Decision on May 18, 2017. Appellant did not file an Opposition to the Motion for Summary Decision.

STANDARD FOR SUMMARY DECISION

Summary decision may be granted "if the papers and discovery which have been filed, 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 prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electrical Industrial Co. v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a

directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, supra, 142 N.J. at 533 (quoting Liberty Lobby, supra, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard,

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Brill, supra, 142 N.J. at 540 (quoting Liberty Lobby, supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'" Brill, supra, 142 N.J. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

STATEMENT OF FACTS

As the appellant did not file an Opposition to the Motion for Summary Decision, I **FIND** that the following **FACTS** are not in dispute:

The appellant worked as a Human Services Assistant at the Vineland Developmental Center beginning December 20, 2008. On September 27, 2012, the appellant was arrested for Aggravated Assault, N.J.S.A. 2C:12-1b (1), and Possession of a Weapon for an Unlawful Purpose, N.J.S.A. 2C: 39-4d. She was issued a PNDA on December 6, 2012. The specifications of the PNDA stated:

> On or about 9/28/12, you were arrested for aggravated assault and possession of a weapon for unlawful purposes by the Vineland Police Department.

On December 6, 2012, a disciplinary hearing was held at the departmental level and the charges were sustained. As a result, appellant was suspended without pay effective December 6, 2012. The sanction of removal was also indicated. On July 8, 2013, appellant was convicted of Simple Assault. Appellant was issued a Final Notice of Disciplinary Action (FNDA) removing her from employment on July 9, 2013.

Following the Brill standard, after considering all papers and evidence filed in support of summary decision and considering that appellant failed to oppose the motion, I **CONCLUDE** that there are no issues of fact that require a plenary hearing and that this matter is ripe for summary decision.

LEGAL DISCUSSION

Respondent argues that appellant is disqualified from employment with respondent due to the offense she was convicted of pursuant to N.J.S.A. 30:4-3.5. This statute, commonly referred to as the "Codey" legislation, addresses the effect an individual's criminal history will have upon employment with respondent. The statute states in part:

> An individual shall be disqualified from employment under this act if that individual's criminal history background check reveals a record of convictions of any of the following crimes and offences:
>
> (1) In New Jersey, any crime or disorderly person's offense:
>
> > (a) Involving danger to the person, meaning those crimes and disorderly persons offenses set forth in 2C:12-1 et seq.

Appellant was convicted of simple assault, which falls within the list of crimes and offenses enumerated in N.J.S.A. 30:4-3.5. As a result, I **CONCLUDE** that the appellant is disqualified from employment with the respondent. The only exclusion from disqualification available to appellant is an affirmative demonstration of clear and convincing evidence of her rehabilitation. See N.J.S.A. 30:43.5(b). Appellant has not demonstrated any evidence of rehabilitation whatsoever. Appellant's behavior is clearly not the type of conduct expected of public employees who work with the developmentally disabled.

Appellant was also charged with violations of N.J.A.C. 4A:2-2.3(a)(6) conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(12). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In this case appellant was charged with aggravated assault and unlawful possession of a weapon. While these charges were later reduced to simple assault, appellant's actions do not constitute the level of conduct expected of one who works with developmentally disabled adults. I **CONCLUDE** that the charges of conduct unbecoming a public employee are sustained pursuant to N.J.A.C. 4A:2-2.3(a)(6).

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Appellant's conduct was such that she violated this standard of good behavior. As such, I **CONCLUDE** that the charge of other sufficient case pursuant to N.J.A.C. 4A:2-2.3(a)(12) is sustained.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The question to be resolved is whether the discipline imposed in this case is appropriate.

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

Here, it is clear that appellant was convicted of simple assault, which falls within the list of crimes and offenses enumerated in N.J.S.A. 30:4-3.5. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**, as set forth above.

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.

9/14/17

DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: September 14, 2017

Date Mailed to Parties: September 14, 2017

JSK/dm

STATE OF NEW JERSEY

In the Matter of Lyndon Johnson
City of Long Branch,
Department of Public Safety

CSC DKT. NO. 2012-3624
OAL DKT. NO. CSV 09884-12

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of Lyndon Johnson, Police Lieutenant, City of Long Branch, Department of Public Safety, 120 working day suspension, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on August 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

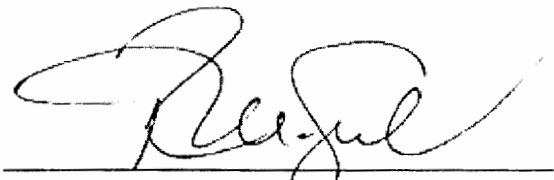
ORDER

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

Re: Lyndon Johnson

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 09884-12
AGENCY REF. NO. 2012-3624

IN THE MATTER OF LYNDON JOHNSON, CITY OF LONG BRANCH DEPARTMENT OF PUBLIC SAFETY.

Stuart J. Alterman, Esq., for appellant, Lyndon Johnson (Alterman and Associates, LLC, attorneys)

James L. Plosia, Jr., Esq., for respondent City of Long Branch Department of Public Safety (Plosia and Cohen Law Firm, attorneys)

Record Closed: July 10, 2017 Decided: August 23, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

The City of Long Branch (respondent) suspended Lieutenant Lyndon Johnson (appellant or Johnson) for 120 days. The discipline stemmed from an alleged violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee. Specifically, respondent alleges that, "On two separate occasions, Johnson threatened and made inappropriate comments to Long Branch police dispatchers under his direct command and supervision." Appellant denies the charge.

PROCEDURAL HISTORY

On May 31, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action charging appellant with a violation of N.J.A.C. 4A:2-2.5(a)(1) and including the specification set forth above. A departmental hearing was waived and, thus, a Final Notice of Disciplinary Action was issued on July 6, 2012, sustaining the charge and a 120-day suspension. An appeal was filed timely and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on July 23, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were held on April 13, 2015, and May 19, 2015, and were conducted by the Honorable John Schuster, ALJ[1]. On the first day of hearing, it was acknowledged that the Notices of Disciplinary Action identified N.J.A.C. 4A:2-2.5(a)(1) as the charge against appellant. Since that regulation concerns disciplinary procedures and not causes for discipline, an oral application was granted to amend the Notices to set forth N.J.A.C. 4A:2-2.3(a)(6) as the charged offense. After the hearing, the parties requested an opportunity to submit closing summations and, upon the last received, the record closed on February 12, 2016.

On March 31, 2017, Judge Schuster retired before writing the decision. On April 21, 2017, the OAL sent correspondence to all parties notifying them of the retirement and requesting a telephone conference. A telephone conference was held on April 25, 2017, with the parties and the OAL assignment judge to discuss how the parties wished to proceed. This matter was reassigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein I requested that the record be reopened for submission of documents that were missing from the OAL file. The parties graciously agreed and submitted the requested documents. The record closed on July 10, 2017.

[1] Respondent brought four separate disciplinary actions against appellant. This was the first case to be heard.

FACTUAL DISCUSSION

Dispatcher Sergio Chaparro

Sergio Chaparro (Chaparro) is currently employed with the Long Branch Police Department as a police officer. He became a police officer in January 2015, but prior to that time he worked as a dispatcher for the Long Branch Police Department. April 13, 2015 ("Tr.1",10.) Chaparro explained that he knew Johnson before he began working for Long Branch because Johnson "knows my family." (Tr.1, 14:12.) Chaparro also went to high school with Lyndon Johnson, Jr. (Tr.1, 14:15.)

Chaparro testified that he spoke to his father and brother, one retired and one a current Long Branch police officer, about statements that Johnson made to him. (Tr.1, 45:19–21.) On January 19, 2012, and January 20, 2012, Chaparro gave statements to the Long Branch Internal Affairs Division regarding the contact he had with Lyndon Johnson, Jr., and a matter concerning a stolen handgun. (Tr.1, 46:12–15.) Chaparro also testified that Johnson had not spoken to him about his son's stolen gun incident until April 5, 2012. (Tr.1, 46:16–19.)

In Chaparro's statement at the Monmouth County Prosecutor's Office, he said that on April 5, 2012, Johnson came into the dispatch area where Chaparro was working. At approximately 3:00 a.m., Chaparro and Johnson were alone in the dispatch area. Appellant opened the conversation by saying, "let me ask you a question, bro, is this the part where you act all buddy, buddy with me and joke around to my face and as soon as I turn my back you try to fuck me?" He continued, "I'm under the impression that the second I ask you to do something you run to the 'back' . . . and tell them what I ask you to do, and you can ask your dad[2] . . . that's not the way we run things around here. The way I run things is I am man-to-man, where if I have a problem I'll address you directly." The conversation continued for the next ten to fifteen minutes, but it was not disclosed what was discussed in that period. Then appellant said, "If I have to I will secure the TV . . . as well as the internet and cell phones. Is that what you want me to

[2] Dispatcher Chaparro's father had recently retired as a Long Branch police officer.

do?" (R-8.) Chaparro understood that Johnson was alleging that Chaparro had stabbed him in the back by giving the Internal Affairs statement. (Tr.1, 58:11–16.) The witness testified that he "didn't know how . . . to take" Johnson's statements. (Tr.1, 59:13.) Chaparro also testified that having the TV on or using cell phones during work can be a distraction, and there are times when shift commanders direct that they be turned off.

Chaparro further testified that he understood Johnson's comments to be threatening and to be intended to make the dispatchers' environment "a little bit of a[n] uncomfortable environment where we have to just pretty much sit there in silence, no TV and no cell phone." (Tr.1, 63:12–14.) The judge asked why somebody would do that, and the witness replied, "Retaliation." (Tr.1, 63:17.) Chaparro commented that the only reason for any retaliation was his statement in the "Junior" Internal Affairs investigation. (Tr.1, 63:20–25.)

Dispatcher Hope White

Hope White (White) has been employed as a dispatcher in Long Branch since 1999. (Tr.1, 106:17.) She has known Johnson since before she began working for Long Branch, and he has been her watch commander for several years. (Tr.1, 107.)

Sometime after 3:00 a.m. on March 8, 2012, Johnson came into the dispatch area where dispatchers White and Chaparro were working and said, "I know you were all called in the back." (Tr., May 19, 2015 ("Tr.2"), 32:5–7, 39:22–23.) White explained that, "when you are called in the back and you give a statement you are not supposed to talk about it. There is like a gag order." (Tr.2, 32:7–10.) White explained that Johnson did not say "you are not supposed to talk about it"; other officers told her that after she was questioned. (Tr.2, 32:11–19.) After Johnson said to White and Chaparro, "I know you were called in the back," he told White, "they are going after my kid." (Tr.2, 32:20–24.)

White testified that Johnson then said, "well things are going to get bad around here," and "we are not going to have TV, you are not going to be allowed to be on the internet, you are not going to be allowed to be on your cell phone." (Tr.2, 33:3–7.) Neither White nor Chaparro responded to Johnson's statement. White went home and wrote down the incident in her journal. She said, "I was really upset that he came in and did that." (Tr.2, 33:18–23.)

White identified Exhibit (R-11), which was a copy of her journal. (Tr.2, 34:3.) She noted Johnson's comments in her journal because, "I was just like furious, you know I was like livid." (Tr.2, 34:7–8.) The March 8, 2012, entry in her journal reads:

> Came into dispatch, when everyone was gone but me and Sergio. They are trying to go after my kid. He asked if we were pulled, called in the back. We both looked down and said yep. I said what I remembered. He said I know there is a gag order but things are going to get bad around here. He has to know every little thing we do, every little thing and that he, wait, every little thing . . . [t]hat we do. He threatened to keep the TV off and no internet and that things were going to get bad around here and [he] was probably being watched and taped. I told Sergio the next day that I couldn't sleep. We needed to speak to Shea. He said, "let's see what happens," and I said, "okay." I told Susan [one of White's senior partners] I think we were threatened but I am not sure.
>
> [Tr.2, 40:4–19.]

White explained that she felt that Johnson's comments were unjustified or offensive, because she does her job. I **FIND** that Dispatcher White was taken aback or alarmed by appellant's comments, but not threatened.

White testified that the dispatchers have no right or entitlement to watch TV, use the internet for private purposes, or use cell phones while on duty. However, the practice has been that the dispatchers use them when they are not busy with police business. Johnson never told her she could not watch TV or use the internet or her cell

phone. Also, he never asked her about anything concerning the interviews she gave to Internal Affairs, nor did he ever specifically threaten her well-being.

Dispatcher Chaparro was not called to testify about appellant's remarks of March 8, 2012.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he int erest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of respondent's witnesses was especially credible and persuasive. Their testimony was clear and concise. It was obvious that they had concerns regarding their contact with Johnson and had no axe to grind. In fact, it was apparent from the testimony that they simply wanted to do their jobs.

Conversely, Johnson did not testify. I cannot and will not make an adverse inference based upon that choice. However, I find the testimony from White and

Chaparro about Johnson's comments to be clear.

Based upon the documents in evidence and the credible testimony, I **FIND** that on two separate occasions Johnson made comments to Long Branch police dispatchers under his direct command and supervision about an incident involving his son and a stolen gun. I **FURTHER FIND** that those same comments were made to dispatchers after Johnson had been under investigation by the Long Branch Police Department Internal Affairs Division. I **FURTHER FIND** that Johnson knew that dispatchers White and Chaparro were witnesses to the Internal Affairs investigation and gave statements to authorities.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 11A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Civil Service Commission requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was

guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962). Evidence is also said to preponderate "if it establishes 'the reasonable probability of fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). 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).

Here, respondent charges appellant with conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to imagine a more basic example of conduct that could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services than the image of a public employee exercising his

authority to intimidate and control subordinate employees for possible personal gain. To allow or ignore this behavior cloaked in the façade of a watch commander having authority to shut off the TV and restrict personal internet and cell-phone usage would be to ignore common sense and the provision of a safe work environment for the dispatchers.

Johnson claims that since Chaparro was unsure if he was threatened, it is conclusory that the charge should not be sustained. However, the fact that Chaparro was unsure if he was threatened is not conclusory to the outcome. Also, Johnson claims that White was unsure of being threatened and simply had an emotional reaction to his comments. A review of her remarks in live testimony and those given in a statement at the Monmouth County Prosecutor's Office reveals that she was clearly offended by his remarks. She believed she was a good employee and did her job faithfully. She was offended by the possibility of losing their common practice of TV, phone, and internet usage on their down time, through no fault of her own. Johnson's comment that he was going to make things "bad around here" was clearly made in an attempt to threaten and affect the behavior of the dispatchers.

Johnson makes the following arguments in support of his position that no threat was made. A watch commander has the authority to shut off the TV and restrict personal internet and cell-phone use at any time. Therefore, saying he would do it cannot be a threat. Also, he claims that a threat requires an intent to inflict harm or loss on another or another's property. I find those arguments to be unpersuasive, conclusory, and, as stated, absent common sense. Again, his comments can only be perceived as attempting to affect the behavior of the dispatchers.

Respondent's theory that appellant's comments were an attempt to scare the dispatchers from cooperating with an Internal Affairs investigation is logically supported by the credible evidence.

CONCLUSION

I **CONCLUDE** that respondent has met its burden of proof by demonstrating that appellant's actions were objectively threatening. I further **CONCLUDE** that for the reasons set forth herein, respondent has proven by a preponderance of the evidence that appellant acted in a manner that constituted unbecoming conduct by a public employee.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, 38 N.J. 500, 523–24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

Here, appellant has no prior disciplinary history. However, considering the nature of appellant's job duties, and the nature of his conduct in attempting to intimidate dispatchers under his command based on their cooperation with an Internal Affairs investigation, I **CONCLUDE** that the respondent's action suspending appellant for 120 days without pay was justified.

ORDER

I **ORDER** that appellant's appeal is **DENIED** and that the charges against Johnson are **SUSTAINED**. I **FURTHER ORDER** that respondent's imposition of a 120-day suspension without pay is **AFFIRMED**.

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.

August 23, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 8/23/17

Date Mailed to Parties: 8/23/17

/vj

APPENDIX

WITNESSES

For appellant:

None

For respondent:

Sergio Chaparro

Hope White

EXHIBITS

For appellant:

None

For respondent:

R-1 Not admitted

R-2 Not admitted

R-3 Not admitted

R-4 Long Branch Police Department work schedule, January 16, 2012

R-5 CAD entries, January 16, 2012

R-6 Transcript of telephone conversation of Hope White, January 16, 2012

R-7 Not admitted

R-8 Statement of Sergio Chaparro, dated April 12, 2012

R-9 Statement of Hope White, dated April 4, 2012

R-10 Not admitted

R-11 Handwritten journal of Hope White

12-13-17

STATE OF NEW JERSEY

In the Matter of Lyndon Johnson
City of Long Branch,
Department of Public Safety

CSC DKT. NO. 2013-2321
OAL DKT. NO. CSV 03234-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of Lyndon Johnson, Police Lieutenant, City of Long Branch, Department of Public Safety, removal effective August 12, 2013, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on August 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

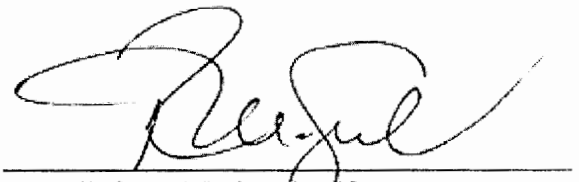
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Lyndon Johnson.

Re: Lyndon Johnson

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03234-13
AGENCY REF. NO. 2013-2321

IN THE MATTER OF LYNDON JOHNSON, CITY OF LONG BRANCH POLICE DEPARTMENT.

Stuart J. Alterman, Esq., for appellant, Lyndon Johnson (Alterman & Associates, attorneys)

James L. Plosia, Jr., Esq., for respondent, City of Long Branch Police Department (Plosia & Cohen, LLC, attorneys)

Record Closed: July 10, 2017 Decided: August 23, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

The City of Long Branch (respondent) recommended termination of Lieutenant Lyndon Johnson (appellant or Lt. Johnson) as a Police Officer employed by the City. Respondent argues that he violated: N.J.A.C. 4A:20-2.5(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. Specifically, respondent alleges

appellant, Lt. Johnson improperly accessed the Criminal Justice Information System (CJIS), specifically by obtaining unauthorized information through the system on multiple occasions. Appellant contends he acted appropriately and did not violate any regulation, rule, policy or procedure.

PROCEDURAL HISTORY

On January 25, 2013, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions. A local hearing was not requested by the appellant and a Final Notice of Disciplinary Action was issued on August 12, 2013, removing him from service on that date. A timely appeal was filed and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL) on March 6, 2013, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings[i] were held on October 5, 2015, January 6, 2016, January 11, 2016, January 12, 2016, January 26, 2016, March 15, 2016 and June 14, 2016. After, post hearing briefs were received the record closed on October 21, 2016.

On March 31, 2017, the originally assigned Judge (Shuster) retired from the bench. On April 21, 2017, the OAL sent a correspondence to all parties notifying them of the retirement and requesting a telephone conference. A telephone conference was held on April 25, 2017, with the parties and Assignment ALJ Delanoy to discuss how the parties wished to proceed. This matter was re-assigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein the court requested that the record be re-opened so that the court may acquire all the closing submissions and documents that were missing from the record at OAL. The parties graciously agreed and the record was reopened on May 8, 20017, so the parties could submit the requested records.

[i] Respondent brought four separate disciplinary actions against appellant. This was the fourth and final case to be heard.

On June 15, 2017, the undersigned requested a telephone conference with the parties. The telephone conference was requested to clarify the discrepancy between the PNDA and FNDA. To be more specific, the PNDA listed the charges as: N.J.A.C. 4A:20-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. However, the FNDA only references N.J.A.C. 4A:2-2.5(a)(1) as the final charge. This section references the opportunity for a hearing before the appointing authority which is frequently referred to as "Loudermill". The FNDA has no reference to any charges from the PNDA.

The discrepancy was not discussed at the initial hearing on October 5, 2015 and neither counsel raised it during the seven days of hearings. Several hundred pages of closing summations were submitted from both parties, none of which address the discrepancy. In fact, the Long Branch's summations list the charges from the PNDA and the appellant's summations list N.J.A.C. 4A:2-2.5(a)(1), the Loudermill regulation. However, Lt. Johnson's October 7, 2017, Closing Summation and October 21, 2016, Reply Brief, specifically reference and defend the charge of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming.

On June 19 and 20, 2017, the undersigned received email replies from both parties to my inquiry. The City of Long Branch argued that:

> "...the Final Notice fails to list the charges. However, ...Howard Woolley, ... found "Lt. Johnson guilty as charges of the specifications contained in the Preliminary Notice of Disciplinary Action", and determined that termination was the appropriate penalty (as checked off on the FNDA Form. Thus, although the "Sustained Charges" box in the 31B was not properly filled out, Mr. Woolley's decision clearly and unequivocally found Lt. Johnson guilty of each of the Charges and Specifications contained in the Form 31A (which Form was the first exhibit in the City's "NCIC look-up" exhibit book. The Court should also note (as per Mr. Woolley's decision) that Lt. Johnson and Mr. Alterman waived their right to a local hearing re the Preliminary Charges and requested the issuance of a Final Notice (Form

> 31B). In so doing, there was obviously no doubt or dispute that the City would find, in the FNDA, that Lt. Johnson was guilty of the Charges and Specifications set forth in the PNDA. In addition, the Court is referred to page 8 of the 10/5/15 OAL transcript, in which this issue was explained to Judge Schuster, and the ALJ accepted that the City, after the waiver of the local hearing by Lt. Johnson, found Lt. Johnson guilty of the Charges and Specifications set forth in Form 31A. See lines 5-18.

I disagree. Similarly, the appellant argues that: "any reference to Wooly's local decision is violative of the law of the case and will result in my immediate application for a mistrial. The burden is on the charging party. Failure to properly charge Lt. Johnson endures to Lt. Johnson's benefit and to the Town's detriment. The transcripts speak for themselves." I also disagree.

First, the argument that because appellant "waived their right to a local hearing re the Preliminary Charges and requested the issuance of a Final Notice" somehow provides "no doubt or dispute that the City would find, in the FNDA, that Lt. Johnson was guilty of the Charges and Specifications set forth in the PNDA" is without merit. There is nothing in any record to support that thought. Furthermore, the transcript is void of any discussion of the charges. It discusses the "specifications" but not the "charges". I agree with appellant that any reference or consideration of Wooley's decision is impermissible. Therefore, in determining the charges, I must consider the law, history of the case and actions of the parties.

Appellants are entitled to due process in the disciplinary process. See N.J.S.A. 11A:2-13. More specifically, appellants are entitled to fair notice and an opportunity to be heard. Id. Fair notice means notice of the disciplinary charges and the basis upon which those charges are justified. Id. Generally, courts look to the content of the PNDA and FNDA to determine whether the stated specifications match the reasoning used to sustain the charges. See Hammond v. Monmouth County Sheriff's Dept., 317 N.J. Super. 199, 206 (App. Div. 1999). The standard, however, is ultimately whether an appellant had "plain notice" of the factual basis for the charges. See Pepe v. Twp. of Springfield, 337 N.J. Super. 94, 97 (App. Div. 2001).

Appellant, if not previously provided plain notice of the specific additional factual allegations, cannot be found guilty based on said specifications.

N.J.S.A. 11A:2-13 provides:

> [B]efore any disciplinary action in [regarding termination, suspension, removal, fine, or disciplinary demotion] is taken against a permanent employee in the career service or a person serving a working test period, the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative. The hearing shall be held within 30 days of the notice of disciplinary action unless waived by the employee. Both parties may consent to an adjournment to a later date.

Pursuant to N.J.S.A. 11A:2-6(d), the Civil Service Commission adopts and enforces the regulatory rules governing disciplinary action. N.J.A.C. 4A:2-1.1–6.2. Pursuant to those rules, civil service employees may be subject to disciplinary action for:

> 1. Incompetency, inefficiency or failure to perform duties;
> 2. Insubordination;
> 3. Inability to perform duties;
> 4. Chronic or excessive absenteeism or lateness;
> 5. Conviction of a crime;
> 6. Conduct unbecoming a public employee;
> 7. Neglect of duty;
> 8. Misuse of public property, including motor vehicles;
> 9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
> 10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder; and
> 11. Other sufficient cause
> [N.J.A.C. 4A:2-2.3(a)].

Removal, demotion, or suspension or fine for more than five working days at any one time constitutes "major discipline." N.J.A.C. 4A:2-2.2(a). An agency seeking to impose major discipline upon a civil service employee must provide the employee

written notice. N.J.A.C. 4A:2-2.5. To that end, prior to the imposition of major discipline, "[a]n employee must be served with [a PNDA] setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing" except:

> An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. . . However, a [PNDA] with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.
> [N.J.A.C. 4A:2-2.5(a)1].

This requirement reflects well established due process rights that attach to employment by state governments. When threatened with major disciplinary action, such as termination, the State cannot, without violating an officer's constitutional rights, deprive an officer of the position without due process of law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). Such a deprivation must "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Id. at 542 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)). "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. . . To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id. at 546. (internal citations omitted). The Third Circuit has emphasized that constitutional due process requires that the notice provide the degree of specificity necessary for the employee to have "'the opportunity to determine what facts, if any, within his knowledge might be presented in mitigation of or in denial of the charges.'" McDaniels v. Flick, 59 F.3d 446, 457 (3d Cir. 1995) (citing Gniotek v. Philadelphia, 808 F.2d 241, 244 (3d Cir. 1986)). "Such notice need only be given so far in advance of the pre-termination hearing so as to allow the officer a chance to present his side of the story." Gniotek, supra, 808 F.2d at 244.

Relevant herein, "[o]n appeal to the Civil Service Commission from a departmental determination a hearing de novo is held at which all relevant testimony may be introduced. It is not a new hearing 'on the record' below, but a new plenary hearing at which evidence and testimony are presented." I/M/O Appeal of Darcy, 114 N.J. Super. 454, 459 (App. Div. 1971) (citations omitted). The importance of proper notice cannot be understated, however, even at the administrative level because "the Civil Service Act mandates review only of the adverse decision of the appointing authority as stated in the final notice of disciplinary action, since that is what the employee appeals to the Board." Hammond, supra, 317 N.J. Super. 199, 206 (App. Div. 1999). To otherwise allow a broadening of the charges beyond those contained in the Final Notice "would be to surcharge the right to appeal with a cost which violates any decent sense of due process or fair play." Id.

The courts have further interpreted the scope of the due process requirement as "plain" notice. "It is elementary that an employee cannot legally be tried or found guilty on charges of which he has not been given plain notice by the appointing authority." West New York v. Bock, 38 N.J. 500, 522 (1962). "'Plain notice' is the standard to be applied when considering the adequacy of disciplinary charges filed against public employees.... These principles emanate from the concept of affording due process and fairness to proceedings which impact so significantly on an employee." Pepe, supra, 337 N.J. Super. 94, 97 (App. Div. 2001). Where an appellant has plain notice of the basis of the charges a technical failure in the specifications does not, therefore, prevent that basis from consideration.

In Pepe, a firefighter was served with a PNDA which contained an expansive narrative specification. Pepe, supra, 337 N.J. Super. at 99–103. Therein, the PNDA broadly accused the firefighter of participating in a false-alarm call with two other firefighters. The hearing officer found him guilty as an accomplice by knowledge and association, a characterization that did not fully match the specifications. Id. at 96. On appeal, the Law Division dismissed the charges on that basis. Id. at 97. The appellate division reversed, however, finding that the firefighter had plain notice of the basis for

the charges and therefore it was error to dismiss the charges on due process grounds. Id. at 98–99.

In Grasso v. Sea Isle City, 93 N.J.A.R.2d (CSV) 747, a police officer was served with vague specifications that could have implicated either the officer's behavior or an entirely different officer's acts. After being dismissed by the ALJ on that basis the Commission remanded under the principle that Grasso could be properly charged, despite vagueness in the PNDA, if he had actual (plain) notice of the charges. Id. at 750. Further, however, the Commission found:

> [T]he appointing authority issued an "amended and/or refiled" Preliminary Notice of Disciplinary Action on February 28, 1992, with detailed specifications of the charges at issue. The Board finds, however, that this attempt to now correct any deficiency in providing notice to appellant of the specifications of the charges against him is impermissible and....void. Id. (emphasis added).

On remand, the ALJ found that Grasso, though discovery and the hearing below, had been fully apprised of numerous more specific allegations and could be charged on the basis of those specifications. Id. at 757. Despite so finding, the ALJ ultimately found none of the plain-notice specifications had been sufficiently proven and dismissed the charges. Id.

Without plain notice of the basis of the charges, new specifications added at a late stage run afoul of, and must be dismissed under, the 45-day limit to bring disciplinary charges against police officers under N.J.S.A. 40A:14-147, which states that "[a] failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint." N.J.S.A. 40A:14-147. In Fabian v. Town of North Bergen, CSV 3198-97, Initial Decision (August 24, 1998), adopted, MSB (October 14, 1998) < https://njlaw.rutgers.edu/collections/oal/html/initial/csv3198-97.html>, a police officer was charged with leaving his assigned sector without authorization. However, during the administrative hearing the department argued that the officer failed to obey orders

and failed to respond to radio calls, charges not contained within the PNDA. The ALJ held that "[n]either Fabian nor his attorney had knowledge that the real issue in this case was Fabian's alleged noncompliance with an order modifying his regular assignment." Id. at 4. Thereafter, because the actual basis for the charges had been introduced outside the 45-day period under N.J.S.A. 40A:14-147, the ALJ dismissed the charges.

In this case, the charges listed in the PNDA are clear, however, the FNDA fails to address any charge. Clearly, the appellant had "plain notice" of the factual basis for the charges in the PNDA, however, with the FNDA failing to address any charge, the subsequent actions of the appellant are critical. Again, the parties participated in seven days of hearings where the charges were never addressed. The parties also submitted several hundred pages of closing summations. In his closing submissions, the appellant references that he "was served with a PNDA alleging the appellant violated the N.J.A.C. 4A:2-2.5(a)(1), seeking his removal...." Although factually incorrect, it likewise fails to provide guidance on notice of the charges that appellant defended over the seven days of hearings.

However, in his October 7, 2016, Closing Summation, appellant stated that, "...based upon the testimony and evidence in the record, the appointing authority has failed to demonstrat[e] by a preponderance of the competent, relevant and credible evidence that it had just cause to sustain the alleged violation of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, against the Appellant." Also, in their October 21, 2016, Reply Brief, "...based upon the testimony and evidence in the record, the appointing authority has failed to demonstrate by a preponderance of the competent, relevant and credible evidence that it had just cause to sustain the alleged violation of N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee, against the Appellant."

As such, I **FIND** as **FACT** that appellant had "plain notice" of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming as a charge from the PNDA. I **FURTHER FIND** as **FACT** that the appellant specifically defended the charge of N.J.A.C. 4A:2-2.3(a)(6)

Conduct Unbecoming at the hearing and in his closing submissions. I **FURTHER FIND** as **FACT** that appellant did not have "plain notice" of N.J.A.C. 4A:20-2.5(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause in the FNDA. As a result, I **CONCLUDE** that N.J.A.C. 4A:20-2.5(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause are **DISMISSED** for improper notice in the FNDA. I likewise **CONCLUDE** that the sole sustained charge is N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming.

The record closed on July 10, 2017.

TESTIMONY

For Respondent

Lieutenant Thomas Shea (Lt. Shea)

As a form of brevity, Lt. Shea's background and qualifications were stipulated by the parties. TR16:3. He explained that his Internal Affairs Investigation Report laid out that the investigation into this case began during his investigation of the "Witness Intimidation" allegations against Lt. Johnson. "There was a Church lookup case, which Lt. Johnson wasn't charged with." R-3, TR18:9. Lt. Johnson performed lookups for Church members from the Second Baptist Church in Long Branch. TR18:13. Dispatcher, Hope White, informed Lt. Shea that a former Long Branch dispatcher, now Officer O'Brien, had concerns about the lookups Lt. Johnson was asking them to perform. TR19:2.

Computer lookups are performed by a Long Branch Police Department dispatcher "under the authority of the Watch Commander". TR19:9. ATS/ACS lookups are for bench warrants and are done for traffic warrants in Municipal Court. TR20:12. Lt. Shea explained that Officers on the street would request an "all the way around"

computer search, which includes a check of the driver's license, registration, and warrant search. TR23:16. They can be performed by police officers in their patrol cars or called into dispatch. TR24:1. Lt. Shea's practice was to call them in. TR24:23.

A NCIC check is used to ascertain whether there are any outstanding warrants on the person nationwide. TR25:17. The witness explained that the "all the way around" check requested by a police officer on the road through dispatch was to check the person's license, registration, the vehicle, and "you're also checking statewide warrants and if they have any, national". TR27:23. Thus, there are three types of "computer checks" in the "all the way around" search: license and registration; New Jersey warrants; and national warrants. TR28:7.

Lt. Shea also described a "criminal history check" or "CJIS" explaining that "[t]he police officers request a criminal history check if they're doing an investigation but they have to ask dispatch. And dispatch has to get approval from the Watch Commander before they can run it." TR31:7. The witness explained that a CJIS check "is more an in-depth investigation. It's not just checking someone for warrants." TR31:17. "[Y]ou can't –check their criminal history unless you're doing an active investigation into them." TR31:22. Lt. Shea explained the legal restrictions because "when a person first becomes a police officer in New Jersey, they are trained with the workings of CJIS and what's allowed and what's not allowed with respect to those lookups". TR33:2. Also:

> And you're asked to sign a memo that states you cannot run a CJIS criminal history checkup on any subject unless you're performing an investigation, have an investigation number attached that you can point to show there's an active investigation. You can't just run someone for no reason. TR33:5.

He explained that incoming police officers are told that an officer could face criminal charges if they conduct an improper criminal history check. TR34:16. Lt. Shea quoted R-8 stating that: "As per Title 28, Federal Code New Jersey CJIS Security Policy, employees of the Long Branch Police Department may only use information obtained directly or indirectly from the criminal justice information system, CJIS, for

criminal justice purposes." TR35:13. Then, he read another sentence into the record: "Any employee found to violate this Order or improperly disseminate, improperly use CJIS information, or irresponsibly dispose of any form or copy of CJIS information, may be subject to federal, state, civil and/or departmental charges, the sanction for which may be incarceration, fines, punitive charges, suspension and/or termination." TR35:21; TR36:1.

Lt. Shea explained for a search to be valid, the necessity of a "criminal justice purpose" is paramount. "[C]ourts have decided that people have a right to privacy when it comes to their past criminal history. You can look at this information as long as there's an investigative purpose." TR37:16. Police Officers in New Jersey have been criminally charged for abusing access to the CJIS system "[a]ll the time." TR38:10.

Lt. Shea was posed with a hypothetical scenario in which a citizen was stopped for a motor vehicle violation, and an officer on the scene ascertained through ATS/ACS that there was an outstanding warrant. The person is thereafter brought into the Police Department and a CJIS can be legitimately be requested "if you're looking to release them on bail to see if they had any priors and they didn't show up for Court." TR39:17. Additionally, the person's criminal history could be relevant for whether or not they should be released or held for bail. TR39:21. In that case, a CJIS lookup would be authorized by the Watch Commander. TR40:7.

Lt. Johnson's "CJIS" lookups originally came into question when several dispatchers informed that Lt. Johnson had requested criminal history lookups for members of a church in Long Branch. TR41:23. Based on this information, Lt. Shea checked to see who Lt. Johnson was making criminal history background checks for, and learned that it was being done for members of the Second Baptist Church. TR42:14. This was a matter of concern to Lt. Shea; accordingly, the City initiated an investigation to ascertain why the lookups were being done. TR44:21. The proper procedure for criminal history lookups is to do a "CCH" lookup in the CJIS system. TR45:23.

Lt. Shea identified the Garrity Statement taken at the Monmouth County Prosecutor's Office of Lt. Johnson on May 31, 2012. TR47, R-4. Lt. Shea testified that Lt. Johnson was not charged for the "Church" CCH lookups, and did not know why. TR47:17. Lt. Shea determined that Lt. Johnson had the Long Branch Police Department run a criminal history background check on his own son. TR49:3. Also, during the May 31, 2012 Garrity Statement, Lt. Shea asked Lt. Johnson if he ever ran criminal histories in his position as liaison to the Housing Authority and Lt. Johnson answered "no". TR49:15.

On June 3, 2003, Lt. Johnson was appointed as liaison between the Long Branch Police Department and the Long Branch Housing Authority. TR50:21, R-6. Then, on October 7, 2008, Lt. Johnson was transferred back into the patrol division. TR51:19, R-7.

Lt. Shea identified R-9, which is a list of criminal histories that Lt. Johnson ran during his time as the Long Branch Housing Authority liaison. TR52:22. Lt. Shea created the list with the assistance of Special Officer Phillips and Sergeant Shirley. TR53:3. Lt. Shea explained after the Garrity testimony, he audited the records to see what CCH lookups Lt. Johnson ran. TR53:18. He looked for searches including "Lt. Johnson" or "247" [Lt. Johnson's number]. TR55:10. As part of his investigation Lt. Shea spoke with Daniel Gibson, who is "second in command" at the Housing Authority under Tyrone Garrett, the Authority's Executive Director. TR61:13. Lt. Shea asked Gibson if he had ever requested Lt. Johnson run criminal histories for the Housing Authority. TR61:23. Lt. Shea explained that the Long Branch Housing Authority has their own screening process and actually obtains written consent from the applicant to do background checks. TR63:18. Gibson stated that he never asked Lt. Johnson to perform any criminal background check. TR64:21. In fact, Gibson told Lt. Shea that neither he nor Garrett ever asked Lt. Johnson to run a criminal history check for or on behalf of the Housing Authority. TR67:17.

The Housing Authority and Long Branch Police Department created a "trespass list". TR67:23, R-10. This was a list of people who were excluded from any Federal

Housing Authority property. TR68:20. They were "known people within Long Branch ..." who had drug convictions. TR69:5. Lt. Shea explained that the Housing Authority does not have the right to request a CCH check of a visitor to the Long Branch Housing Authority to see if they are on or belong on that witness trespass list, TR69:10, and Lt. Johnson as the Housing Authority liaison could not legally request such a CCH check for a person visiting the Housing Authority. TR69:15.

Lt. Shea testified that an officer could request a CCH lookup from the New Jersey State Police if they were requesting a bail determination TR69:21 and during an active criminal investigation. TR69:25. Police officers will generally do many more "all the way around" lookups than CCH criminal history background lookups. TR71:15. He explained that a police officer may request a CCH lookup if, for example, he arrested someone in possession of a weapon. TR72-73. This would be appropriate because "convicted felons can't carry firearms legally." TR73:8. Accordingly, ascertaining whether the person brought into Headquarters with a firearm may have violated the "no carrying of firearms by convicted felons" law is a legitimate ongoing investigative purpose for a CCH lookup. TR73:12. As for someone arrested on a drug offense, a CCH lookup might be part of the legitimate "criminal investigative purpose" if the Police Department was considering using the person as a confidential informant. TR73:22. That decision would be made by the Patrol Officer's supervisor, who would obtain permission for the CCH lookup, if at all, from the Watch Commander. TR74:5.

Lt. Shea, referring to R-9, concluded there were "a whole bunch of individuals [who] were run [by Lt. Johnson] for no apparent reason that I could find." TR75:11. Lt. Shea found no "investigative reason" why these CCH lookups were requested by Lt. Johnson while he was the Housing Authority liaison. TR75:14. In order to ascertain if there had been any legitimate criminal investigative purpose for Lt. Johnson to conduct these lookups, Lt. Shea "compiled a list of all the people Lt. Johnson ran that didn't have an investigative number attached to it and then I looked through our computer system to see if there was any reason why he would performing an investigation or any report attached to that particular person, who the CCH was run for." TR76:6. Lt. Shea

testified that if there was no "investigative reason" which can be found for the lookup, then there was no legal reason for the check to have been run. TR76:15.

When a CCH lookup is being done due to and consistent with an ongoing criminal investigation, an investigation number is attached to the CCH look-up list. TR77:12. Investigation numbers are obtained by the officers from dispatchers. TR79:14. Lt. Shea asserted in the Internal Affairs Report that investigation numbers were listed on many of the CCH lookups, noting that there was a legitimate investigation ongoing would justify the CCH lookup. TR80:3, R-11. The lookups themselves were performed either by dispatchers or police officers who had the ability to do the lookups because they used to be dispatchers; he testified that he would not have known how to do such a lookup. TR82.

Lt. Shea further checked into all CCH requests where Lt. Johnson was the receiving agent for the past five years when Lt. Johnson was the Housing Authority liaison. TR85:7. In one entry reviewed by Lt. Shea, there was a legitimate criminal investigation purpose listed on the entry "[f]or bail due to arrest authorized by 247 [Lt. Johnson's badge number]." TR83:12.

Lt. Shea explained the "IMC" computer system used by the Long Branch Police Department. In that system, a person can check any criminal history the person has within the Long Branch Police Department only. TR89. Lt. Shea conducted such an "IMC" search for Mr. T., the person listed on the CCH lookups, and nothing came up. TR90:11. The Lieutenant spoke to Daniel Gibson about Mr. T. Gibson informed him that Mr. T. was a former employee and resident of the Housing Authority. TR90:19. Neither of those facts, however, was sufficient to justify a CCH lookup for Mr. T. TR91:4. Even though another Police Officer, Fernando Sanders [No. "250"] had approved the lookup, it was Lt. Johnson's responsibility because he was the one who requested it. TR92:8. On occasion, Watch Commanders can investigate a request for CCH from officers however, it was the officer making the request who is responsible for the legitimacy of the request "because he's the one entrusted with the authority who asked for it in the first place." TR93:19. Lt. Shea explained that obtaining the Watch

Commander's approval was simply a matter of asking the Watch Commander for permission to ask a dispatcher to run a CCH lookup. In many cases, the Watch Commander would not question the requesting officer on why the CCH was being sought. TR94:3.

The Court asked the witness about the significance of the Watch Commander giving approval for doing the CCH lookup. TR95-96. After listening to this colloquy, the witness responded that the Watch Commander would trust the officer making the request. TR97:1. In this case, it was the Watch Commander trusting a Lieutenant – Lt. Johnson. TR98:1. Sanders, the person whose number was on the lookup that had previously been reviewed, was a Sergeant and Watch Commander, and Lt. Johnson was a Lieutenant. TR98:11. Thus, a Sergeant who is subordinate to a Lieutenant trusts Lt. Johnson to understand the legal parameters of doing a CCH background check. TR98:20.

Lt. Shea testified that Lt. Johnson requested seventy-four CCH lookups during his five years as Housing Authority liaison for which there was no legitimate criminal investigative purpose. TR100:16. However, the Monmouth County Prosecutor's Office informed the Long Branch Police Department that the Prosecutor's Office was not going to treat this matter as criminal, instead, it was remanding to Long Branch to be handled administratively. TR101:21.

Lt. Shea "researched each one of these names [CCH lookups requested by Lt. Lt. Johnson] through our computer system, which is the IMC system" (TR24:7) to ascertain whether there was any legitimate criminal investigative purpose for Lt. Johnson to request CCH lookups. There were no investigation reports or ongoing criminal investigations for any of the seventy-four denoted CCH lookups Lt. Johnson had requested. TR24:13. The few lookups Lt. Johnson requested during the five-year period for which there were investigation numbers were excluded from the list of the seventy-four. TR24:25.

On cross-examination, Lt. Shea was asked about "training" Lt. Johnson received regarding R-8 and the Long Branch Police Department's policy on CCH lookups. Lt. Shea explained that as a Lieutenant in the Police Department you must have considerable knowledge of criminal statutes as part of your daily duties. TR146:1. Prior to a police officer signing off on R-8, they are required to attend a class, which instructs them what they can or cannot do with respect to CCH lookups. TR146:11.

For Appellant

Lieutenant Lyndon Johnson

Lt. Johnson testified that the January 25, 2013, Preliminary Notice of Disciplinary Action served on him was "vague" with respect to the specifications. TR14:12.

The witness testified that, having received the City's exhibit book, he "went through each and every name that Lt. Shea accused me of running illegally and utilized the information that they gave me to justify whether those names were ran". TR15:6. He justified them "name by name". TR15:11. Lt. Johnson became the Long Branch Housing Authority liaison from the Long Branch Police Department on June 3, 2003. TR16:11. The Housing Authority wanted its "no-trespassing policy" enforced by the Police Department. TR23:19. Lt. Johnson testified that the no trespass policy was "a way for us to get around a rush search and seizure, the 4th Amendment. We knew who the drug dealers. . .". TR24:1. Essentially, the purpose of the no trespassing policy was to "[k]eep the undesirables out of the projects." TR25:25.

Lt. Johnson identified A-13, which was the "LBHA Criminal History Log Notes". TR57:5. He typed it after going through each of the names the City claimed that he had illegally run. TR57:7. He was asked about the significance of his first entry, Mr. T., on Exhibit A-13, the witness testified as follows:

> The – I want to give a foundation of this that there were several, the way that information was asked of me came from several different sources meaning that the Housing

> Authority manager could call me and say listen, we have reason to believe that J.S. was arrested on such and such date, can you find out because we want to take action. So the information could have come via newspaper clipping, phone call, sometimes anonymous phone calls, or an official request as there are some documents in here from the Housing Authority Director or other personnel that will stipulate that they specifically asked for information pertaining to a particular individual. So from Mr. T. from my recollection of taking from what the City provided me, he was a resident of the Housing Authority. There were no reports provided to me in their file. There was a case number generated when this criminal history was done and it was approved by a Sergeant.

TR59:11 –TR 60:1.

When asked why he looked up Mr. T. on the CJIS system, Lt. Johnson stated "I couldn't tell you because they didn't provide me with any reports. I mean I don't know. I could have gotten the call from the Housing Authority saying we suspect him of whatever, whatever ...". TR61-62. The witness testified that he did not look up Mr. T. "for some illegitimate purpose". TR63:7.

He then testified about A.M. TR63:8. He typed "unknown date when CCH was ran. No info or reports provided by LBPD." TR64:11, A-13. The third person is J.A. and Lt. Johnson testified that he was arrested in June 2004, on Long Branch Housing Authority property for domestic violence, and subsequently added to the no trespass list. TR64-65.

Lt. Johnson identified the Housing Authority Resolution authorizing a "vigorous enforcement policy" on Housing Authority property to improve the quality of life for residents. TR67:23, A-29. He and Natalie, a former Housing Authority employee, created the no trespass list. TR68:11. Attached to the Resolution is the "Criminal Trespassing/Barring Policy" which provides that "any person who has received a warning should not be allowed on the Authority's property as a guest of a resident or otherwise", and that such a person is "subject to arrest for criminal trespassing ...". TR70:6.

He understood the "no trespass" policy to provide "[t]hat is if you did not have a legitimate purpose for being on the property and you were involved in criminal activity or violation of quality of life issues or had a pass, the Housing Authority would bar you or member of the Long Branch Police Department". TR72:5.

Returning to A-13, Lt. Johnson's rationale for doing a CJIS lookup on H. was that he was on the no trespass list and he "has an extremely long, lengthy history of drug arrests and his mother was a resident of the Long Branch Housing Authority." TR73:7. Asked to explain how persons get on the no trespass list, he said:

> In order to justify putting him on the list we had to run a criminal history, because, just because someone is not, the IMC systems which is being referred to in all these proceedings, is a system that only deals with Long Branch reports. If someone committed a crime in Eatontown or Alabama, you are not going to see those crimes or anything that they were involved in-house system so therefore you have to run a CCH to get the full rap sheet on what they have been involved in and where at. That information would turn around and be used against them because just because we took it one step further with the policy, just because we said that H. committed this crime, that person was notified by mail and then we would give them a chance to appeal it because just because it is on a criminal history doesn't mean he may or may not have been convicted we could not follow through and add them to the list. So there was a whole process of how they came to be known on this list and maintained on the list.

TR74:13 – TR75:1.

The witness testified that the CJIS lookup he did would reveal convictions, as in the "disposition of the case." TR76:9. Lt. Johnson testified that his justification for doing a CJIS lookup on H. was "[t]o show that he qualified to be added to the trespass list." TR77:16.

Regarding the CJIS search on Mr. B., Lt. Johnson testified that he may have been involved in a domestic violence episode in May of 2004. TR77:23. " I was asked

to find out what happened in that particular case." TR78:3. Lt. Johnson offered the same rationale for doing the lookup on Mr. N.. TR78:23. Explaining that :

> No, what would happen is, I could come in in the morning and I could have an e-mail that said, 'Lyndon, what happened at ... G. Court last night,' and I have to backtrack. I have to look into the police blotter, see who was involved and then I would have to get the investigative report. If it warranted I would go further and say, 'okay, well this person has a criminal history and this person doesn't.'
>
> Again, just because a person didn't commit a crime in Long Branch doesn't mean that they haven't committed a crime someplace else. We are at a zero-tolerance policy so anybody that we came into contact with, meaning any other officer not just Lyndon Lt. Johnson, we did a full work up on because that was the only way to address the problem.

TR79:3.

The witness referred to the November 2004, lookup of D.A., and testified that she had been arrested for "endangering the welfare of a child." TR84:4. He performed this lookup because the Housing Authority requested that he do so "maybe for the disposition, was she found guilty and so forth, criminal justice purposes". TR84:8.

He testified that he did the lookup in December 2004, for J.S., who had been arrested five months earlier for domestic violence. TR84:17. He performed the January 2005, lookup on Mr. R. because he had been asked "specifically from the Housing Authority requesting that we deal with Mr. R." TR85:14. Robinson had a history of CDS arrests, and may have been living with his father on Housing Authority property. TR85:9.

He did a lookup on R.M. because he had been arrested on a weapons charge and "to justify adding him to the no trespass list." TR87:18. He performed a March 2005, lookup on N.G. because she had been arrested four months earlier on a bad check charge explaining that "[s]he would violate the one strike policy which involves criminal activity." TR88:2. The one strike policy is cause for evicting Housing Authority

residents. TR88:5. A-28. The policy "clearly states that if you are involved in criminal activity you will be evicted." TR88.

The 13th person on A-13 no trespass list, D.J., "had a long history of drug arrests." TR91:3. Also, K.S., was on the Long Branch no trespass list and "has a long history of CDS arrests". TR6:7. Lt. Johnson proffered that the justification for doing this lookup was to potentially put K.S. on the Housing Authority no trespass list. TR6:14. Lt. Johnson testified that doing a CJIS lookup for this reason was legitimate. TR6:12.

Exhibit A-13A and A-13B, are emails concerning the "no trespass list" hearing. TR25-26. Lt. Johnson testified that those emails caused him to "run a criminal history" on people. TR27:23. Exhibit A-13D, are Lt. Johnson's handwritten notes concerning the "1-61" exhibits and A-14, is an exhibit that he believes shows that 152 of the 305 computerized criminal histories run during this period of time "contained no case number or had a CJIS or contained no information." TR31:11. Lt. Johnson's point was that other people failed to properly use the CJIS system and were not questioned or disciplined. TR33:20. One example he gave was a "background" investigation authorized by Sgt. Roebuck. TR38-39. Lt. Johnson referred to this entry in order to demonstrate that it is not fair for the City of Long Branch to charge him "... for violating a policy that I signed saying that every lookup will have a case number." TR40:18. Also, Lt. Johnson pointed out a lookup where the wrong purpose code was inserted. TR42. He explained that valid lookup code was "C" for criminal matters, "J" for criminal justice employment, "X" for expungement and "F" for firearms. TR43:5. The witness testified that twenty-six Officers had authorized CCH lookups without a companion case number. TR44-45.

Lt. Johnson asserted that is was permissible for him to do a CCH lookup on someone who had filed an appeal to be removed from the no trespass list. TR65-66. "Q: But you were gathering information [re-evictions] does that mean you would also be running criminal histories? A: Correct." TR67:5. Lt. Johnson went on to state that criminal histories were justified for persons who were being barred from Housing Authority property. TR69. Lt. Johnson explained that the "one-strike policy provided

him authority for running criminal history or CCH checks because "I need to run criminal histories in the performance of my job to do my job. I couldn't provide them with the information that they needed if I didn't have that information." TR74:21. Lt. Johnson testified that the names for which he ran criminal histories would come to him from telephone calls, newspaper clippings, emails from the Housing Authority residents, etc. TR75:2. Also, Lt. Johnson testified that he had reason to run criminal history checks on persons on the no trespass list because, in his view, one had to have a "good reason to be put on the list." With respect to evictions, Lt. Johnson referred to Ms. B., who the Authority "was looking to evict due to criminal activity in and around her unit." TR95:3.

Exhibit A-45, concerns a "trespass sweep" and Lt. Johnson testified: "... it looks like here, there were numerous people with drug-related arrests. So, we definitely would have done criminal lookups for this." TR102:20. Also, he testified that A-47, a 2013 memo from Randy Phillips to Lt. Johnson provides justification for performing CCH lookups. Stating that "[d]epending on the matter involving the particular person that I found. If I did the IMC lookup and if he wanted to know on such and such date, they called up about J.S., what he was arrested for, what did he do, so forth and so on." TR104:7.

Lt. Johnson identified Exhibit A-48, which was advising Garrett of persons that the Long Branch Police Department had been arrested in and around Housing Authority property, and who were, accordingly, added to the trespass list. TR104:12. Lt. Johnson testified that he was asked to do this list, and that, in order to do so, he would have to "do the research, follow up and maybe run a criminal history or whatever, because all that may be in the file could be limited information, meaning the IMC file." TR104:11.

Lt. Johnson identified Exhibit A-50, which was a letter concerning a particular Housing Authority property seeking permission of the Police Department "to stop and question anybody that was around that property that didn't belong there." TR105:17. Remarkably, Lt. Johnson stated that this letter gave him justification to run a criminal history background check! TR106:2. Lt. Johnson testified with respect to two evictions,

and stated that these were examples "of why I may run a criminal history on somebody". TR108:2.

On cross-examination, Lt. Johnson testified that the lookups he ordered to be done while he was Long Branch Housing Authority liaison were for a purpose related to Long Branch Housing Authority operations. TR6:14. When asked why he had denied doing so in his Garrity Statement R-4, he claimed that he was "mistaken". TR7:5. In fact, he found the City's charges against him in this case to be "ambiguous" even after he had read Lt. Shea's Internal Affairs Report. TR16:14.

His understanding of the IMC database in Long Branch Police Department was that it was "a self-contained system within the City of Long Branch that deals with reports and things of that – records of that nature." TR26:18. The IMC database contained only documents and information generated by the Long Branch Police Department. TR26:24. Asked if there was any information in the IMC database about someone's arrest record compiled outside of Long Branch, Lt. Johnson agreed that the information would be contained therein and in fact said: "It could be, yes." TR27:21. This was because an arrest report generated by a Long Branch Police Officer might make mention of a person's prior arrest record outside of Long Branch. TR27:22. He also agreed that it was possible someone could find out information about arrests outside of Long Branch in documents contained in the IMC system without having to access the CJIS system. TR28:13.

Lt. Johnson stated that A-29, the Long Branch Housing Authority trespass policy was in existence when he became the liaison in 2003. TR30:11. He agreed that there were five grounds set forth in the policy for putting someone on the Long Branch Housing Authority no trespass list. TR31:4. He was asked if a person would have to do one of those five things to be a trespass list, the witness stated: "I wouldn't say it's true, I would refer to F. 'No person should be added to the no trespass barring list without first, just cause. Said just cause will be stipulated by the executive director, director of management, or a member of the Long Branch Police Department.' " TR31:10. Asked if numbers one thorough five of the policy "involve conduct which occurs on or near

Authority property", the witness responded: "I would say one through five deals more with residents and F could be non-residents." TR31:22. The witness agreed that the phrase "on or near Housing Authority property" is contained in paragraphs one through four of the policy. TR33:5. Asked about number five, which was damage to Authority property, the witness would not agree that a person had to be on Housing Authority property to cause damage. TR34:7.

He was asked to explain the "warning" language in the "no trespass" policy, Lt. Johnson stated that the warning consists of being told that you are on the no trespass list, and, if you violate the policy and are on Housing Authority property, despite being on the trespass list, you are subject to criminal prosecution. TR36:11. Asked if numbers one through five of the policy only describe conduct in Long Branch the witness would not agree to that either. TR36:16. However, when confronted with the fact that each of the five provisions states that the conduct which results being on the no trespass list must be "on or near" Housing Authority property meant that the misconduct has to occur in Long Branch, the witness then contradictorily stated: "I agree with that statement." TR37:3; 13. The witness then stated that a person cannot be on a no trespass list for an allegation, only for convictions. TR37:25. The witness was then asked if the no trespass list only included persons convicted of crimes in Long Branch, and replied (again contradictorily): "No, I'm not saying that." TR38:7. When asked to explain the discrepancy, he stated "IMC is only as good as the information being put into it" and that "[w]hat one officer may find important, another officer may not." TR39:10; 21. The witness went on to state that he did the CCH checks because he wanted to see if the person involved had "[a] certified conviction." TR40:11.

Lt. Johnson stated that it was not enough for a person to have allegedly engaged in misconduct to get on the no trespass list (TR40:25) and it was not necessary to have a conviction in order for someone to be put on the no trespass list. TR41:6.

When asked about the lookups he requested while Housing Authority liaison that Lt. Shea investigated and whether he performed the CCH lookups and did not do any IMC lookups, the witness replied: "No, I may have did a multitude of things, I may have

re-dug out a criminal complaint, I may have dug out a DMV lookup, I may have dug out the IMC, I may have had a multitude." TR42:13. The witness agreed that, with respect to an IMC lookup, he could do this himself or he could have a dispatcher do it. TR42:20. Lt. Johnson agreed that the information in the Long Branch IMC system can be accessed by any Long Branch Police Officer at any time. TR43:12. He agreed that this was not true for the CCH lookup, which is an "investigative tool". TR43:17. The witness also agreed that access to the CCH system was limited to "criminal justice purposes." TR43:25. He further agreed that these lookups were done by dispatchers, not himself. TR44:3. Lt. Johnson specifically recalled doing IMC lookups on his own for Housing Authority issues. TR44.

Lt. Johnson was asked if the only way to find out about a person's convictions was to go through the CCH system, and answered that question in the negative. TR44:22. The witness immediately thereafter agreed, however, that he could not find out about criminal convictions in Long Branch Municipal Court by looking at the IMC system. TR46:18. Lt. Johnson then stated, however, that there could be information about prior convictions because a police officer investigating the current crime the person had been charged with might have conducted a CCH lookup. TR49:16. Lt. Johnson testified that he may have received information about prior convictions from another source, such as a parole officer. TR51:4.

Lt. Johnson testified that he "could have" put persons on a no trespass list for which he did not order CCH lookups. TR53:17. He explained that "I used a multitude of sources to justify someone being placed on the no trespass list." TR54:9. He did not recall whether he informed Tyrone Garrett that he was performing CCH lookups as a component of his recommending people to be placed on the no trespass list. TR55:8. Nor does he recall telling Garrett that he was doing IMC lookups for the same purpose. TR55:15. He does not believe he showed Garrett any "IMC" documents for anyone on the no trespass list. TR55:20. Asked several times whether he had any facts to dispute the assertion that only persons who engaged in misconduct on or near Housing Authority property were placed on the no trespass list, Lt. Johnson eventually answered that he did not have any facts to dispute this statement. TR58:2.

Lt. Johnson asserted that Section F of the "no trespass" policy provided additional "cause" for being placed on the list on top of the five provisions set forth in the policy. TR60:4. Asked if he recalled anyone going on the no trespass list for being arrested for drugs outside the City of Long Branch, Lt. Johnson replied: "I couldn't tell you." TR60:17. He was asked about the fifty-five persons for which he requested lookups, each of which he went through in incredible detail in his exhibit books, and whether any of these persons were arrested outside the City of Long Branch, Lt. Johnson replied: "I would say probably 92 to 95% of those crimes, if not more, where – these were things that were done in the City of Long Branch." TR61:1. When asked if any of the crimes for which these lookups were done occurred outside of Long Branch, Lt. Johnson answered: "I'm not sure." TR61:8.

The witness defined just cause as "the totality of the circumstances with everything involved." TR63:16. Lt. Johnson recalled that there may have been ten or fifteen appeals of persons to get off the no trespass list in the years he was the Housing Authority liaison. TR63:25. The witness stated he didn't have the appellant's criminal history background with him at these hearings, but had a "synopsis" of the history, which he would then summarize and present at the hearing. TR64:8; 11. Lt. Johnson testified that he was given the CCH reports in paper form, but may have looked at the computer screen as the dispatcher did the CCH lookup. TR65. Lt. Johnson testified that he made notes of these CCH "summaries", but did not save any of these notes "[b]ecause I did not find it relative." TR68:4. He was asked several times whether he had written or "summarized" the appellant's criminal history on the appeal form, the witness finally answered: "[s]ome of them I did, some of them I didn't." TR72:15. He did not know where the appeal forms were and he did not keep copies of those them. TR73:23; 25. Although Lt. Johnson initially stated he was not the "Prosecutor", he agreed that he was at these hearings "presenting evidence to support the recommendation that you should be on the no trespass list ...". TR75:13.

Lt. Johnson explained how a request to put someone on a no trespass list originally came about. TR79:3. It could occur because Lt. Johnson saw a police report that indicated someone had been involved in alleged criminal activity on or near

Housing Authority property. TR79:21. Asked how he would proceed at that point, Lt. Johnson gave a number of answers which, when summarized, seemed to amount to "it depends." TR80. He stated that he may have started with the IMC system and looked at reports contained therein and perhaps interviewed the arresting officer about the episode which precipitated the criminal complaint. TR81:4. Lt. Johnson then reiterated that he would destroy his notes after the "no trespass" appeal hearing. TR85:8. He stated that he may also have listed criminal convictions or arrests on the appeal form. TR85:11. That form would be kept by the Housing Authority. TR86:3.

Lt. Johnson agreed that he was aware nationally of challenges to no trespass lists for housing authorities. TR90:9. Asked if some of the CCH lookups were for evictions, and the witness responded: "[t]hey could have been, I'm not sure." TR91:16.

Lt. Johnson was also asked about the CCH lookups he did for residents, and whether any of those were for purposes of eviction. TR91:24. Lt. Johnson was then asked to confirm that it wouldn't be for a "no trespass" reason that he did the CCH lookups for residents, and eventually agreed that made no sense. TR92. Asked if he recalled any Housing Authority official requesting that he do CCH lookups for purposes of evictions of Housing Authority residents, Lt. Johnson answered that he did not so recall. TR92:24. He also did not recall Mr. Garrett ever asking him to run a CCH for an applicant seeking to obtain housing. TR93:4. The witness agreed that applicants (as opposed to "trespassers") could be excluded for criminal conduct outside of Long Branch. TR95:9. In his view, it would justify performing a CCH lookup. TR95:14. He stated that he did not know how the Authority did these lookups, because "it wasn't my job" (TR95:20) and did not know if applicants had to sign a release in order to allow the Authority to do the CCH lookups. TR96L4.

Lt. Johnson agreed that, for purposes of eviction, a resident could engage in criminal conduct outside of Long Branch which might require a CCH lookup. TR97:7. Asked again if any of the fifty-five CCH lookups he reviewed from Lt. Shea's IA report involved evictions, and Lt. Johnson replied: "I would have to go back over them." TR97:22.

Lt. Johnson was asked whether any of these fifty-five lookups were for evictions (and after having confirmed that Lt. Johnson himself created the exhibit books in conjunction with his attorney's office), the witness continued to state that some of those fifty-five lookups "could have been" for eviction purposes. TR100:5; 14.

Thereafter Lt. Johnson was asked whether he ever request a CCH lookup for a victim in a domestic violence situation. TR101-103. He was then referred to R-3, at page 10 (Lt. Shea's IA report) and the entry for B.W. TR104. Lt. Johnson testified that he did a CCH lookup because B.W. was involved in a domestic dispute with his wife and was arrested. TR108:15. B.W. had not been arrested at the scene but was arrested for a prior incident, four months prior to the domestic violence incident. TR108:21. Lt. Johnson agreed that he had run a CCH check for B.W. TR111:21. Lt. Johnson testified that he was asked to investigate whether B.W. lived at P. Street or J. Avenue, TR112:17, and that he did the CCH lookup because of this address issue. TR113:2. Lt. Johnson then testified that he did not run this CCH lookup because of the address issue (TR113:13 but rather because B.W. "gave one address but as a previous address, he gave a Housing Authority address. TR114:12.

> Q: And is it your testimony that you're allowed to do a CCH lookup over a residency question for a Housing Authority purpose?
>
> A: If they're going to move for eviction.
>
> Q: So you think that's the law, you think you're allowed to do a CCH criminal history background check form someone because they may be illegally residing in the Housing Authority? That's what you – that's your understanding of this?
>
> A: And to - -
>
> Q: Could you answer my question, then you could explain, yes or no? Is that your understanding?
>
> A: Yes.

TR114:14-TR115:1.

Lt. Johnson then provided a second potential rationale for doing this lookup stating that B.W. "was involved in a domestic violence incident and his wife was an employee and the Housing Authority and wanted it investigated." TR117:23. Lt. Johnson testified that the Authority did not ask him to do a criminal history background lookup in this matter, TR118:6, but that he did this on his own as "part of my investigation." TR118:10. He stated that that was not part of his duties as liaison to conduct a criminal background check for employees or prospective employees of the Housing Authority. TR119:15. He was asked why he did a CCH lookup in this case when anything he wanted to know about the domestic violence incident could have been obtained by looking up an IMC, he replied that it "[d]epends on what I was looking for." TR120:10. Regarding the CCH lookup for B.W., Lt. Johnson finally stated that "[w]hat I said to you is that there are a multitude of reasons why I would run a criminal history." TR123:1.

Lt. Johnson was given a chance to clarify his testimony and stated:

> A: No, what I would like for you to do is not take a snippet of what I say and try to hone in on it. What I said is that he – if you look at the police report, his wife was accused of stabbing him, or using a weapon, or he was. So, I may have been doing an investigation, she may have been terminated as an employee, the Housing Authority can't come to the police department and do the investigation. That's why I believe I was entrusted with the position and the title.[ii]

TR123:21-TR124:5.

The witness did agree that it would not be legal for him to do a CCH lookup on B.W. (the husband) because the Authority was worried about whether his wife should continue to be employed by the Authority. TR127:3. He was then asked if it was legal for him to do a CCH lookup for B.W. to be evicted from Housing Authority property, and he testified that yes this was a legitimate criminal justice purpose. TR127:7; 9; 11. Lt. Johnson believes that this is criminal because B.W. might have "violated the one strike policy". TR127:14. Lt. Johnson testified that an eviction procedure is a criminal matter. TR127-128.

He testified that he ran criminal history checks at the Long Branch Housing Authority when he was the liaison, Lt. Johnson again responded: "... there was a multitude of reasons why I ran criminal histories." TR137:1. Sometimes he ran them just to see if someone should be on the no trespass list. TR137:9. Lt. Johnson reiterated that he did the run to put them on the no trespass list or for eviction. TR137:25. It was done for "quality of life issues and to get drugs out of the projects." TR139:11. The witness was then asked if he had ever done a CCH lookup for someone who was already on the no trespass list, and agreed that he had done so. TR140:9. Lt. Johnson testified that he did so because he wanted to see if they perhaps should have been taken off the list. TR140:19. Lt. Johnson's answers on this to this questioning was "could have been." TR140:21. He then testified that he also did the lookups to see if they should stay on the list. TR142:7. However, he never took someone's name off the no trespass list. TR142:21.

Lt. Johnson agreed that, for anyone arrested in the City of Long Branch, records concerning said arrest would be accessible through the Long Branch Police Department IMC system. TR6:5. The only exception would be that if someone was giving a "desk" appearance for disorderly person offense. TR6:17. Other than that exception, the witness agreed that any criminal involvement of a citizen within the environment of the City of Long Branch would be accessible in the Long Branch Police Department IMC system. TR7:5. Lt. Johnson testified that the IMC system provides information about arrests, etc., of residents of Long Branch, but not about criminal convictions. TR7:18.

The witness is not aware of any legal restrictions imposed by the State or Federal government with respect to a police officer's access to the Long Branch Police Department IMC system. TR8:7. Lt. Johnson agreed that a police officer can access the IMC system on his or her own, without any assistance or help from a dispatcher. TR8:18; 21. The only thing a police officer would need to do to gain this access would be a password. TR9:5.

Lt. Johnson stated that he never accessed the CJIS system, and did not know how to do it. TR9:21. He did, however, have a CJIS password. TR9:25. Lt. Johnson

accessed the CJIS system via a Long Branch dispatcher. TR10:4. Lt. Johnson did not give his own password for the CJIS access; rather, the dispatcher would use his or her own password. TR10:7; 9.

Lt. Johnson understood that there were restrictions placed on a police officer's right of access to the CJIS system: "... you were supposed to only use it for criminal justice purposes, not for personal use." TR11:5. Lt. Johnson testified that his understanding of "criminal justice purpose" was "[i]f I'm conducting an investigation or anything I'm using in the course of the duties – my everyday duties I should say." TR11:10. Lt. Johnson stated that a criminal justice investigation was one example of a criminal justice purpose. TR13:3. Asked if his use of the word "investigation" meant investigation into violation of criminal laws, the witness replied: "[i]t could be, but it isn't limited to that." TR13:16. He again equated a "criminal justice purpose" with "the performance of my duties." TR13:20.

Lt. Johnson was asked if he had the authority to investigate criminal convictions for purposes of admission into the Housing Authority and eviction from said Housing Authority, and he responded that "[n]o, they did their own admission." TR15:25. Lt. Johnson agreed that he never requested any CJIS lookups for applicants for Housing Authority apartments. TR16. Lt. Johnson testified that he believed there was a legitimate "criminal justice purpose" to look up the criminal history of "visitor" to the Housing Authority property. TR16-17. Lt. Johnson stated that, for such "visitor" investigations, it was not sufficient for him to access the Long Branch Police Department IMC system. TR17:10.

He never determined, on his own as Housing Authority liaison, to do CJIS lookups on persons who were visiting the Housing Authority property. TRT19:12; 14. He then stated affirmatively that, for every single CJIS lookup he did for visitors, he spoke with someone at the Housing Authority before requesting such CJIS lookups. TR19:19. However, Lt. Johnson testified that there were times when he did request CJIS lookups based upon something that "I witnessed." TR20:14; 17.

He arrested "plenty of people" as Housing Authority liaison. TR21:4. He then clarified that some of the persons that he did CJIS lookups for were for persons he had arrested before he became Housing Authority liaison, and there are other persons that he arrested while he was working as the liaison. TR21:22; 25. When asked which of the "fifty-five" in Lt. Shea's IA investigation report Lt. Johnson had arrested as Housing Authority liaison, the witness replied, "I'm not privy to give you that information ... [b]ecause I would have to run through IMC with all those names, and print out every single one." TR22:3. The witness was then asked if Lt. Shea had not already done that, and testified that there were no active investigations for any of the fifty-five, and Lt. Johnson agreed that he had heard Shea testify that. TR22:15. He was then asked if he had the legal authority to do a CJIS lookup in 2004, for someone he had arrested in 2001, "[t]he mere fact that they got arrested in 2001, or you arrested them, did not give you the authority to do a CJIS lookup in 2004". He then answered: "That's not true." (TR23:24) stating that he had authority "if that particular individual was going to be barred". TR24:11. Putting a person on the "no trespass" list is a "criminal justice purpose" (TR24:14; 17) "[b]ased on the totality of things ... [m]y job is to make sure that there was a safe and secure environment." TR24:20.

He understood that he was not permitted to do a CJIS lookup for somebody on Housing Authority property whom he had arrested three years ago. TR25:9. He explained that he could only do this "[i]f there's an active – if there's a criminal justice purposes." TR25:14. To do a lookup on someone simply because they had been arrested (or even convicted) three years ago, would be a "violation" of the CJIS legal requirements. TR25:25; TR26:1. Only if they were engaged in current alleged criminal activity could you do a search. TR27:11; 14.

Lt. Johnson testified that he initiated a criminal investigation for some of the fifty-five persons on the list. TR27:17. Asked which ones, the witness replied: "[y]ou're asking me something ten years ago." TR27:19. When confronted with the fact that Lt. Shea testified his investigation revealed none of the fifty-five persons and had active criminal investigations, Lt. Johnson replied: "Okay and I would submit to you that every criminal investigation that was conducted by the Long – Branch Police Department was

not documented. And if you're asking me if I documented every single inquiry, no. Nor does every other police officer." TR27-28. Putting someone on the "no trespass" list was a criminal justice purpose and allows him to conduct a CJIS lookup. TR39:6.

Lt. Johnson was asked about one A.H., who he testified that he personally arrested as Housing Authority liaison. TR40:19. He was referred to Exhibit R-3, Lt. Shea's investigative report, which showed that the CJIS lookup was ordered by Lt. Johnson nine months after he had been arrested. TR42. Asked if recalled when he arrested A.H. and/or when he did order the CJIS lookup for him, Lt. Johnson testified that he did not recall either of those events. TR43:23; 25. He testified, however, that he conducted a CJIS lookup to obtain A.H.'s "certified convictions" for the purpose of placing him on the no trespass list. TR44:6. The witness was then shown Exhibit A-10, which showed that A.H. was on the no trespass list as of June 2005 (Lt. Johnson ordered the CJIS look-up for A.H. in May of 2007). TR44:13. Lt. Johnson offered no explanation as to why A.H. would not have been placed on the no trespass list at the time of his arrest (as opposed to years later). TR45:11. Lt. Johnson stated that it was "not enough" A.H. had been arrested on Long Branch Housing Authority property to get him on the no trespass list. TR45:23.

Lt. Johnson did not recall testifying that he actually typed up the "no trespass" list. TR50:10. The witness agreed that A.H. was not on the no trespass list as of September 4, 2003 (as per A-34B). TR51:9. He was on the no trespass list as of June 24, 2005. TR51:25. A.H. was also on the list for 2006 and 2007. TR52:10. Lt. Johnson was then asked what possible justification there could be for doing a CJIS lookup on A.H. in 2007, when he had been on the no trespass list for the prior two years. TR52:16. In response, Lt. Johnson first said "[t]here could be several reasons." Then stated "[b]ased on the information I have here, I don't know." TR52:21; 24. Asked if there were any of the fifty-five persons on Lt. Shea's IA report list for whom arrests had occurred around the same time that they were placed on the no trespass list, the witness replied: "I never claimed that the lookups were done at the same time the arrests were done." TR53:6. The witness then (quite remarkably) testified that one reason he may have done a CJIS lookup was to find out an address for the person so

that a "no trespass list letter" could be sent to the person. TR55:13. In fact, Lt. Johnson testified that it was legal for him to have done so. TR56:7. Lt. Johnson stated that one could obtain a person's address from a CJIS lookup, but that would be "[w]here they were arrested and what address they used". TR58:15.

The witness provided a second reason he would do a CJIS lookup: "[t]he gentleman was arrested and we wanted to see if he was illegally living there and we wanted to see, during his arrest time, if he had ever used that address before." TR59:22. He went on to say: "... one reason I would do that [do the CJIS lookup] would be to prove what address he might have used in the past." TR60:6. Another reason Lt. Johnson gave for the CJIS lookup was to ascertain the date of their convictions. TR60:16. Another reason the witness gave was: "The location of the crime. If it happened actually – it may not have happened at Long Branch Housing Authority. It could have happened in Asbury Park, it could have happened in Florida or at a housing authority anyplace. TR61:11.

The witness agreed that persons put on the no trespass list only get one "notice" of that action – when they are originally put on the list. They do not get an annual notice that they will continue to be on the list thereafter. TR63-64. Asked again if Mr. A.H. was on the no trespass list in 2005, why Lt. Johnson had done a CJIS lookup for A.H. in 2007, after he had already been on the no trespass list for two years prior, the witness responded: "I'm not privy to that." TR64:8. The witness was then asked if he agreed that there would be no reason to do a CJIS lookup for inclusion of someone on the no trespass list if they are already on the list (unless they filed an appeal), the witness responded: "Wrong." TR65:14. Lt. Johnson then testified that he might have been running A.H. to see if he should actually be taken "off" the list. TR67:8. Asked if he ever actually did this, the witness responded: "I can't tell you.", and "I don't recall". TR67:12; 15.

Asked about looking up someone's address, and whether, if they live in Long Branch, he simply could not do that through IMC, the witness agreed that he could have done so. TR70:14. Asked if he specifically recalled any of the fifty-five CJIS lookups

he ordered to ascertain a person's addresses, the witness answered that some of them "may" have been done for this reason. TR71:5. Lt. Johnson agreed, however, that before he even thought about using the CJIS to find someone's address, he would have first done the driver's abstract and second an IMC lookup. TR71:14. Lt. Johnson went on to describe the case of the domestic violence victim, who may have used a Long Branch Housing Authority address on an arrest report, when he wasn't listed on a lease. TR73:12. Doing the CJIS lookup to check addresses was, in Lt. Johnson's mind, part of his investigation, on behalf of the Housing Authority, to ascertain whether the husband (domestic violence victim) was not legally living at a housing authority address. TR75:1. If that were the case, "[t]hat's a violation of their lease." TR75:9. Lt. Johnson agreed that he did not investigate the domestic violence incident, but that he might have investigated the incident to see if she should be evicted for the domestic violence episode or because she improperly allowed her husband to live on Housing Authority property. TR76. Lt. Johnson did not know if there was any "outcome" to this, in terms of the Authority either evicting or attempting to evict Sarah (a fictional name). TR77:10. When asked if it would have been inappropriate to do a CJIS lookup at the beginning to check someone's address, the witness replied: "No, because maybe the person doesn't have a driver's license." TR77:23. He refused to agree that, given the limited legal nature of access to CJIS information, a police officer such as Lt. Johnson should have done a driver's abstract and IMC search before going to CJIS. TR78:4; 8.

Lt. Johnson had never seen R-19, N.J.S.A. 53:1-20.6, which concerns dissemination of criminal history record background information (TR6:11) nor R-20, the definition of "criminal justice purpose" promulgated by the New Jersey State Police at N.J.A.C. 13:59-1.1. TR8:7. TR8:9. Lt. Johnson did not agree that the definition applied to access to CJIS records. TRTR8:13. The witness was then read the definition of "criminal justice purpose" for purposes of access to criminal history background records: "[t]he detection, apprehension, detention, pretrial and post-trial release, prosecution, adjudication, correctional supervision or rehabilitation of the accused persons or criminal offenders." TR9:6. After reading the definition (over objection of Lt. Johnson's counsel), the witness was asked if he agreed with that

definition "in terms of your ability as a police officer in New Jersey to access CJIS records". The witness then replied in the affirmative. TR10:20.

The witness was then shown Exhibit R-34, which consists of various "no trespass" lists. TR11:3. Lt. Johnson was asked what "List A" means (which was one of the lists in the exhibit), and replied that he did not know. TR12:16. Lt. Johnson testified that he helped create the "no trespass" list. TR13:23. He also agreed that, at least for some of the lookups for which the City was disciplining him for, he did those lookups "in order to determine whether or not people should be on the no trespass list". TR14:3. The witness was again asked why he didn't do hundreds of CJIS lookups for persons on the no trespass list for a period of more than five years (TR14:4) and his answer could best be described as nonresponsive. TR14:12. The witness was then asked if he had placed anyone on the no trespass list for which a CJIS lookup was not performed; he replied "Couldn't tell you yes or no". TR15:3.

Lt. Johnson was referred to entries in A-13 and R-3 for Mr. T., as well as the language of A-3 the City of Long Branch which provided "no reports" regarding H.T. TR16:20. When asked if that meant that there was no information on H.T., he agreed. TR17:5. He was then asked if he had any reason to doubt the veracity that there was "no information" in the IMC system for H.T., Lt. Johnson answered "yes ... [because] I don't believe anything he has in his report." TR17:10. "I believe he omitted things that would benefit the City of Long Branch". TR17:17. He was asked if that meant that Lt. Shea had looked up H.T., found that he had been arrested for crack cocaine distribution in Long Branch, but intentionally did not include it in his report, Lt. Johnson provided the following answer:

> What I'm saying to you is that, throughout these proceedings, we have shown the [sic] Lieutenant Shea has done a one-sided investigation, so why would I believe that he would do anything to help me or to show that what he did? I had to create R-13 from his report and the mast name index that was provided to me, and there is [sic] several names on this list that there were no reports provided or no information.

TR17:23.

Lt. Johnson explained it was not the case that "no reports existed", he believes that H.T. had a criminal history. Asked if that criminal history was in the City of Long Branch, Lt. Johnson replied that "I don't know where it is ...". TR18:14. Asked if he agreed that there would be no information in Long Branch's IMC system unless the person's criminal history occurred in Long Branch, Lt. Johnson stated: "[n]ot necessarily". TR18:17. It was possible that there might be written information in a police report in the City of Long Branch which could conceivably refer to criminal activity outside the City. TR19:1. When asked why, if there was no report generated by Long Branch Police Officer for H.T. for the City of Long Branch, there could be no information in the IMC system about H.T., Lt. Johnson disagreed stating that H.T. "could have been a victim ... could have been a Megan's Law registrar ...". TR19:10. Lt. Johnson was then asked why he did a CJIS lookup for H.T., and replied: "[c]an't tell you why ... no". TR19:20.

Lt. Johnson explained that H.T. was a former employee of the Housing Authority, and that he would do a CJIS lookup for Housing Authority employees "[i]f they – if a request was made of me by the Housing Authority." TR21:7. Lt. Johnson was then asked if doing a criminal history background check on someone because they worked for the Long Branch Housing Authority satisfied the statutory "criminal justice purpose", and he replied that it did not. TR23:19. The witness was then asked several times how a lookup could be justified if it did not satisfy a "criminal justice purpose" and he answered that "I would say that it's not – not limited to just those [criminal justice purposes as set forth in the statute]". TR26:13. "[A] missing or endangered person" is not covered in the statutory definition either. TR26:17. The witness testified that doing a criminal history background check for a missing person would meet the definition of the "criminal justice purpose". TR27:13.

Lt. Johnson was asked why he did a CJIS lookup for Mr. M., number fifty on the no trespass list (A-34A) and Lt. Johnson answered that he did not know why he did the lookup on Mr. M. TR41:10. In fact, he did not recall doing a CJIS lookup on anyone, and did not remember that person from the trespass list. TR41:15.

Lt. Johnson was questioned on why he did criminal history background checks on B. and M.N., both had been involved in a fight with B. as the suspect and M.N. as the victim. TR55:7. Lt. Johnson did not recall anything about the fight between the two parties (TR56:14) and explained that he did lookups on them "[b]ecause the Housing Authority requested information concerning these individuals." TR55:25; TR56:1. He said the Housing Authority had a right to request this information and he had a right to do the lookup based on the request. TR56:4. When asked if it was enough for B. to get on the no trespass list if he assaulted a Section 8 resident, Lt. Johnson answered: "No". TR56:14. Lt. Johnson, apparently seeking to explain why he did a lookup on B. and found out about a domestic violence incident in which he was the perpetrator, then inexplicably failed to put B. on the no trespass list, characterized the B. incident as his having being "involved" in a fight. TR57:1. Lt. Johnson then denied that the "fight" was a domestic violence incident, but was then shown Exhibit A-13, which stated that the incident was a "DVA", which he testified was domestic violence. TR57. The witness then testified that he had made a mistake, and that the B. incident was a domestic violence incident. TR59:1. Lt. Johnson testified that he did the lookup for M.N. "[b]ecause he was involved in the incident". TR60:9. Lt. Johnson agreed that M.N.'s name was not placed on any of the Exhibit A-34 "no trespass" lists. TR63:2.

Lt. Johnson was asked the lookup of C.W., who is only listed in the Long Branch IMC system as the victim of a theft. TR65-66. His answer was unresponsive. TR67:20.

Lt. Johnson was then asked again about running C.W., for whom the only entry in the Long Branch IMC system is a victim of a crime, and how he could justify a CJIS search for C.W. for a narcotics investigation. TR69:8. In response, Lt. Johnson questioned whether or not he was the person who made this request for a CJIS lookup. TR70:5. Asked about the lookup of D.A., Lt. Johnson said he did so because she had been arrested for endangering the welfare of a child. TR70:21. Asked whether, however, someone else was doing the investigation into that allegation, Lt. Johnson replied "No, you're wrong." TR71:3. He then immediately agreed that he didn't conduct a criminal investigation or write any reports about the child endangerment issue.

TR71:7. Lt. Johnson then speculated that the Housing Authority may have asked for the criminal history background check after D.A.'s arrest "... to see if she was convicted of this or whatever else, because that could jeopardize her lease and have her terminated." TR71:18. Lt. Johnson then testified (for the first time), that CJIS lookups may have been done to find out not only about convictions but arrests. TR72:10. Asked whether the arrest information couldn't have been more easily obtained through the Long Branch IMC system, Lt. Johnson said no, then clarified that this would only work if the arrest had taken place in Long Branch. TR72:14; 20. Asked if that was in fact true for D.A., Lt. Johnson replied "I'm not – I don't know. I didn't see the arrest report." TR72:22. He was then referred to a document which showed that she was arrested at G. Ct.; at that point, Lt. Johnson had agreed that she had been arrested in Long Branch. TR73:3. Asked again why information about the arrest could not have been and should not have been accessed through the IMC system, Lt. Johnson replied that doing so would have only revealed "part of the information". TR73:6. Asked if he had done the CJIS lookup despite the fact that he could have found everything he needed to know about the arrest in the IMC system, to find out if the woman had a prior criminal history, Lt. Johnson answered: "[i]t could have been". TR73:12. Lt. Johnson stated he would have done such a lookup "[i]f the Housing Authority wanted to ascertain if she had a criminal history." TR73:15.

Lt. Johnson was then asked the following questions and provided the following answers:

> Q: And you think they had the right to ask that any time they want, under your understanding of how this works? In the CJIS system? They can ask, anytime they want, and you would do it and that would be fine?
>
> A: Based on the definition for criminal justice purposes, yes.
>
> Q: And what was the criminal justice purpose in the Housing Authority wanting to know about whether she had a prior criminal history?
>
> A: I would say detection.
>
> Q: Detection of what?

> A: If she was a convicted criminal. What if she was a sex offender?

TR73:17 – TR74:3.

Lt. Johnson was then asked if he was saying that the Housing Authority requested the lookup after the woman had been arrested in Long Branch because, based upon the arrest, the Housing Authority wanted to find out if she had been convicted of some other offense, and replied: "[c]ould have been." TR74:14. Asked what he meant by "could have been", Lt. Johnson testified that he was just thinking that, and had no independent recollection thereof. TR74.

Lt. Johnson was then asked about J.S., whose lookup was done in December 2014, but who had been arrested in 2005 and 2006. TR74:20. Lt. Johnson was asked what he wrote in his notes concerning the Shea report that the City had not produced arrest records from 2005 or 2006 for a lookup that was done more than two years prior. TR75:21. Lt. Johnson disagreed with that conclusion; confronted again with the incongruity of the point, he then agreed that it made no sense for the City to provide arrest reports after the CJIS lookup was done, because subsequent arrests could not possibly serve as a justification for a previous CJIS lookup. TR76:24.

Lt. Johnson was then asked about an incident in July of 2004, in which J.S. was listed as a "domestic violence victim"; Lt. Johnson clarified that J.S. may not have been a victim but a perpetrator. TR77. Asked what the justification was for doing a lookup in December for an arrest that took place in July, Lt. Johnson replied: "[b]ecause that may have been when it finally made its way to my desk from the Housing Authority". TR77:24. Asked why J.S. had not been on a no trespass list, Lt. Johnson replied that he "[m]ay not have met the qualifications." TR79:23. Asked how being accused of beating up a resident was not enough to get a person on the no trespass list, Lt. Johnson then shifted gears again and sought to place all responsibility on the Housing Authority: "All I did was facilitate the information to the Housing Authority. They made the ultimate decision." TR80:1. He then stated that he did the CJIS lookups for them "[w]henever they requested." TR80:9.

Lt. Johnson was then referred to the R. lookup from R-3. TR80:10. Lt. Johnson did the lookup to "justify his criminal history to the Housing Authority". TR81:19. Lt. Johnson was again asked for the purpose of the lookup, and replied to "[m]ove for eviction for his father." TR81:22. When asked if that eviction had occurred, Lt. Johnson replied "I was just following orders" "I provided the information. What happened after that, I couldn't tell you, sir." TR81:24. Lt. Johnson testified that "sometimes" he would go to the eviction proceedings if he provided information (like a CJIS lookup to the Authority). TR82:25; TR83:1. Lt. Johnson had no explanation why R. was not on any of the no trespass lists. TR83:22. He then explained that R. was on the no trespass list under the name "M.R.". TR85:1. Lt. Johnson was then pointed to the fact that there were no entries in the IMC system until May of 2005, which was five months after Lt. Johnson authorized the CJIS lookup. TR85. He explained "that might have been when the IMC was installed." TR85:22.

Lt. Johnson was asked about his lookup for N.G., who was arrested for a bad check not on Housing Authority property. Lt. Johnson wrote in his report that: "[a]ccused is believed to be a section 8 resident". TR89:18. Lt. Johnson agreed that he had nothing to do with the investigation, charge, and arrest of N.G. for the bad check. TR90:9. He said the only possible justification for looking up N.G. is if she had been a Housing Authority resident. TR91:2. He did not recall her being a resident and assumed she was because he wouldn't have done the lookup otherwise. TR91:12.

Lt. Johnson was then asked about D.J.. D.J. was already on the Long Branch Housing Authority no trespass list when the lookup was done. TR91-92. He was asked if he did the lookup to see if the man should be removed from the no trespass list, and answered "[c]ould have been." TR92:12. Lt. Johnson stated that in order to be placed on the no trespass list, the person had to have the history of drugs or violent behavior anywhere – in Long Branch, New Jersey, or the United States. TR92:19-24. When asked if he had ever done a lookup to find out about crimes that persons might have committed other than the Housing Authority property, Lt. Johnson stated that: "[t]hat would be a reason to do a criminal history lookup." TR93:14. He was then asked if that meant if a person convicted of a crime in 2001 was put on the no trespass list in 2005,

he said "[c]ould have been." TR93:19. Lt. Johnson did not remember making any recommendations to put a person on the no trespass list simply based solely on a prior criminal conviction. TR94:2.

Lt. Johnson was then pointed to the H. entry. The lookup was done on January 3, 2005, yet there was not a single piece of information in the IMC system as of that date. TR94-95. Lt. Johnson readily agreed that he did not possess any facts to dispute Lt. Shea's conclusion that there were no IMC entries for H. at the time the lookup was done. TR102-103.

Lt. Johnson was then directed to K.J., the next person on the list. Lt. Johnson refused to acknowledge that Lt. Shea was accurate in his statement regarding this lookup – "[t]he only incident that proceeded the CCH check, which happened on April 8, 2005, was an arrest for contempt, approximately seven months prior that occurred on Housing Authority property and Lt. Johnson had nothing to do with the arrest." TR107:19. Lt. Johnson's basis was for doing the CCH check was "[b]ecause the Housing Authority requested that information." TR108:15. Lt. Johnson remembered Natalie Turner, asking for the lookup; however, when asked if he specifically recalled her saying so, he replied no. TR108. He did testify that he remembered "someone" at the Housing Authority to look up this person – although he did not remember who it was, he "absolutely" recalled someone requesting it. TR109:2. Lt. Johnson testified that he did not do any lookups at his own initiative, but, rather, was simply "just following orders" of the Housing Authority. TR109:21.

With respect to the Housing Authority requests, Lt. Johnson stated he would do the lookup "[i]f it was a legitimate request." TR109:24. He then gave what Lt. Johnson asserted were "legitimate" reasons: "[t]hat they had reason to believe that this person was either living there illegally, committing crimes on the property, and they wanted to bar that person from their property." TR110:1. Lt. Johnson testified that he thought it was legitimate for the Housing Authority to do a criminal history background check on residents for purposes of eviction. TR110:9. He also thought it was legitimate to run a criminal history background check on persons who the Authority might want to put on a

no trespass list. TR110:13. Another reason was if the Housing Authority had "reason to believe that a person was actually committing crimes on the property." TR110:17.

On redirect, Lt. Johnson testified that the lookups in question were not done for any purpose other than Housing Authority reasons. TR140:11. Lt. Johnson believed that he had the authority to perform these lookups. TR140:22. Lt. Johnson further testified that "[i]t was my understanding that I was to cooperate with the Housing Authority, based upon the federal act." TR144:6.

Natalie Turner

Natalie Turner (Turner) is the Assistant Executive Director at the Long Branch Housing Authority. TR148:14. Turner's understanding of Lt. Johnson's job as liaison was that he was the "point person for us to – to assist us with the cleaning up the area around the – the – public housing area in Long Branch." TR150:5. When Lt. Johnson was the liaison, she was the Director of Management at the Housing Authority and Mr. Garrett was still the Director at the time, and a Mr. Phillips was the Assistant Director. TR150:25.

She recalled that Lt. Johnson was trying to "clean up" the Housing Authority property by enforcing the Authority's "no trespass" policy. TR152:1. While Lt. Johnson was liaison, she asked him to look up individual's criminal backgrounds in the form of criminal convictions and arrests. TR154:23. She asked Lt. Johnson to do the criminal history background check for purposes of an individual's appeal of having been placed on the no trespass list. TR158:8. Lt. Johnson would provide Turner with summaries of the person's criminal history background, but not the actual computer generated criminal history form. TR160:6. She understood the one strike policy to mean that "... if a resident was found to be engaging in criminal activity ... they would be evicted." TR161:22. Lt. Johnson's role as a Housing Authority Liaison was to provide the Housing Authority with "criminal history information" on individuals. TR163:15.

The witness confirmed that the criminal history background checks for Housing applicants were conducted by the Housing Authority without any involvement of the liaison. TR166; TR167:25. She testified that she would ask him "[i]f this person has a criminal history, if they've been arrested." TR173:15. The information she received from Lt. Johnson might be used for eviction purposes or to be added to the no trespass list. TR174:8. Ms. Turner reiterated that she would ask Lt. Johnson about visitors to the Housing Authority property to see if the person "had a criminal background" or "if they've ever been arrested." TR178:14; 17.

On cross-examination, she testified that she did not know what CCH, CJIS or IMC were (TR180:5; 7; 10) nor did she know the difference between an arrest report and a criminal conviction history. TR180:13. The witness testified that she was not aware of any limitations on the Housing Authority's ability to access criminal history information, TR181:8, and never spoke to Lt. Johnson about them. TR181:14. Likewise, she was not aware of any restrictions that Lt. Johnson had as a Police Officer in terms of accessing this information. TR181:21. She had no idea if it was legal for Lt. Johnson to gather the information she was asking him to obtain. TR181-182.

She testified that a person who has a criminal conviction record anywhere in the country could be placed on the Long Branch Housing Authority no trespass list. TR182:21. The witness was then shown A-29 – the "no trespass" list (TR182:25) and testified that policy is a HUD policy. TR184:7; 11. She agreed that the five numbered paragraphs setting forth "misconduct" that can be the cause of placing someone on the no trespass list means "misconduct on or near Authority property." TR184:23. It was her understanding that, in order to be placed on the no trespass list, the misconduct had to occur on or near Authority property. TR185:3. When asked the question again the witness provided the following response: "I – I mean, probably, I mean, I don't know exactly where everyone that's on that list actually committed their crime." TR187:13.

Turner agreed that the "no trespass" policy was adopted pursuant to HUD law, TR189:5, and that the Long Branch Housing Authority had no choice but to adopt it. TR189:9. The "no trespass" policy is mandated for every single housing authority in the

United States. TR189:15. Asked if the Housing Authority in Long Branch had the legal ability to go beyond the policy in terms of creating and enforcing the no trespass list or, alternatively, the Authority had to comply with the policy because it was a HUD mandate, the witness responded: "that wouldn't have been my call." TR190:15.

Turner testified that "I don't know of anybody that was on this list that didn't violate 1 through 5." TR190:22. The witness further agreed that persons were placed on the "no trespass" based upon criminal activity, not criminal conviction. TR191:3. She agreed that the typical way that a "no trespass" inquiry began is when she went to Lt. Johnson and said "could you check and see if this person got arrested?" TR191:18: "It could've been something that I heard or something I could have seen myself." TR191:20. The witness also responded that this would have been something that actually happened on Authority property. TR191:24. She agreed that, if there wasn't police activity based upon the incident or incidents in question, the person could not be put on the no trespass list. TR192:4.

The witness has never heard of anyone being charged criminally for providing an improper address to the Housing Authority. TR196:2; 20. The witness looked at a page from Lt. Johnson's exhibit book involving B.W., and testified that she had seen a "criminal history" before. TR199:5.

On re-direct, she explained that "just cause" in the "no trespass" policy would be determined by "the Executive Director, myself at the time, or a member of the Long Branch Police Department." TR202:1.

Randy Phillips

Randy Phillips (Phillips) was hired by the Long Branch Housing Authority in 1991, and retired in June 2015. TR98:10. He was the "Drug Elimination Coordinator", and his job was to eliminate the drug problem that existed in the Long Branch Housing Authority. TR99:2.

Phillips testified that it was the Housing Opportunity Program Extension Act of 1996 that provided him "with a pathway" to push to eliminate drug distribution and use on Housing Authority property. TR105, A-60. He was involved in requesting information, including criminal background checks, from the Police Liaison. TR108:14. The purpose of this was to keep "undesirables who had a history of drug activities from becoming residents at the Authority," TR108:16, and the second reason was to "keep them off of our property." TR108:20. He testified that the information he requested would concern "arrests" (TR109:15) and that "sometimes" he was provided information about convictions, but that was not his main focus. TR109:19. Phillips testified that prior convictions might be relevant in terms of evictions of residents. Id. Any criminal conviction within five years meant that the person would not be admitted to residency in the Housing Authority. TR110:11.

Phillips explained that he wanted information about convictions anywhere in the country on "applicants". TR112:24. If the Authority learned that the applicant had a criminal record, "[w]e would deny them the entrance into the Housing Authority." TR114-115. Asked if there were any reasons other than checking on applicant's criminal background history to do a criminal lookup, the witness answered: "No." TR116:9. Phillips also testified that both the police and an outside agency did criminal background checks on applicants. TR117.

When asked if he ever spoke with any police officials about the need for background checks, the witness stated that: "I don't recall doing that. No, because we were already getting the information we needed." TR128:10.

On cross-examination, Phillips confirmed that Lt. Johnson blacked out some information on the background searches and Phillips assumed that this was done because "I guess it was information he didn't want us to see, that he blacked it out." TR130:21. When asked if he was aware of any legal limitation on the ability of police officers to obtain information about citizens by way of computer, Phillips said that he was not aware of any limitations. TR131:7. In fact, he specifically asked Lt. Johnson, to obtain approximately 300 criminal background information checks about applicants

for residency in the Long Branch Housing Authority. TR133:13. Mr. Phillips agreed that, as part of the application process, the applicants had to sign a release allowing the search to be done. TR133.

When confronted with Lt. Johnson's earlier testimony that he had never performed any lookups for Housing Authority applicants, the witness replied: "I was under the impression that when we ask for certain applicants, yea, that were looked up." TR134:7.

He understood the basis for the criminal background check would be in a situation in which "I would get some information that this person was arrested with – with drugs." TR137:14. Sometimes he would read about the arrest in the paper; TR137:16, and other times the police would tell Phillips about an arrest. TR137:20. He asserted that "eviction" searches were based on "probable cause". TR138:8.

Phillips confirmed that, in order for a person to be removed from the no trespass list, they would have to file an appeal, followed by a formal hearing. TR139:23. Mr. Phillips attended some of these hearings. TR140:8. He said conduct on or off Housing Authority property could get someone on a no trespass list. TR140-141. Phillips testified that he would only ask Lt. Johnson to do a criminal background check for persons thought by Phillips to be "known drug dealers." TR142:23.

Phillips asked Lt. Johnson to do a criminal history background check on visitors. TR145:8. However, when confronted with R-29, which set forth the five "behavioral" grounds for putting a person on the no trespass list, all of which stated on or near property of the Authority, (TR145:25) he agreed that the misconduct in question had to be on or near Authority property to justify placement of a person on a no trespass list. TR146:6. Similar to Turner, he did not know what NCIC, CJIS, or IMC stood for. TR146:7.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a

credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of Lieutenant Thomas Shea, was especially credible and persuasive. Even from simply reading the transcripts, the testimony was clear and concise. It was obvious that Lt. Shea had concerns regarding the "lookups" Lt. Johnson performed and he had no axe to grind. Likewise, was the testimony of Natalie Turner and Randy Phillips. It was apparent that they simply wanted to do their jobs.

Lt. Johnson's testimony was also somewhat credible. His explanation on why he performed the searches was that after 9/11 he was trained by the Department of Transportation. He was appointed the safety coordinator for the Long Branch Police Department. Under that title, he was granted permission to utilize CJIS to bring the Second Baptist Church into compliance with Federal Motor Carrier Act. Lt. Johnson explained that he believed this authority was still in place and he admitted to using it again in February 2012, for the same purpose. This explanation was not

believable. It is not a lucid thought that a lieutenant with twenty years of experience believed that he still retained authority.

Also, his explanation of what constituted a "criminal justice purpose" to investigate individuals associated with the Housing Authority was even less clear and logical. I **FIND,** by a preponderance of credible evidence, that N.J.A.C. 13:59-1.1, states that "criminal justice purpose" means: 1. The detection, apprehension, detention, pretrial and post-trial release, prosecution, adjudication, correctional supervision or rehabilitation of accused persons or criminal offenders; 2. The hiring of persons for employment by criminal justice agencies or the granting of access to a criminal justice facility..." N.J.A.C. § 13:59-1.1 [Emphasis Added]. I **FURTHER FIND,** by a preponderance of credible evidence, the record and law supports that a CJIS search may only be performed by a police officer in New Jersey as part of a criminal investigation or to determine a criminal history background for purposes of bail. I **FURTHER FIND,** by a preponderance of credible evidence, that an officer will be in violation of the law if they perform a CJIS lookups without a "criminal justice purpose".

I **FURTHER FIND,** that Lt. Johnson testified he performed a CJIS lookup on B. "[b]ecause I was asked to find out what happened in that particular case" [a domestic violence episode]. TR78:3. Johnson testified that he believed he was legally authorized to conduct a CJIS criminal history background lookup for any person who may have been involved in an incident on or near Authority property (or, for that matter, anywhere else in the United States). TR79. Lt. Johnson offered the same explanation for the January 2005, lookup on R.R. TR85.

I **FURTHER FIND**, that Lt. Johnson repeatedly attempted to justify lookups in order to "potentially" put persons on the Housing Authority no trespass list. TR6:14; TR25-26. He testified that it was legally permissible to do a CJIS lookup for someone who filed an appeal to be removed from the no trespass list or to gather information for evictions of Housing Authority residents. TR62-67. However, that is not a "criminal justice purpose".

I **FURTHER FIND,** Lt. Johnson expanded his justification for CJIS lookups to in a "stop and question anybody that was around their property that didn't belong there" (TR105:17) as well as "a purpose related to Housing Authority operations". TR6:14.

I **FURTHER FIND,** as the Housing Authority Liaison, Lt. Johnson could not legally request a CJIS lookup for a visitor the Housing Authority to determine if the person belongs on the Authority's "no trespass" list because creation and/or modification of the list is not an investigative "criminal justice purpose". He continually changed his rationale and justification for the searches. That inconsistency was difficult to follow and understand. Moreover, it was not a lucid explanation. I found his efforts to explain these rationale as an attempt to "sell" his justification for the searches. It was not successful and detracted from any modicum of credibility.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate

penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained a charge of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming. "Conduct Unbecoming a Public Employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a Police Lieutenant performing more than fifty-five CJIS lookups without a "criminal justice purpose" when other avenues of searching were available. I **CONCLUDE** that

appellant's actions constitute Unbecoming Conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

CONCLUSION

I **CONCLUDE** that respondent has met its burden of proof by demonstrating Lt. Johnson performed more than fifty-five CJIS lookups without a "criminal justice purpose".

I FURTHER CONCLUDE for the reasons set forth herein respondent has proven by a preponderance of the evidence that petitioner acted in a manner that constituted a violation of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming and that charge is **SUSTAINED**. Likewise, I **CONCLUDE** for the reasons set forth herein respondent has not proven that appellant had notice of the charges in the PNDA and those charges are **DISMISSED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has a significant prior disciplinary history. I somewhat agree with appellant when he argues that "if this Court were to find that some violation occurred, the reasonableness of appellant's conduct in the course of performing what he reasonably and honestly believed were proper lookups for a lawful purpose is not egregious or offensive." I do not agree that "remedial training or a verbal reprimand, or at most a suspension, would be far more appropriate."

It is settled that "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Furthermore, police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). Both police officers and correction officers represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Here, general progressive disciplinary

standards make clear that removal can be imposed. Given the high standard of conduct required, I **CONCLUDE** that the Department has demonstrated that the removal is warranted.

The record in the above case coupled with commonsense reflects inexcusable Conduct Unbecoming. Considering the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action Terminating and Removing appellant was justified.

DECISION AND ORDER

I **ORDER** petitioner's appeal be **DENIED** and the charge levied against Lt. Johnson, Conduct Unbecoming be **SUSTAINED**. I **FURTHER ORDER** respondent's imposition of removal is **AFFIRMED**.

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.

August 23, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 8/23/17

Date Mailed to Parties: 8/23/17

/vj

APPENDIX

WITNESSES

For Appellant:

Lieutenant Lyndon Johnson

For Respondent:

Lieutenant Thomas Shea

Natalie Turner

Randy Phillips

EXHIBITS

For Appellant:

A-1 February 10, 1994, letter from Randy Phillips to F.H.

A-2 February 28, 1996, letter from D.B. to Judge Cieri

A-3 June 11, 2003, letter from Tyrone Garrett to W.R.

A-4 July 30, 2004, memo from Tyrone Garrett to Natalie Turner

A-5 July 22, 2003, letter from S.R., Esq. to W.R.

A-6 July 29, 2003, letter from S.R., Esq. to Long Branch Police Department

A-7 December 19, 2003, letter from Tyrone Garrett to Michael Cunningham, Esq.

A-8 September 28, 2006, letter from Tyrone Garrett to Monmouth County Prosecutor Louis Valentin

A-9	September 29, 2006, letter from Tyrone Garrett to Steven C. Rubin, Esq.
A-10	June 2, 2005, letter from Tyrone Garrett to W.R.
A-11	September 2005 Sergeant Lyndon Johnson "Official Commendation"
A-12	2005 NAHRO National Award of Merit to Long Branch Housing Authority
A-13	Lyndon Johnson "LBHA Criminal History Log Notes"
A-14	Lyndon Johnson "Dissemination log notes"
A-15	Lt. Johnson list of "LBPD Officers who ran criminal histories with no case numbers or information"
A-16	Long Branch Housing Authority emails
A-17	November 30, 2011, email from Tyrone Garrett to Natalie Turner
A-18	December 11, 2003, letter from Sgt. Lyndon Johnson to K.R.
A-19	March 31, 2004, memo from Lyndon Johnson to Randy Phillips
A-20	July 20, 2006, memo from Lyndon Johnson to Tyrone Garrett
A-21	Emails between LBHA and LBPD
A-22	Sample letter re "Baring List"
A-23	Sample Acknowledgment Form of hearing date to be allowed on Housing property

A-24 Sample letter re "Barring Policy"

A-25 Barring Policy Appeal Form

A-26 LBHA Trespassing List

A-27 LBHA "Barring" form

A-28 Long Branch Housing Authority "One Strike and You're Out" Policy

A-29 Long Branch Housing Authority "Vigorous Enforcement Policy Resolution and Criminal Trespassing/Barring Policy

A-30 **[INTENTIONALLY OMITTED]**

A-31 April 19, 2005, Resolution re admission to Housing Authority

A-32 August 3, 2004, "Notice to Cease" letter from Natalie Turner to R.R.

A-33 November 21, 2003, "Notice to Quit" from Randy Phillips to V.S.
September 29, 2006, memo from Lt. Johnson (recipient unclear)

A-34 2003-2007 inclusive Long Branch Housing Authority "No trespass" list

A-35 September 13, 2004, memo from Tyrone Garrett to W.R. re trespass list update

A-36 August 2, 2004, memo from Natalie Turner to Sgt. Lyndon Johnson re trespass list update

A-37 February 4, 2000, memo from Randy Phillips to Long Branch Police Dept.
2002-2006 "One Strike Evictions"

A-38	November 28, 2011, letter from K.K. to Lt. Johnson and P.O. Bataille February 3, 2006, letter from K.K. to Lt. Johnson
A-39	2006 Blank "Memorandum of Understanding" between LBHA and LBPD
A-40	February 15, 2005, memo from K.G. to Tyrone Garrett
A-41	Long Branch Housing Authority "Vehicle" form
A-42	Blank letter from LBPD to vehicle owner
A-43	May 2, 2000, memo from Lt. Johnson to Randy Phillips
A-44	July 20, 2003, memo from Lt. Johnson to Tyrone Garrett
A-45	July 28, 2003, memo from Lt. Johnson to Tyrone Garrett
A-46	September 3, 2003, memo from Lt. Johnson to Tyrone Garrett
A-47	September 19, 2003, memo from Lt. Johnson to Randy Phillips
A-48	September 5, 2003, memo from Lt. Johnson to Tyrone Garrett
A-49	October 26, 2003, memo from Lt. Johnson to Lt. G.H.
A-50	September 8, 1997, letter from C.T. to D.B.
A-51	August 26, 2003, letter from K.K. to Lt. Johnson
A-52	October 13, 2007, news article re Long Branch Housing Authority eviction
A-53	2006 "Public Housing Safety Initiative" article

A-54 April 25, 1996, letter from L and C. T. to LBPD

A-55 September 18, 1996, letter from T.Y. to Lt. Johnson

A-56 May 3, 2000, letter from G and E. T. to LBPD

A-57 October 26, 2003, letter of complaint from Rockwell Avenue homeowners to the City of Long Branch

A-58 May 3, 2006, letter from H.S. to LBPD

A-59 May 1, 2014, news article regarding guilty plea by NJ State Police Sergeant

For Respondent:

R-1 January 25, 2013, Preliminary Notice of Disciplinary Action

R-2 August 12, 2013, Final Notice of Disciplinary Action

R-3 September 4, 2012, Shea Internal Affairs Investigative Report

R-4 May 31, 2012, Lt. Johnson Internal Affairs Interview ("Church lookups")

R-5 29 C.F.R. §960.203 and 204

R-6 June 2, 2003, Lt. Johnson Personnel Order

R-7 October 7, 2008, Lt. Johnson Personnel Order

R-8 December 20, 2004, CJIS Police memo

R-9	2003-2008 Lt. Johnson "lookup" list
R-10	July 2011 Long Branch Housing Authority "Trespass List"
R-11	2003 Criminal History Dissemination Log
R-12	2004 Criminal History Dissemination Log
R-13	2005 Criminal History Dissemination Log
R-14	2006 Criminal History Dissemination Log
R-15	2007 Criminal History Dissemination Log
R-16	2008 Criminal History Dissemination Log
R-17	D.Q. Curriculum Vitae
R-18	NJCJIS Security Policy
R-19	§53:1-20.6 Rules concerning dissemination of information; fees
R-20	Administrative Code – N.J.A.C. 13:50-1.1 (2012)
R-21	Administrative Code – N.J.A.C. 13:59-1.2 (2016)

10-18-17

STATE OF NEW JERSEY

In the Matter of Lyndon Johnson
City of Long Branch,
Department of Public Safety

CSC DKT. NO. 2014-373
OAL DKT. NO. CSV 11668-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of Lyndon Johnson, Police Lieutenant, City of Long Branch, Department of Public Safety, demotion to Police Officer and 180 calendar day suspension, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on August 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

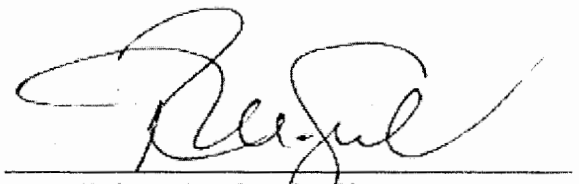
ORDER

The Civil Service Commission finds that the actions of the appointing authority in demoting and suspending the appellant was justified. The Commission therefore affirms those actions and dismisses the appeal of Lyndon Johnson.

Re: Lyndon Johnson

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11668-13
AGENCY DKT. NO. 2014-373

IN THE MATTER OF LYNDON JOHNSON, CITY OF LONG BRANCH POLICE DEPARTMENT.

Stuart J. Alterman, Esq., for appellant (Alterman & Associates, attorneys)

James L. Plosia, Jr., Esq., for respondent (Plosia & Cohen, LLC, attorneys)

Record Closed: July 10, 2017 Decided: August 23, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

The City of Long Branch (respondent) suspended Lieutenant Lyndon Johnson (appellant) for 180 days and demoted him from Lieutenant to Patrol Officer. The discipline stemmed from an alleged violation of N.J.A.C. 4A:2-2.3(a)1 Incompetency; N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)7 Neglect of duty. Specifically, respondent alleges appellant 1. Failed to call out the detective bureau; 2. Failed to videotape an accused statement; 3. Failed to charge an accused with all offenses; 4. Ignored facts given by subordinates; and 5. Misled assistant prosecutor in conversation on how matter should be handled. Appellant

contends he acted appropriately in his position as Watch Commander and did not violate any regulation, rule, policy or procedure.

PROCEDURAL HISTORY

On January 23, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions on September 25, 2011, while serving as Watch Commander. Following a local hearing before the City Administrator a Final Notice of Disciplinary Action was issued on August 6, 2013, sustaining the charges and penalty. An appeal was filed timely and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL) as a contested case on August 14, 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings[i] were held on June 12, 2014, September 10, 2014, September 30, 2014, October 20, 2014, October 21, 2014, November 13, 2014, November 25, 2014, and December 9, 2014. After post-hearing briefs were received the record closed on April 24, 2015.

On March 31, 2017, the originally assigned Judge (Shuster) retired from the bench. On April 21, 2017, the OAL sent a correspondence all parties notifying them of the retirement and requesting a telephone conference. A telephone conference was held on April 25, 2017, with the parties and Assignment ALJ Delanoy to discuss how the parties wished to proceed. This matter was re-assigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein the court requested that the record be re-opened so that the court may acquire all the closing submissions and documents that were missing from the record at OAL. The parties graciously agreed and submitted the requested records. The record closed on July 10, 2017.

[i] Respondent brought four separate disciplinary actions against appellant. This was the second case to be heard.

FINDINGS OF FACT

Based upon the documents in evidence and review of the testimony, I **FIND** the following facts undisputed:

This case concerns the way appellant handled the charging of a suspect in his capacity as the shift Watch Commander. The general protocol in the City of Long Branch was for the arresting officer to bring an accused to police headquarters for processing and the Watch Commander is to determine the charges to be filed and prepare the summons or warrant in accordance with those charges.

This matter started at a Section 8 public housing project (Seaview Manor) on the early morning hours of Sunday, September 25, 2011. A disturbance occurred at the home of Juan Suarez (Suarez) who was hosting a party. There is ample proof in the record that the participants had been drinking alcoholic beverages that evening. Prior to the events that give rise to this matter, Troyshon Phillips (Phillips) was involved in an altercation during the Suarez party and was injured. Later that evening Phillips learned of the injury and went to the Suarez residence to investigate. A verbal altercation took place between Phillips and Suarez and someone called the police. Officer Robert Bell (Bell) answered the call by going to the Suarez residence and Officer Thomas Hueston (Hueston) arrested Phillips after performing a Terry-Stop on the Phillips vehicle similar in description to one being driven by an individual involved in the Suarez altercation. All three police officers, Bell, Hueston and appellant were working the 11:00 p.m. to 7:00 a.m. shift with Hueston doing overtime.

When Officer Bell responded to the Suarez residence he spoke with Suarez and his companion, Ms. Precious Best (Best) at 12:42 a.m. Bell was told they were about to escort an intoxicated partygoer home and when they opened the side door Phillips was there holding a knife. Suarez told Officer Bell, Phillips asked what happened in the earlier altercation. Suarez said he slammed the side door closed and went to the front door and started yelling at Phillips. Suarez continued by saying Phillips responded by

going toward him and threatening to cut him. Suarez then retreated into the house. Bell radioed into headquarters a description of Phillips and the Phillips's vehicle.

Officer Hueston was also responding to the same call as Bell when he observed a vehicle matching the description of the one Bell had called in and he proceeded to make a stop. Hueston had his service weapon drawn and after some initial discussion Phillips identified himself and gave Hueston his three-inch blade pocket knife. When originally asked, Phillips said he was coming from a convenience store but when advised the store was closed he admitted coming from the housing project where the Suarez incident occurred. Hueston then arrested Phillips, handcuffed him but did not Mirandize him and brought him to the police station. When coming into the station, Phillips said to appellant something to the effect "I only pulled the knife on him because he had a sword." Officer Hueston then made the statement that Phillips said something different during the road stop to the effect that the person went to get a sword, not that he had it. As there were multiple disturbances going on that morning and Johnson sent Hueston back on the street to deal with those events.

Bell and Hueston returned to the station between 3:00 a.m. and 3:30 a.m. and met with appellant. The officers wanted Phillips charged with several indictable offenses but Lieutenant Johnson was inclined to go with a lesser charge. Johnson then directed they do a joint interview of Phillips. The officers asked if the detective bureau be called out to do a video interview pursuant to Attorney General guidelines for first, second and third degree charges. Johnson declined.

The interview took place after Phillips was Mirandized shortly after 4:00 a.m. He said he went to the Seaview housing complex and was at the Suarez unit trying to speak with someone but the door was closed in his face. He then walked back to the parking area to speak with others there. Then Suarez came out the front door with his sword challenging him with, "you want some of me M_ _ _ _ _F_ _ _ER." Phillips said he returned to the side door with his knife out but then left the scene. The officers still could not agree on charges because of conflicting statements. As a result, Assistant Monmouth County Prosecutor James Jones (Jones) was called regarding the charges

to be filed. The telephone receiver was held up by appellant as if on speaker mode and the call took place in a small closed room. Jones could hear everyone and everyone could hear Jones. Johnson was corrected by the patrol officers if they felt he misspoke and the officers spoke freely during the conversation. Officer Bell stated that appellant stressed his position but gave all the facts to Assistant Prosecutor Jones. Johnson advised Jones there were conflicting stories as to who pulled a weapon first. Assistant Monmouth County Prosecutor Jones said if there are questions go with the lesser charge.

Johnson directed the patrolmen to continue their investigation by interviewing Latoya Bland (Bland) who was with Phillips during the event. Also at the direction of Johnson, they also spoke with Suarez and Best again to get more information. Bland told the officers she and Phillips went to Seaview Manor so Phillips could find out what happened to his friend. Phillips had something in his hand when he approached the side door of the Suarez residence. Bland did not know what the object was. Suarez also had a long object in his hand but she could not identify it but she did say both Suarez and Phillips were yelling at each other. When Suarez came out of the residence with the sword and yelling, Ms. Bland said she left in a hurry. In the second interview with Suarez and Best they admitted Suarez had a sword but claimed it was only at the front door and was produced after being threatened by Phillips at the side door. Officers Bell and Hueston attempted to interview other witnesses but due to substantial intoxication they could not. Officers Bell and Hueston then returned to the police station and spoke with Johnson. Officer Hueston wanted Phillips charged with indictable offenses for two reasons. First, he felt Suarez and Best were more credible and Phillips was the aggressor. Second, Officer Hueston did not want to be named in a false arrest lawsuit.

I also make the following findings of fact:

1. Officer Hueston wanted Phillips charged with aggravated assault and various weapons charges all indicatable offenses.

2. Johnson ordered the non-indicatable offense of criminal trespass was the appropriate charge.

3. When doing the Phillips interview at police headquarters there was no one present who could operate the video recording equipment. Recording the interview of an accused is only required for persons charged with indictable offenses.

4. There were two incidents that took place on the morning hours in question. Suarez and Best reported Phillips had a three-inch blade pocket knife and was threatening at the side door of Suarez's unit. Phillips reported Suarez had a fourteen-inch machete-type weapon at the side door and brandished same and threatened Phillips at the front door. Bland confirmed Suarez had something long in his hand but didn't stay long enough to observe the details.

5. After the initial investigation is done and charges are filed a case goes to the detective bureau where the file is reviewed. Additional investigation may or may not occur. The bureau makes the final decision on whether the initial charges will be downgraded, up charged or remain the same. In this case the Phillips's charge was upgraded to an indicatable offense.

6. The indictable charge on Phillips was presented to the Monmouth County Grand Jury and was "no billed" by that body.

7. At 6:30 a.m. Lieutenant Roebuck arrived at headquarters to relieve Johnson as Watch Commander. Johnson, Bell and Hueston were continuing the debate on charging Phillips. Lieutenant Roebuck heard from both sides and agreed with Johnson's conclusion. He also suggested to let the detective bureau continue the investigation if they so chose.

8. Lieutenant Roebuck was not charged with a disciplinary action for not up charging Phillips's offense. He has now been promoted to the civilian position of Director of Public Safety.

9. The investigating and charging IA (IA) officer, Lieutenant Thomas Shea, did not believe the witnesses intoxication had any bearing on the accounts of events they gave to Officers Bell and Hueston.

10. In the past, the detective bureau has upgraded charges filed by Shift Commanders on numerous times and none of those Commanders have ever received disciplinary charges as in this case.

11. IA Officer Shea did not interview anyone involved in the Phillips case, either police officers or civilians. All information was gathered by reading reports, memos and written statements.

12. This case is the only time the IA officer is aware a Watch Commander was disciplined for failing to call out the detective bureau or failing to upcharge a suspect.

13. The IA officer believes Lieutenant Johnson acted with nefarious motives but can not explain why or what those motives are.

14. The IA officer did not speak with anyone in the detective bureau to find out why the Phillips charge was upgraded to an indictable offense.

15. The Long Branch Police Department does not have a Standard Operating Procedure (SOP) regarding charging criminal suspects. Watch Commanders have discretion.

16. The Long Branch Detective Bureau is ultimately responsible for handling all criminal investigations. The protocol is for the patrol division to be the

first responders and gather the information relative to the event. The Watch Commander charges the individual and turns over the reports and charges to the detective bureau. Every morning the bureau reviews the files and then it is decided if additional investigation is needed and if charges should be modified.

17. Johnson stated that he believed Officer Hueston, who was the officer pushing hard for indictable charges, was acting prematurely as he made up his mind prior to assembling all the facts. Additionally, he believed Officer Hueston arrested Phillips without probable cause. He therefore believed that Officer Hueston was therefore exposing himself and the City to false arrest litigation.

18. Johnson stated that he did not charge Phillips with indictable offenses because he did not believe they could be substantiated.

19. Johnson stated that he believed there was no reason to call out the detective bureau because Phillips's statement to the officers did not have to be video recorded as he was not going to be charged with an indictable offense. Additionally, he thought the entire matter was going to be turned over to the detective bureau.

TESTIMONY

Respondent

Officer Robert Bell

Officer Bell (Bell) had been employed as a Police Officer in the City of Long Branch since 2005. TR23:7. After graduating high school, he attended Stockton College for a time, then joined the Marine Corps from 1998 to 2003. TR23:18. He was

hired as a dispatcher by the City in 2004, and then as a Police Officer in 2005. TR23:22.

Bell's involvement in this matter began shortly after 12:42 a.m. on September 25, 2011, when a call was received from the residence of Precious Best and Juan Suarez. TR28:2. The two lived in an apartment at Seaview Manor, which is Section 8 housing located in Long Branch. TR29. When Bell responded to the call and arrived at the scene, he began speaking with two persons, who were later identified to him as Precious Best (Best) and Juan Suarez (Suarez). Best told him that they were about to walk out of the side door of their apartment in order to escort a family member home when they saw a male standing there, known to her as Troy, and he had a knife. R30:21. Suarez told him that he went to the side door to walk his uncle home, and then when he opened the door a male was standing at the side door holding a knife. TR40-41. As Suarez told Officer Bell these facts, Best was far enough away from their conversation so she could not hear what was being said. TR42:11. Bell arranged this purposely "[s]o that I could get their two stories without each one hearing what the other said." TR42:16.

Phillips began asking Suarez "[w]hat happened to my friend" and that "there was an altercation". Suarez told Bell that he shut the side door on Phillips because he was holding a knife. TR42:20. Suarez then went to the front door of the apartment, and began yelling at Phillips to get him away from the side door where his family was located. TR43:18 and TR44:5. Phillips then appears at the front door, holding the knife, and tells Suarez he was going to cut him in the face. TR44:15. Best then pulls Suarez back into the apartment. TR44:19. In his initial discussion with Officer Bell, Suarez did not mention that he had a weapon of any kind at the front door after the initial side door incident. TR44:24.

Bell testified that Best separately gave him "pretty much the same account" that Suarez had provided to him. TR45:6. Best stated that she knew that Troy was – Troyshon Phillips. TR45:24.

Bell then radioed a description of Phillips and the vehicle he occupied. TR47:8. He also radioed that Phillips may possibly be in possession of a knife. TR48:4. Bell then heard Officer Hueston (Hueston) and Officer Brown (Brown) on the radio that they had a vehicle matching Bell's description. TR48:8. As Bell heading back to Police Headquarters, he was informed on the radio that there "multiple large fights" in the City, so broke off headed to the fights. TR49:11.

At around 3:30 a.m., Bell arrived a Headquarters where he and Hueston briefed Johnson as to what happened at Seaview. TR50:12. Bell explained that it was the practice for any patrol officers who are going to institute criminal charges to explain those potential charges to the Watch Commander, who would be the one to type up the criminal complaint. TR51:3. Johnson "thought we needed to speak to more people because the charges that we had, he didn't feel that we had enough of that". TR52:4. Bell said that he expressed his opinion to Johnson during this conversation that there was enough evidence to charge Phillips with a criminal offense. TR53:10. At that time, Bell also learned from Hueston that Phillips had a weapon matching the Suarez/Best description in his car when stopped. TR54:9.

Officer Bell described the telephone conversation that Johnson had with Monmouth County Assistant Prosecutor Jones (Jones), and stated that, Jones wanted the Officers to obtain more information about the Suarez/Best incident. TR55:19. Bell explained that, during the telephone conversation Johnson had with Jones, there were a couple of times when he and Hueston corrected statements made by Johnson. TR56:16.

Bell, Hueston and Johnson all spoke with Phillips but before the interview, Bell asked Johnson if the Detective Bureau needed to be called to videotape Phillips's statement. TR58:16. Bell understood that a video interview had to be done for certain charges. TR58:22. Johnson, did not call the Detective Bureau. During the interview of Phillips at the station, Phillips claimed that he pulled a knife out only because "they pulled the sword" on me. TR 62:18. Hueston questioned the statement, pointing out to Phillips that this is not what he had stated to Hueston when first pulled him over. TR

67-68. Phillips also told the three officers he had been accompanied by a female companion – Latoya Bland – who was with him at the Seaview Apartments but left "when the whole thing started". TR 69:5. Based upon this information, Johnson told Hueston and Bell to go find Bland and interview her. TR 69:21.

Subsequently, Hueston and Bell spoke again to Suarez and Best, as well as speaking to Bland at her home. TR 71. Initially, Bland told Hueston and Bell that she did not know who they were talking about when they mentioned Troy, (TR 72:11), but then acknowledged that she knew who Troy was when her sister said "[y]ou know Troy, you were just out with him tonight." TR 72:12. Bland then explained to the officers that she and Phillips had been at a bowling alley earlier that night, TR 72:25, and that she and Phillips had dropped off a friend, Simon Puryear (Puryear), at the Seaview Avenue party. Puryear was a friend of Best and Phillips who had gotten into the incident at the Seaview Avenue apartment. TR 73. Bland told the officers that Phillips received a phone call that Puryear had gotten "jumped or beat up" at the party. TR 74:1. Phillips wanted to leave the bowling alley to go back to the party, and Bland argued with him to try and convince him to stay at the alleys. TR 74:5. Eventually the two left the bowling alley and drove to the Seaview Apartments. TR 74:7. She remembered that Phillips threw his keys in the car and went to the side door of the apartment with something in his hands, although she could not say what it was. TR 74:9. Bland was with him at the side door, but left when an argument began at the door, she walked away. TR 74:15. Bland stated that she had seen something in Suarez's hand but did not know what it was. TR74:20.

Bell recalled that when he and Hueston then went back to speak with Suarez and Best and they learned that, after the side door was closed in Phillip's face and Suarez went to the front door, he went to get a sword in his apartment and brought it to the front door. TR 78:4. Hueston and Bell collected the sword and brought it back to headquarters. TR 78:24.

Hueston and Bell related to Johnson what they found out in speaking with Bland, Best and Suarez. TR 92:7. Bell recalls that Hueston began to argue with Johnson that

there is certainly sufficient evidence to charge Phillips with several criminal offenses, and Johnson was adamant that there was not enough evidence to justify the charges. TR93:13.

On cross-examination, Bell testified that there was a "discussion" between himself, Hueston and Johnson (TR51:23) and he disagreed with what Johnson told him. TR52:6. Bell heard the "Johnson" side of the conversation that Johnson had with AP Jones, and, on occasion, were able to hear AP Jones because Johnson held the phone up for them. TR52:17. Bell and Hueston corrected Johnson about the information he was conveying to Jones during the phone call and Johnson did not always relay the corrected information to Jones after Hueston and Bell had pointed it out. TR:53. Johnson did not always accurately convey information to Jones even after they corrected him. TR54:6.

Bell explained the difference between the information he got from Suarez in his first interview and the second interview: "Well, the facts did change, because Lt. Johnson was stating as a fact that Suarez came to the side door with the sword which is what Phillips was saying and that he [Phillips] produced the knife only because Suarez had the sword. Suarez didn't produce the sword at the second door until after Phillips was already at the side door with the knife." TR68-69. Johnson told Jones during the telephone conversation that Suarez opened the door to his apartment and confronted Phillips with the sword. Bell explained again that Johnson continued to convey incorrect information to Jones during the phone conversation about Suarez brandishing a sword, despite he and Hueston correcting him. TR77:23.

Bell explained that Bland essentially corroborated Suarez's story that Phillips went to the side door of the apartment with something in his hand and Suarez pushed Phillips away from the side door proceeding to the front door thereby confronting Suarez. TR83:4.

Bell and Hueston wanted Phillips to be charged with aggravated assault, possession of a weapon, possession of a weapon for an unlawful purpose, and second

degree burglary. TR90:20. Johnson disagreed, and only justified a charge of criminal trespass. TR92:1. Bell testified that he could not understand that, and Johnson still would not budge off his "no charge greater than criminal trespassing" position. TR93:7.

Bell testified that he advised Johnson that the Detective Bureau should be called out for the Phillips matter and (TR117:22) that he was not conveying accurate information to Jones because Johnson was stressing Phillip's side of the "story" more than the actual facts. TR149:25.

Officer Thomas Hueston

Hueston has worked with as a Police Officer with the City of Long Branch Police Department for fifteen years. TR165:24. He recalled being dispatched to the Suarez residence earlier on the night of September 24 for Puryear. TR167. Around 10:30 p.m., (TR168:6) Hueston was dispatched to the scene, and found that Simon Puryear had been involved in a fight at Seaview Manor. TR168:11. An ambulance was at the scene, but Puryear did not go in the ambulance (TR168:23) and noted an "RMA", which means that Puryear refused medical assistance. TR169:4.

Hueston described responding to the dispatch call at 0:42 on September 25 (TR176:18) with lights and sirens on. In route, Hueston observed a small blue car coming in his direction. TR178:3. Based upon this description he received, Hueston stopped it (TR178:14) and asked the driver if his name was Troy, but Phillips did not respond. TR178-179. Hueston had his weapon drawn during this stop, because it was a "hot call" and Phillips had been described as a subject with a knife leaving the scene of a crime. TR179:9.

Phillips eventually confirmed that his name was Troy, and that he was in possession of a knife. TR179:20. Phillips handed him the knife (TR180:15) and told the officer that he was coming from a convenience store on North Broadway. TR181:18. Hueston was able to ascertain that the convenience store was not open (TR182:8) and asked Phillips if he had been over at Seaview Manor, and Phillips

replied yes. TR182:19. Phillips was placed under arrest (TR182:24), but not Mirandized, and was brought to the Long Branch Police Department. TR184:22.

As Phillips was being escorted in the Police Department, he blurted out "Johnson, I only pulled the knife on him because he pulled – pulled the sword out on me". TR186:3. Hueston said to Phillips after he made his "guy pulled a sword" statement something to the effect that, "That's not what you said on the road", and pointed out that Phillips had said during the stop that Suarez had gone to get the sword, not that he actually pulled a sword. TR187:22. Johnson told Hueston that he would take charge of Phillips, because there were numerous fights going on and he needed police officers on the road. TR186:9.

At the scene of the stop, Phillips told Hueston that he had gone over to Seaview Avenue because "his friend had gotten jumped" (TR188:16) and that he had pulled his knife out at the Seaview Avenue apartment "because the guy was getting a sword. . .". TR189:3. This is why Hueston pointed out in the Police Department that Phillips was "changing his story" – from "Suarez getting a sword" at the scene to "guy pulled a sword on me" to Johnson in Headquarters. TR189:23. Hueston testified that he said to Johnson and Phillips in Headquarters, after Phillips made the "guy pulled a sword" statement: ". . . now you're changing the story to the guy getting it to now he has it." TR190:4.

Hueston returned to Headquarters sometime around 3:00 or 3:30 a.m. (TR191:8) and he and Bell spoke to Johnson about how Phillips should be charged. Hueston stated that the conversation eventually evolved into a dispute. TR192:6. Johnson told he and Bell that the evidence was "a little on the weak side". TR195:3. Hueston wanted to charge Phillips with aggravated assault, terroristic threats, possession of a weapon, and possession of a weapon for an unlawful purpose. TR195:5. The discussion about how to charge Phillips became heated at times (TR195:11) with Hueston explaining that if the suspect is to be charged with an indictable third degree offense or above, the interview must be recorded. TR196:11. Hueston could not work the videotape machine because he does not know how, (TR198:3) and he did not know

if Johnson or Bell know how to work it. TR198. He said that Bell was adamant in with Johnson that they should not be interviewing without videotaping his statement (TR205:14) and Bell insisted that the Detective Bureau be called in order to run the videotape machine. TR206:8.

A statement was taken from Phillips and Hueston, which is identified as R-20, the Miranda form with Phillips' signature thereon. TR207:12. It was signed at 4:04 a.m. TR207:17. No record was made of statements Phillips made during the interview (TR207:20) but it took less than an hour. TR208:3.

When the interview concluded, the Officers went to the Watch Commander's area to further discuss charges against Phillips. TR232:3. Hueston testified that he "was just very adamant that he [Phillips] had broken the law by going there with a knife and produced it." TR232:14. Hueston was "100% positive that he [Phillips] had broken the law", he wanted to charge him and not let him go. TR232:17.

Hueston identified R-6, which is the transcript of the telephone conversation Johnson had with AP Jones. TR235:3. Hueston testified that the telephone portion of the call had a speaker phone capacity, but it was not used. TR236. Hueston was not able to hear what AP Jones was saying (TR238:11; 13) but said "[w]e were all talking." TR239:7.

Johnson never told AP Jones the prior statement of Phillips made when he was first pulled over by Hueston – "I pulled my knife out because the Spanish guy was going to get a machete." TR243:17. Hueston confirmed that, when he and Bell went back to speak with Suarez at around 5:00 a.m., both of them said that they came to the back door and Phillips was there with a knife out wanting to know what happened to his friend. TR244:17. This was consistent with Best's statement to Bell when he first arrived. Johnson never told this information to Jones. TR245:19; TR246:19. Johnson never conveyed the inconsistent statements Phillips had given and the spontaneous utterance he made to Johnson upon arrival at the station. TR247:18. This was important because it detracted from Phillips credibility (TR248:11) and Johnson knew

about the contradictory statements but failed to relay that critical information. TR252:4.

Hueston explained that Johnson quoted Phillips as saying that Suarez came out of his house swinging a machete and then Johnson confirmed this when Jones repeated it to him. TR270:12. Johnson agreed to both of these statements that Jones made. TR277:21.

Hueston confirmed that Jones asked Johnson "if Phillips went to the Suarez house looking for trouble", Johnson replied, "[h]e went looking for answers." TR274:2. Hueston testified that if Phillips was telling the truth about leaving the Suarez home, then running back to the stoop to confront Suarez, he exacerbated the situation "[i]f in fact that's what happened." TR23:25. Hueston did not agree with Johnson's retort to AP Jones (who had said that Phillips went looking for trouble at the Suarez apartment), and that Phillips merely went looking to the apartment "for an answer". TR26:8. In his opinion, Phillips should have gone to the police, not to the Suarez's apartment with a knife. TR26.

He said he had a "cordial relationship" with Johnson, Hueston and in fact was personally indebted to Johnson – "because of him my brother is clean and sober today." TR172. Hueston testified that he did not believe he was being insubordinate to Johnson that night. TR173:20. In fact, that was the only time he had spoken to a superior officer as he did to Johnson in his entire career. He did so because "I just felt very strong[ly] that Troyshon broke the law and I really wanted to see that it was followed through with, that's all." TR174:2. Phillips was originally charged with criminal trespass, a petty disorderly offense, based on the orders of Johnson. TR174. If he had been charged like Hueston and Bell wanted him to be charged, Phillips would have had to posted bail. TR175:22. This was all based on the action taken by Phillips at the side door of the apartment, which constituted felony offenses, occurred before Suarez ever went to the front door of the apartment. TR190:24. Hueston stated unequivocally that the basis for the felonies that he and Bell wanted to charge Phillips with were Phillips's actions at the side door. TR193. Thus, based on the simple chronology of events,

whatever Phillips had done at the front door was "after" the felony conduct at the side door, and has no impact on how Phillips should have been charged. TR191:8.

Lieutenant Thomas Shea

Lieutenant Thomas Shea (Shea), involvement in the Phillips "knife" case began when he received a memo from Captain Bucciero, about how Johnson handled the Phillips case. TR10:18. Shea began his investigation by contacting Hueston and asked him to write a "to/from memo" about what happened on the night of September 25. TR14;16. Shea made the same request of Bell, and received R-12 in response. TR15.

Shea identified Exhibit R-30 as his IA Report about the Phillips "knife" case (TR16:15) and identified R-18, which notified Johnson that an IA complaint had been made against him. TR18:8. Shea also contacted the Monmouth County Prosecutor's Office, as he is required to do if there is any allegation of any possible criminal offense on behalf of a police officer. TR18:14. The Prosecutor's Office informed Shea on October 18 that they were not going to proceed with their own investigation. TR21:12.

Johnson was interviewed on November 14, 2011 (R-19). At that time, Shea's understanding was that Phillips threatened someone with a knife and both Hueston and Bell believed that Johnson had not given the full version of events to AP Jones. In fact, Hueston and Bell strongly believed that more serious charges should have been lodged against Phillips than the petty disorderly offense of criminal trespass. TR22:13.

During the interview, Johnson repeatedly stated "it was unclear as to what [had] happened and that's why he didn't feel that. . . the charges that Hueston wanted to lodge against Phillips were warranted and that he felt that as a Watch Commander he should be more impartial." TR23:1. Shea did not agree with Johnson's statement that Phillips was entitled to meet "force with force", "[b]ecause Phillips was the one who initiated the confrontation at another person's house." TR25:5. In fact, Shea's investigation revealed that there were two incidents, the first was at the side door in

which Phillips brandished his knife and threatened Suarez and his family, and the second at the front door. TR26:11. Phillips was the only one who alleged that Suarez had produced the sword first. TR27:1. Therefore, Shea explained that the there was no possibility of a "force with force" defense because Phillips produced the knife and threatened Suarez and his family at the side door. TR27:14. Shea testified that there was no basis for Johnson to state in his IA interview that the facts were "unclear" to him because the facts strongly supported the conclusion that "Phillips. . . initiated the confrontation at the door. . .". TR28:1.

Shea also explained that the recording device required to be used when suspects are to be charged with a criminal offense of a certain degree is located in the Detective Bureau. It is a mobile unit that is only operated by members of the Detective Bureau. TR28. Shea identified R-28, Attorney General Guidelines regarding videotaping statements (TR30) and quoted from the section on custodial interrogations: "Unless one of the exceptions set forth in paragraph D are present all custodial interrogations conducted in the place of detention must be electronically recorded." TR31:2. Shea explained that the policy originally only applied to first or second degree charges but was later expanded to include crimes in the third degree. TR31:15.

The charges that Hueston and Bell had requested Johnson to charge Phillips was a second-degree offense. TR31:24. Shea further explained that possession of a weapon for unlawful purposes is a third-degree offense. TR32:1. He also said that the Detective Bureau should have been called out that night by Johnson (TR39:24) to provide clarity about what had happened. TR40:1. In fact, after the Phillips matter was reviewed by the Long Branch Police Department Detective Bureau, Phillips was charged with possession of weapon, possession of a weapon for an unlawful purpose, terroristic threats, and aggravated assault. TR46. Shea had "no doubt" that if a detainee is potentially to be charged with an indictable offense any statement that the detainee gives to the police department must be videotaped. TR47:14; 16; 18.

The charges were presented to a Monmouth County Grand Jury, and were "no bill" due to "[l]ack of victim cooperation." TR51:20; 23. But, at the time Phillips gave his

statement to Johnson, Hueston and Bell, he was under arrest, it was a custodial interrogation, and his statement should have been electronically recorded. TR56:10. Failure to memorialize the custodial interrogation constituted a violation of the IA Guidelines. TR58:12. He said that the failure to record made the statement an "illegal interrogation". TR58:17.

Shea said that there was no doubt based upon the investigation conducted in this matter that, other than Phillips's self-serving statement, all of the witness at the scene concluded that Phillips initiated the contact at the Seaview Avenue apartments. TR65:9. He also said all criminal charges are in fact allegations, until they are proved before a jury. TR67. Shea was aware that Hueston told Johnson the same thing on September 25, 2011 and he wasn't the "judge and jury". TR68:5. The standard for instituting criminal charges was whether the probable call existed to believe that the facts supporting the allegation were accurate and correct. TR72:14. Shea clarified that the "beyond a reasonable doubt" standard of proof which applies to a criminal jury trial is not the same as the "probable cause" that must be met to charge a person with a criminal offense. TR73. Shea explained that potential contradictory statements by witnesses do not preclude finding a probable cause for purposes of initiating a criminal charge against a Defendant. TR76L14. This was especially true if a perpetrator gives a statement which is inconsistent or disagrees with statements given by others that would support the criminal charge. TR76:19. Shea also explained that it was indeed "common" for criminal defendants to deny the allegations which were made against them. TR76:22. Denial of certain facts by a perpetrator does not preclude a finding of probable cause a criminal charge against a defendant. TR77:4.

Shea filed the Preliminary Notice of Disciplinary Action against Johnson because "it was my belief that Lt. Johnson purposely downgraded the charges on Phillips." TR81:20. Shea explained that Johnson had only given Phillips's version of events to AP Jones during their phone conversation. TR82:15. He was also charged for failing to call the Detective Bureau and failing to electronically record the statement of an accused while in a custodial interrogation. He was also charged with misinterpreting the statute for self-defense. TR83:7.

On cross-examination, Shea was asked what he meant when he said Johnson "purposely downgraded" charges against Phillips, and he replied "I meant that he had clear facts and probable cause from the investigation at that point that warranted more serious charges and Lieutenant Johnson for some reason chose not to charge Phillips with those charges." TR86:16. A police officer does not have discretion on whether or not to charge a person with a crime if he witnesses it. TR90:5.

Regarding the videotaping of Phillips' statement, Shea testified that he recalled that Lieutenant Johnson stated in his IA interview that he did not call the Detective Bureau because they would not have come out for this, and also stated that he did not know how to run the videotape machine. TR148:14. Hueston and Bell likewise said that they did not know how to run the videotape machine. TR149.

Regarding the issue of the drinking at the Seaview Avenue party on the night in question, Lieutenant Shea testified that Johnson never told him that the reason he did not want to charge anyone was because they were drinking at the party. TR152:24.

When asked about whether or not "all the witnesses were drinking", Shea acknowledged that the fact that the witnesses were drinking alcohol at the crime scene could impact on their ability to recite factual information, but this possibility does not mean that the witnesses should not be interviewed. TR169-170. Shea did not think the alcohol consumption issue was significant because that fact was not an issue to the officers at the scene. TR171:2.

Johnson was "supposed to sign a complaint based on probable cause, not find if it's true or not." TR178:2. Shea was asked if this was "a simple matter of you disagreeing with Lt. Johnson", Shea replied that it was not just himself, but the two Officers on the scene, and the entire Detective Bureau in the Long Branch Police Department who disagreed with Johnson as well. TR181:9.

Shea was asked if he believed Johnson had done something "nefarious" with respect to his refusal to charge Phillips, he replied that he believes that there was

indeed something nefarious, "Based upon the fact pattern we have here, it's inexplicable to me why Johnson wouldn't charge this guy with more serious offenses, why he released a man accused of a violent act on a petty disorderly persons charge". TR37:15.

Appellant

Assistant Prosecutor James Jones

Jones worked as an Assistant Prosecutor in the Monmouth County Prosecutor's Office from 2005-2012; previously, he had been with the New Jersey Attorney General's Office for eighteen years. TR137:17. He said he was "professionally friendly" with Johnson in 2011. TR138:25.

Jones was asked to describe what Johnson had conveyed to him during the phone conversation on September 25, and he recalled that Johnson told him that Suarez had been armed with a "machete", (TR140:2) and that Phillips was armed with a knife that "he used in his capacity in whatever position he had his job, that he used to open up boxes. . .". TR140:16.

Jones did not recall whether or not people had been consuming alcohol at the scene. TR144;17. But when asked about whether it was necessary to charge as many charges as possible, Jones replied "I try to charge with the most serious charge when I'm consulted that I think will stand, because I have to take into consideration that there is going to be a bail hearing coming up." TR145:4. Anybody could be charged with an offense on "any given evening". TR145:25.

Jones testified that there appeared to be a "conflict" in that there may have been a "spontaneous" drawing of knife and sword (TR156) but criminal trespass charge satisfied "the interests of the State and Mr. Phillips". TR153:18. Jones also said that he would have spoken to either Hueston or Bell if they had called him that night. TR163:1.

On cross-examination, Jones testified that Johnson did not tell him that Phillips lied to Hueston when he was pulled over. TR174:6; 15. Nor did Johnson tell him about the inconsistent statements Phillips made about Suarez's actions – "going to get his sword" as opposed to "pull the sword". TR175:9.

Jones stated that Johnson told him that the story Phillips gave was that "Phillips approached the Suarez home and Suarez came out or opened the door brandishing a sword." TR176:17. Jones was then shown R-10, which was Officer Hueston's supplemental police report where Hueston wrote Phillips' version of events where Suarez did not open the door holding a sword. TR178:15. Jones agreed that it was not consistent with what Johnson told him. TR179:1. Jones further agreed that Phillips's statement that Suarez did not produce the sword until after the incident at the side door was also inconsistent with what Johnson told him. TR179:13. Jones was then shown Suarez's statement (R-13), and was asked if Johnson had conveyed any additional information during the phone call. Jones replied in the No. TR181:22. In fact, Jones testified that he would have given different advice to Johnson (TR182:1) and it may have been charged as an aggravated assault. TR182:4. Jones had no idea why Johnson did not convey this information to him. TR182:12.

Jones was about Phillips's credibility and he said "From the outset he had less credibility than anyone, because he is the person that had gone to someone else's house. . . in possession of a knife and obviously looking for trouble, in my mind." TR203:1. Based upon the statements given by Suarez and Best, Phillips should have been charged with indictable offenses (TR209:22 and TR208:4). In fact, after looking at page 3 of R-6, Jones said it would have been "natural" for Johnson to have told him that Precious Best corroborated Suarez's statement. TR208:9.

Jones was asked about videotaping Phillips's statement and testified that he was not aware that Johnson and the two Police Officers had actually questioned Phillips prior to calling him. TR221:23. In fact, if he had learned this, he would have been disappointed because the statements should have been videotaped. TR222:1. It also

would not matter if the suspect was under the influence of alcohol "because quite frankly, if they're drunk, they are what they are." TR222:23.

Jones reiterated that, the timing of the "production" of weapons would have been important in terms of any conclusion as to who was lying about the incident. TR231:15.

Lieutenant Frank Rizzuto

Lieutenant Frank Rizzuto (Rizzuto), has been a Police Officer in the Long Branch Police Department for eighteen years. TR5:22. He is currently a Lieutenant. TR6:4.

In 2011 he was working in the Detective Bureau and reviewed the "Phillips" case. He assigned Detective Michael Decker to work on the case in order to conduct a follow up investigation. TR8-9. He said Detective Decker expressed "a certain discomfort" in investigating the matter, because he would be investigating the actions of a superior officer. TR11:1. and TR17:5. However, Phillips was eventually charged with possession of a weapon, possession of a weapon for an unlawful purpose, aggravated assault and armed burglary. TR12:18. He said that the New Jersey Criminal statutes should have been the guide post for determining what should be charged. TR20:21.

Rizzuto also testified that the videotape recording of statements of criminal suspects is mandated if the suspect is to be charged with a crime, or even if there is the "potential" of charging with a crime of third degree or higher. TR28:2; 18.

Jason Roebuck

Jason Roebuck (Roebuck), is currently the Director of Public Safety for the City of Long Branch. He is on a leave of absence from his position as Captain. TR34. On September 25, 2011, Roebuck was a Lieutenant (TR35:6) and worked as the Watch Commander for the day shift. TR35:11.

As a Watch Commander, he would determine what charges to bring against any suspect by examining if "there is the facts and you have to go with the facts". TR36:18. In determining what charge should be levied against a suspect should be based on 2C of the New Jersey statutes. TR36:25.

On September 25, Roebuck reported to work around 6:00 a.m. or 6:15 a.m. and recalled that there was a discussion going on between Johnson, Hueston and perhaps Bell. TR38:18. There was a debate about what Phillips should be charged with and Johnson asked Roebuck what he thought. Johnson gave Roebuck his version of what had happened. TR39:1. After that Roebuck had a discussion with Hueston in the locker room some ten minutes later. TR39:15.

Based on what Johnson told him, Roebuck thought the charge against Phillips "could have gone either way." TR42:1. Hueston, however, gave Roebuck a very different version of what had happened at the scene (TR42:10) which changed Roebuck's opinion about what should have happened. TR42:14. He told Hueston that it would make no sense for him to have any further discussion with Johnson but, rather, he should simply memorialize in writing the facts he had just recited to Roebuck, and the Detective Bureau would review the matter. TR43:1.

On cross-examination, the Director denied ever seeing a situation where the Detective Bureau ever "upcharged" a criminal defendant based upon the same facts that had been adduced during the initial investigation. TR48:4 and TR49:5; 8. The only "upcharging" will occur when the Detective Bureau uncovers additional facts, not based upon the same facts discovered by the initial investigating officer. TR49:12.

He explained if a fact pattern justified charging a defendant with aggravated assault, "then you don't really have any – a discretion on whether or not to charge him". TR52:13. He also explained that the legal obligation to charge exists even if the victim says one thing and the alleged perpetrator says another, TR53:8, and explained that sworn police officers have no discretion regarding charges based upon credibility judgments which may not be made as to witnesses. TR53:15.

A Watch Commander "doesn't override the facts. . ." if he does not "agree" with what he was hearing from his police officers. TR54:8. He "would tend to believe the officers on the street" (TR55:12) and has never declined to pursue charges against a criminal suspect "because you doubted the veracity, or credibility or honesty of your officers who actually did the investigation which was the basis for the proposed charge". TR56:5. "I've never had that happen where they went, you know, where they went, no, I want to indict him. . ., and I said, no, I'm going to let him go." TR59:20. "I just look at the facts that are there" and, if the facts fit into a 2C criminal violation, "then I'm going to charge them." TR62:1; 6. "I'm going to charge and I'm going to let someone else figure out later whether it should be, you know, downgraded. I would also tend to. . . do the higher thing [charge]." TR62:9.

Lieutenant Lyndon Johnson

Lieutenant Lyndon Johnson (Johnson) testified that he began his employment in the Long Branch Police Department in 1993 (TR6:1) and served in every unit in the Police Department. TR6:15. After discussing his career and achievements, he described that "at one time, we had 100 police officers, and the highest number we've ever had was 5 Black minority officers, and that created a lot of tension in the community." TR23:5. There are no black officers above a lieutenant. TR23:9.

Johnson testified regarding many of the undisputed facts above including Phillips's "unsolicited utterance" to Johnson, "Johnson, the only reason I pulled my knife was because the Spanish guy pulled a sword out on me." TR30:9. He recalled that after Hueston and Bell returned to Headquarters, Hueston "had a whole litany of charges he wanted to charge Phillips with, and as a supervisor, you learn that you have to decipher." TR30:22. Johnson explained "[a] lot of times, young officers, they will come in and think they have this, and they really don't, because they don't meet the elements of the crime, and they're excited. . . They want to charge as many charges as they can, but sometimes you just have to bring them back down that you just don't have it." TR30-31.

Johnson found it "odd" that Hueston had a list of charges even though he had not been at the scene to speak with the victim. Johnson suggested that the officer should speak to Phillips to get his side of the story because he thought that Hueston "just refused to think that Phillips could be telling the truth. . .". TR31-32. Johnson thought that there "wasn't enough to place Phillips under arrest, because Hueston had no probable cause of what took place." Johnson also doubted the existence of probable cause because he did not know if Hueston had ever spoken to Bell. TR33:2.

Johnson testified that he knew Phillips was "under the influence because of his physical appearance, and I could smell it on him", as well as given the fact that he already admitted that he had been at the Suarez party "where alcohol was flowing freely". TR34:15.

Johnson said that the watch commander "is intricately involved for figuring out how to charge someone in Long Branch". TR37:13. Johnson objected to Hueston's opinion on charging because he "hadn't even been at the scene". TR37-38. Johnson then testified that he explained to Hueston that "we represent the State, and we have the burden to prove whether someone committed a crime or not, and at that particular point, I said to him show me what proof do you have that Phillips committed this crime," and he could not do that. TR38:16.

Johnson did not believe that Phillips needed to have his statement videotaped because he had not yet been charged. TR39:7. He also testified that it was not "feasible" to videotape Phillips because "he or we did not have access to the equipment, nor did we have the proper training, and at this particular point, it wasn't an interview and interrogation." TR39:13. Johnson suggested that they call the on-call prosecutor and run the situation by him. TR40:11.

Johnson testified that he did not call out to the Detective Bureau because there was no crime scene (TR42:18) and referred to a memo on overtime which he believes justified him not calling the Detective Bureau. TR45:20. Johnson also referred to three

cases where the Detective Bureau did not investigate. One was a case where a woman lost an engagement ring, and the Detective Bureau refused to "come out". TR49:11.

"Troyshon Phillips was not a flight risk" (TR54:4) that's why he was given the petty disorderly persons offense and "it's kind of confirmed that, you know, Phillips had some truth to what he was saying. . .". TR55:11. There were "credibility gaps" on both sides (TR56:3) and Hueston wanted to bring charges against Phillips that "did not meet the elements to any of the crimes that he wanted to charge Phillips with, and that's the most important thing." TR56:22. "I have to believe that they took place", and Johnson did not believe that they took place. TR57:2. He concluded this because "there's a lot of confusion. . .". TR57:4. Johnson also stated that he would have typed the complaint and swore Officer Hueston to it. TR57:12. Johnson did not want to swear Hueston to the criminal charges Hueston wanted to bring because "I believe we couldn't prove that what he was saying took place." TR57:23. Rather, he authorized only a criminal trespass charge. TR58:5; 8.

Sometime later, Johnson received a letter from Shea informing him that an IA investigation was initiated against him based on the Phillips incident. TR67:12. He testified about his interview in the IA investigation and that he was targeted because he had a poor relationship with the Director of Public Safety, Al Muolo. TR69-72.

Johnson again testified about videotaping Phillips's statements and spoke about the "feasibility" exception to the Attorney General Guidelines and the fact that Phillips "was not charged with anything", which, in Johnson's mind, meant that the Guidelines did not apply. TR83:2. Johnson also claimed that Phillips did not give a "statement". TR84:6.

On cross-examination, Johnson was asked about his testimony on direct how Hueston could know what had happened at the Seaview Avenue scene, when Bell had been there, not Hueston. He was also asked about whether he knew that Hueston and Bell had spoken to each other. TR103-104. Johnson stated "I said that I found it odd that an officer would have a list of charges and he never went to the scene to speak

with the victims." TR104:6. Johnson was also asked if he believed that Hueston was simply making up the facts, Johnson replied that "It was not presented to me that the two had conversed about why he felt the way he did." TR105:5. Johnson also did not believe that police officers under his command conferred before they spoke to him about potential charges. TR105:12.

Johnson acknowledged that Hueston told him at 3:00 a.m. that Suarez and Best said Phillips banged on the side door of their Seaview Avenue apartment, and began cursing and threatening Suarez and wielding a knife. TR107:25. Johnson then acknowledged that this is precisely what Suarez and Best told Bell and what was reflected in Bell's written report. TR108:3. Johnson was asked if that was not what Suarez and Bell said in their formal statements and in fact, the three versions of events they gave were entirely consistent, Johnson replied "[a]bsolutely no". TR108:13. Johnson said it "just became a who is telling who". TR109:8. Johnson then claimed that what Bell told him at approximately 12:45 a.m., and what Hueston and Bell told him at 4:00 a.m., was inconsistent because Suarez initially indicated that he did not have a weapon or produce a weapon." TR115:17.

Johnson acknowledged that Suarez and Best gave the same account to Bell (TR120:11) and there has never been any inconsistency in their story. He said "I wasn't there. I don't know what was said at the door. I don't know what exactly directly what was said to Bell by Suarez. I wasn't there." TR123:10. Johnson said that as Watch Commander, he is never present when the incident takes place and information is only relayed to him later. TR123:19. Therefore, he must rely on what his officers say occurred, either as to what they personally observed or what was conveyed to them by witnesses, as the basis for what crimes if any a suspect should be charged with. TR123:24. Johnson said that it was very rare for a violent crime to occur in front of a police officer, and extremely rare to have a videotape of a criminal incident. TR124:12; 15. That was one of the reasons that he did not call the Detective Bureau that night because he knew there was no video to retrieve from the Housing Authority. TR125. Johnson finally acknowledges that the information Hueston conveyed to him at 3:00 a.m. was the same information which Bell had obtained at around 12:45 a.m., and that

the two officers had done no other investigation on the matter between those two timeframes. TR133:16. Johnson believed that Hueston was insubordinate but did not charge him. TR133-134.

Johnson testified that he did have the 2C book in front of him when was having the discussion with Hueston and Bell. TR137:16. The charge of terroristic threats, did not fit with what Phillips had done "[b]ecause there was no evidence which was presented to me that Phillips went there with the purpose to make a terroristic threat on the victim." TR137-138. Asked if it was not true that at 12:45 a.m. and again at 3:00 a.m., Bell and Hueston informed him twice that Suarez and Best stated that Phillips went to the door of their apartment, knocked on the door, and yelled loudly at Suarez and Best "I'm going to fucking kill you", Johnson replied that "[t]hey said a lot of things", (TR138:8; 10) then stated "I can't recall", what Hueston and Bell told him at 12:45 and 3:00 a.m. that night. TR138:19.

Johnson denied that the "I'm going to fucking kill you" statement Suarez and Best told Bell about at 12:45 a.m. was not what Hueston and Bell presented to him at 1:00 a.m. and again at 3:00 a.m. on that night. TR139:3; 5. Johnson then denied the insubordinate conversation he allegedly had with Hueston at 3:00 in the morning. TR143:6. He claimed the inconsistency was created by Phillips' nine-word unsolicited utterance as he walked in the Police Department. TR143:19.

Johnson's version was that "you had an overzealous police officer that walked in the police department that wanted to overcharge someone for a crime that he had never been to the scene, and the end result showed exactly what it was, that the Long Branch Police Department brought forth a litany of charges which were all finally dismissed and pled out into municipal court for ordinance". TR152:23.

Johnson disagreed with the testimony by Lieutenant. Rizzuto and Director Roebuck, that, you should ere on the side of caution and charge with more serious offenses, with the possibility of downgrading later. TR160:24.

Johnson testified that Phillips smelled of alcohol and was slurring his words when he was brought into the Police Department, TR202, and that he appeared to be under the influence of alcohol in terms of being potentially impaired at the time he was brought in. TR203:4. Despite that fact, Johnson acknowledged that he interviewed Phillips anyway (TR203:6), but he considered that Phillips might not be telling the truth when interviewed. TR203:14. Johnson was asked if Phillips was required to be given a Miranda caution before he being interviewed and he replied, "I would say no." TR204:7. He justified the answer by stating that it was only an "investigation" at that point. TR204:9. Johnson said that there is a difference between an "interview" and a "statement" (TR205), a statement is only something that is recorded or handwritten. TR206:1. He was asked whether a suspect who has been arrested and is to give any form of statement about the alleged crime to police, must be given a Miranda warning first, Johnson answered "False". TR207:24. Johnson explained that he meant you are allowed to ask name, date of birth, etc., but then eventually agreed that a police officer cannot question an arrestee ". . . about the probable cause or the actions for which the arrest is based. . .". TR208:15. Phillips had to have been given Miranda if he or Hueston or Bell talked to him about anything that happened that night at the Suarez residence after Phillips had been arrested. TR208:22.

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the

credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of respondent's witnesses, as well as James Jones, Assistant Monmouth County Prosecutor, Lieutenant Frank Rizzuto and Director Jason Roebuck, were especially credible and persuasive. Their testimony was clear and concise. It was obvious that they all had concerns regarding their interaction with Johnson and his actions on the date in question. It was also clear from reading the testimony they had no axe to grind. In fact, it was apparent from the testimony that they simply wanted to do their jobs.

Conversely, Johnson's testimony was not credible in the least bit. His own testimony assisted the respondent in proving the facts of the case by a preponderance of the evidence. He admitted to not being at the scene at the time and a Watch Commander "doesn't override the facts. . ." if he does not "agree" with what he was hearing from his police officers, he "would tend to believe the officers on the street". However, here, he claims that there "wasn't enough to place Phillips under arrest, because Hueston had no probable cause of what took place" was an uneducated opinion based on the facts Johnson had at the time. In fact, Bell and Hueston were the two individuals most aware of all of the facts and Johnson ignored them. The only reasonable explanation for Johnson not listening to the officers and properly charging Phillips was that Johnson knew Phillips and wanted to give him a break. Clearly, Phillips knew Johnson because he addressed him directly upon entering the Department and uttered "Johnson, the only reason I pulled my knife was because the Spanish guy pulled a sword out on me." Johnson believes that he used good judgment and did nothing wrong but unsuccessfully attempted to direct attention away from the

facts of the case and claim that he was targeted because he had a poor relationship with the Director of Public Safety, Al Muolo.

Particularly glaring was the testimony of AP Jones who when confronted with Officer Hueston's supplemental report where Suarez did not open the door holding a sword and Jones agreed that it was not consistent with what Johnson told him. Equally inconsistent with what Johnson told him was the fact that Suarez did not produce the sword until after the incident at the side door. Jones was also shown Suarez's statement and said that Johnson had not shared any of that information during the phone call and would have given different advice to Johnson including charging aggravated assault.

Likewise, his explanation for not videotaping the interview began with that fact that Phillips was "under the influence because of his physical appearance, and I could smell it on him", as well as given the fact that he already admitted that he had been at the Suarez party "where alcohol was flowing freely". However, those facts were not supported by any other facts in the record. In fact, that would bring into question why Officer Bell did not question it when he was stopped while driving his vehicle. Also, Johnson's comment that the fact that a charge of terroristic threats, did not fit "[b]ecause there was no evidence which was presented to me that Phillips went there with the purpose to make a terroristic threat on the victim" is unsupported in fact and law.

It was obvious that Johnson attempted to "sell" his version of the facts to the trier of fact. Particularly, his recitation and demonstration of the contact with the officers and AP Jones not credible, but also not realistic to believe a competent police officer would ignore the facts of the case as presented. Particularly disturbing was Johnson's testimony about whether Phillips was required to be given a Miranda warning before being interviewed. Johnson replied, "I would say no." He justified the answer by stating that it was only an "investigation" at that point and there is a difference between an "interview" and a "statement". He said a statement is only something that is recorded or handwritten. TR206:1. When asked whether a suspect who had been arrested and is

to give any form of statement about the alleged crime to police, must be given a Miranda warning first and Johnson answered "False" was particularly poignant.

Based upon the documents in evidence and testimony I **FIND,** by a preponderance of credible evidence, that on September 25, 2011, Johnson discounted the facts from two officers in charging Phillips. I **FURTHER FIND,** on the same date, Johnson did not properly charge Phillips. I **FURTHER FIND,** Johnson performed a suspect statement without videotaping it even though he was aware that a videotape was required and mandated by the NJAG Guidelines. I **FURTHER FIND** that Johnson relied solely on the suspects version of facts and relayed them to the on-duty AP thereby misleading him. I **FURTHER FIND** Johnson failed to notify the Detective Bureau of the events of September 25, 2011.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138,147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in everity are used in o his or her duties. N.J.S.A. 1 1A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A.1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof

and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962) Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty.

Initially, Johnson has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties. Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Although progressive discipline is the general rule, sheer incompetency can be the grounds for firing without progressive discipline.

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (Note: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper

remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that '[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest.' The court determined that Klusaritz's prior record is 'of no moment' because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the County.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

Here, Johnson discounted the facts from two officers in charging Phillips, did not properly charge Phillips, Johnson performed a suspect statement without videotaping it even though he was aware that a videotape was required and mandated by the NJAG Guidelines, relied solely on the suspects version of facts and relayed them to the on-duty AP thereby misleading him and failed to notify the Detective Bureau of the events of September 25, 2011. Accordingly, I **CONCLUDE** that the respondent has met its burden in demonstrating support to sustain a charge of Incompetency, Inefficiency, Failure to Perform Duties. Charges of violation of N.J.A.C. 4A:2-2.3(a)(1) are hereby **SUSTAINED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a police lieutenant ignoring his officers' version of the facts, purposefully misleading an on-duty AP, improperly charging a suspect in a violent crime and not recording a suspect's

statement. I **CONCLUDE** that appellant's actions constitute unbecoming conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of neglect of duty than the image of a police lieutenant as articulated above. I **CONCLUDE** that appellant's actions constitute neglect of duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

CONCLUSION

I **CONCLUDE** respondent has met its burden of proof by demonstrating that on September 25, 2011, appellant Johnson discounted the facts from two officers in charging Phillips, did not properly charge suspect Phillips, performed a suspect statement without videotaping it even though he was aware that a videotape was required and mandated by the NJAG Guidelines, relied solely on a suspects version of facts and relayed them to the on duty AP thereby misleading him and failed to notify the Detective Bureau of the events of September 25, 2011. I further **CONCLUDE** for the reasons set forth herein respondent has proven by a preponderance of the evidence

that petitioner acted in a manner that constituted violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming and N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has no prior disciplinary history. Despite this unremarkable disciplinary record, it is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

(NOTE: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

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> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

The record in the above case coupled with commonsense reflects inexcusable Incompetency, Inefficiency and Failure to Perform Duties; Conduct Unbecoming and Neglect of Duty. Considering the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action suspending appellant for 180 days without pay and a demotion to patrol officer was justified.

DECISION AND ORDER

I **ORDER** petitioner's appeal be **DENIED** and the charges levied against Lieutenant Johnson be **SUSTAINED**. I **FURTHER ORDER** respondent's imposition of a 180 days without pay and a demotion to patrol officer is **AFFIRMED**.

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.

August 23, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 8/23/17

Date Mailed to Parties: 8/23/17

/lam

APPENDIX

WITNESSES

For appellant:

James Jones, Assistant Monmouth County Prosecutor

Lieutenant Frank Rizzuto

Jason Roebuck, Director of Public Safety

Lieutenant Lyndon Johnson

For respondent:

Officer Robert Bell

Officer Thomas Hueston

Lieutenant Thomas Shea

EXHIBITS

For appellant:

P-1 Withdrawn

P-2 Attorney General's Office Internal Affairs Guidelines 2000 and 2014

P-2A Attorney General's Office Internal Affairs Guidelines 2000

P-2B Attorney General's Office Internal Affairs Guidelines 2011

For respondent:

R-1 Preliminary Notice of Disciplinary Action, dated January 23, 2012

R-2 Dispatch Call list, dated September 25, 2011

R-3 Monmouth County 911 calls and Long Branch Police Department calls, dated September 25, 2011 (on CD)

R-4 Arrest Report for Troyshon Phillips, dated September 25, 2011

R-5 Phillips Incident Report, dated September 25, 2011

R-6 Transcript of Johnson's conversation with Assistant Prosecutor Jones, dated September 25, 2011

R-7 Memo from Sergeant Gotfredsen to Captain Bucciero, dated September 28, 2011

R-8 Memo from Captain Bucciero to Director Muolo, dated September 28, 2011

R-9 Narrative for Patrol Officer Robert Bell, dated September 26, 2011

R-10 Supplemental narrative for Patrol Officer Thomas Hueston, dated October 2, 2011

R-11 Memo from Patrol Officer Hueston to Lieutenant Thomas Shea, dated September 30, 2011

R-12 Memo from Police Officer Bell to Lieutenant Shea, dated October 3, 2011

R-13 Statement of Juan Suarez, dated September 28, 2011

R-14 Statement of Precious Best, dated September 28, 2011

R-15 Statement of Latoya Bland, dated September 30, 2011

R-16 Statement of Patrol Officer Robert Bell, dated November 22, 2011

R-17 Statement of Police Officer Thomas Hueston, dated November 18, 2011

R-18 Internal Affairs notification forms for Lieutenant Lyndon Johnson, dated October 25, 2011

R-19 Statement of Lyndon Johnson, dated November 14, 2011

R-20 Miranda warning for Troyshon Phillips

R-21 Police Officer Thomas Hueston's handwritten notes

R-22 Photos of Phillips' black knife and Juan Suarez's sword

R-23 Criminal Background Check for Troyshon Phillips

R-24 Videotaped recording of interview with Troyshon Phillips (on DVD)

R-25 Seaview Drive CD

R-26 Long Branch Police Department Rules and Regulations

R-27 Attorney General's Police Statement re Electronic Recordation of Stationhouse Confessions

R-28 Attorney General Directive 2006-4 re Electronic Recordation of Stationhouse Interrogations

R-29 Monmouth County Uniform Policy – Videotaped Review of Formal Written Statements

R-30 Investigative Report of Lieutenant Shea, dated May 10, 2013

R-31 Appeal of the Final Notice of Disciplinary Action, dated August 9, 2013

R-32 Phillips knife

R-33 Suarez sword

R-34 "Emergency Call Out/Notification List" memo, dated September 8, 2010

R-35 Complaint – Warrant form

10-18-17

STATE OF NEW JERSEY

In the Matter of Lyndon Johnson
City of Long Branch,
Department of Public Safety

CSC DKT. NO. 2014-375
OAL DKT. NO. CSR 13474-13

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of Lyndon Johnson, Police Lieutenant, City of Long Branch, Department of Public Safety, removal effective August 8, 2013, on charges, was heard by Administrative Law Judge Dean J. Buono, who rendered his initial decision on August 23, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Lyndon Johnson.

Re: Lyndon Johnson

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 13474-13
AGENCY REF. NO. N/A

IN THE MATTER OF LYNDON JOHNSON, CITY OF LONG BRANCH

Stuart J. Alterman, Esq., for appellant, Lyndon Johnson (Alterman & Associates, attorneys)

James L. Plosia, Jr., Esq., for respondent, City of Long Branch (Plosia & Cohen, LLC, attorneys)

Record Closed: July 10, 2017 Decided: August 23, 2017

BEFORE **DEAN J. BUONO**, ALJ:

STATEMENT OF THE CASE

The City of Long Branch (respondent) removed Lieutenant Lyndon Johnson (appellant, Johnson or Lt. Johnson) as a Police Officer employed by the City. Respondent argues that he violated: N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. Specifically, respondent alleges appellant Johnson knowingly and purposefully approved a report in which he and his

son were listed as victims and aware that it contained false information. Appellant contends he acted appropriately and did not violate any regulation, rule, policy or procedure.

PROCEDURAL HISTORY

On December 10, 2012, respondent prepared and served appellant with a Preliminary Notice of Disciplinary Action because of his actions on January 16, 2012, while serving as Watch Commander on the 11:00p.m. – 7:00a.m. shift. A local hearing was not requested by the appellant and a Final Notice of Disciplinary Action was issued on August 8, 2013, sustaining the charges and removing him from service on that date. An appeal was filed timely and the matter was simultaneously filed with the Civil Service Commission and the Office of Administrative Law (OAL) as a contested case on September 13, 2013 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held on February 13, 2015, February 24, 2015, March 24, 2015, April 7, 2015, April 13, 2015, May 19, 2015 and August 24, 2015. After post hearing briefs were received, the record closed on December 23, 2015.

On March 31, 2017, the originally assigned Judge (Shuster) retired from the bench. On April 21, 2017, the OAL sent a correspondence to all parties notifying them of the retirement and requesting a telephone conference. A telephone conference was held on April 25, 2017, with the parties and Assignment Administrative Law Judge Delanoy to discuss how the parties wished to proceed. This matter was re-assigned to the undersigned on May 1, 2017. A telephone conference was held on May 8, 2017, wherein the court requested that the record be re-opened so that the court may acquire all the closing submissions and documents that were missing from the record at OAL. The parties graciously agreed and submitted the requested records. The record closed on July 10, 2017.

[1] Respondent brought four separate disciplinary actions against appellant. This was the third case to be heard.

TESTIMONY

For Respondent

Lieutenant Thomas Shea

Lt. Shea (Shea), was the Internal Affairs Officer that investigated Johnson concerning theft of his son, Lyndon Johnson, Jr.'s (Junior) gun. He testified that the incident occurred on January 16, 2012 (TR22:21) and he became aware of it that morning when he reported to work. (TR24:16). Evidently, the handgun that Junior claimed was stolen from him was located at the Monmouth County Prosecutor's Office as evidence in a homicide case. (TR25:23).

Shea began his investigation by pulling reports, such as the CAD entries (Computer Automated Dispatch). The CAD documents how the call comes in to the department and to whom it is assigned. (TR28:1). On January 16, 2012, a CAD entry for the incident was made at 3:46 a.m. (TR30:13). Shea described that the CAD entry initiated by Dispatcher Hope White (TR31:4) displayed Johnson's address because he was the owner of the car from which the gun was stolen. (TR32:6). The CAD entry indicated that a backpack and a loaded Glock 9 mm was stolen from Johnson's car. (TR34:15).

Lt. Shea then testified about (R-10), which documented a "TRAX" message regarding this incident. (TR35:15). A TRAX message is a report of a serious crime that is broadcast to the surrounding agencies to notify them. (TR35:24). The TRAX message is R-11 (TR38:24) and includes a statement that the Glock was "loaded" when it was stolen from Johnson's car. (TR38-39). Lt. Shea testified that Dispatcher Sergio Chaparro typed the TRAX message. (TR40:19). Lt. Shea explained that, even though the CAD and TRAX message both indicated the gun was loaded, Junior gave a report to Officer Brown that the gun was not loaded. (TR41). Officer Brown's report, also

indicated that the Glock had a trigger lock attached that was locked and a ten-round ammunition magazine in the backpack. The gun was not loaded. (TR43:1).

The vehicle from which the backpack was stolen was owned by Lt. Johnson (TR43:16) and that the weapon was registered through the Long Branch Police Department to Junior. (TR45:8). Lt. Shea testified that: "you're not allowed to carry a loaded handgun unless you're a police officer." (TR48:16). Shea further testified that you are not permitted to carry the weapon on your person unless you have a carry permit, (TR50:20), and Junior did not have one. (TR51:1). Any person who owns a firearm and who does not have a carry permit must transport the firearm in a case in the trunk of the car, unloaded, and the ammunition must be separated from the firearm. (TR51:4). Junior did not indicate that the firearm was located in the trunk when it was stolen. (TR51:10). In fact, he indicated that the weapon in the backseat of his father's car in a backpack, and, although he claimed it was not loaded, there was ammunition in the same backpack. (TR51:12). Any handgun owner who does not properly secure the handgun when transporting it is subject to a third-degree criminal offense for being in possession of a handgun. (TR52). In his report, Officer Brown noted that Junior told him that no ammunition had been taken with the backpack. (TR54:7). Also, Lt. Johnson was present when Officer Brown interviewed Junior (TR55:13) and Junior told Officer Brown that the gun was in the car because he was going to a shooting range the next day. (TR64:24).

Based on the results of his investigation, he contacted the Monmouth County Prosecutor's Office because "this something [he had] to do." (TR71:5). Lt. Shea called Lt. Mayo from the Prosecutor's Office and Mayo told Shea that under these facts it did not appear to justify criminal action against Lt. Johnson, only administrative charges. (TR71:9).

Lt. Shea identified (R-27), a witness statement Junior gave to Detective Verdadeiro and Sgt. Pallone on January 17, 2012. (TR75:10). That statement was the same as had been given to Officer Brown the prior night. (TR75:22). (R-16) is Detective Verdadeiro's report. (TR76).

Lt. Shea explained that there are audio recordings of some of the events that night, including the Watch Commander's telephone conversation and the dispatch calls. (TR78-79). (R-12), was identified as a transcript of Dispatcher White advising a neighboring jurisdiction of the stolen gun. (TR79L:19).

Shea testified that his investigation on the issue of whether the firearm was loaded or unloaded revealed that Lt. Johnson told Officer Bell that the gun was loaded. (TR85:9). As part of his investigation, Lt. Shea reviewed: (R-19), the statement of Dispatcher Sergio Chaparro, (TR86:19) (R-20) the supplemental statement of Dispatcher Chaparro, (TR87:2), and (R-21) the statement of Dispatcher Hope White. (TR87:6). After these statements had been taken, Lt. Shea had another conversation with Lt. Mayo at the Monmouth County Prosecutor's office, and sent the written statements to Lt. Mayo. Thereafter the case was reviewed by Assistant Prosecutor Schweers. (TR87:12). On January 27, 2012, Schweers sent a letter to the Long Branch Police Director of Public Safety Alphonse Muolo stating that "[t]here is insufficient evidence to support any allegation of criminal wrongdoing against Lyndon B. Johnson pertaining to this matter", and referring this case back to the City for administrative review and action if appropriate. (R-3). (TR87:25).

The witness then identified (R-13), the initial report by Police Officer Brown which was signed by Lt. Johnson. (TR88:6). The report did not specify if the gun was loaded or that there was ammunition in the backpack. (TR88-89). However, Junior told Brown that there was a magazine in the backpack, but that the magazine was not loaded with any ammunition. (R-14). Officer Brown wrote a memo to Lt. Shea dated January 18, 2012, that summarized his involvement in the "Junior" incident. (TR89).

There was a telephone conversation between Officer Bell and Lt. Johnson at 3:43 am where Johnson told Bell that the gun was loaded. (TR98:21). That conversation took place approximately six minutes after the conversation between Junior and his father. (TR98:25). Lt. Shea's investigation did not reveal whether, as of 3:43 a.m., Lt. Johnson had any knowledge of whether the stolen gun was loaded or not. (TR99:16); (TR100:3).

Lt. Shea confirmed that Dispatcher White conveyed to the dispatchers in neighboring towns that a loaded gun had been stolen out of Lt. Johnson's car. (TR101:20). She got the information about the gun being loaded from Lt. Johnson. (TR101:25). Sometime later, Lt. Shea confirmed that Junior told Officer Brown that the weapon was unloaded. (TR102-103). Having this information, Brown noticed the TRAX message and NCIC form both indicated that the gun was loaded, so he spoke to Lt. Johnson about this issue. (TR103). Lt. Shea testified that the discrepancy is critical because "if it's unloaded and loaded, it's the difference between charging him and not charging him, the son. If he's carrying a loaded handgun in the car, you would charge him with the possession of a weapon." (TR104:21). Lt. Shea clarified that a weapon that is locked with a trigger lock cannot be loaded with ammunition (TR107:23) and further explained that if Junior "were stopped by an officer and he had a loaded handgun in the car, he would be charged with a third-degree offense for possession of a firearm, because he doesn't have a permit to carry in the passenger compartment of the car." (TR108:22). If Junior was carrying an unloaded weapon in the car but it was not appropriately stored, that is not a criminal offense, but he could be reported to the State Police for inappropriate carrying with a possibility of revocation of license. (TR109:14).

When asked about what he would do as a Watch Commander if he had been working on February 12, he indicated that while Junior was a victim of burglary, "they would also be charged with carrying that handgun. If they made an admission they had a loaded handgun in their car, they'd be charged with [unlawful] possession of a weapon." (TR116:17). Interestingly, Lt. Shea was asked a hypothetical question that if his son was the person who had made the complaint about the stolen handgun while he was the Watch Commander, Lt. Shea testified that "I would immediately remove myself from the case as the Watch Commander [because] [t]here's a direct conflict. It's my son. I can't perform an official duty where it directly involves me and my family." (TR124:16). Although, Lt. Shea could not point to any policy that stated that principle, he testified that it was just "common sense". (TR125:2). In fact, one of the reasons Lt. Shea filed disciplinary charges against Lt. Johnson is that he continued to be involved in the case after he learned that his son had his weapon stolen. (TR125:17).

Lt. Shea confirmed that he had never heard of a situation where a Dispatcher in Long Branch issued information to other law enforcement agencies (or on an official police document) about whether a weapon was loaded without that information having been conveyed to them by a Watch Commander or police officer. (TR125:25). Lt. Shea also said he never had any issues with the credibility of either Hope White or Sergio Chaparro.

When confronted by Officer Brown about the "loaded vs. unloaded" discrepancy, Lt. Johnson told Brown that "we found out later on it's unloaded, and we'll correct it. We'll update [the TRAX]." (TR134:4). However, nothing was ever updated by Lt. Johnson or anyone else. (TR134:17; 19).

Lt. Shea was asked what if any "equipment" Junior would take to the shooting range besides the weapon and he testified that you take goggles and hearing protection (TR135:13) however, Junior did not claim any of this equipment was stolen from his car that night. (TR138:8).

The witness then identified Exhibit (R-5), which was a Watch Commander's report completed by Lt. Johnson for the shift in question. (TR139). No "matter of record" was noted on the form, although Lt. Shea testified that a claim of the theft of a weapon (loaded or not) from a car owned by the Watch Commander's son would have been important enough to notify the Patrol Commander. Exhibit (R-5). (TR140:6).

Lt. Shea identified (R-12), a transcript of the telephone call that Hope White made to the West Long Branch Police Department and (R-31), a DVD recording of that call from dispatch on that night. (TR6). He confirmed that Lt. Johnson told Hope White the gun was loaded. (TR8-9).

Next was R-30, a DVD of the transcript of Lt. Johnson's Internal Affairs statement. (TR9:16). When asked where he obtained the information that the gun was loaded, Lt. Johnson stated that "I assume it was my son". (TR12:12). Lt. Shea did not

have an explanation where Lt. Johnson could have obtained information other than from Junior. (TR12:20).

Officer Brown learned from Junior that the gun was not loaded before he started typing his report at 4:04 a.m. (TR15:16; 19). Referring to his report (R-17), Lt. Shea confirmed that when Officer Brown arrived at the station to interview Junior, Junior was already present and standing at Lt. Johnson's desk. (TR22:15). Lt. Johnson did not change the TRAX message, NCIC information, or have the Dispatcher call the local Police Departments back to inform them that the gun was unloaded even after learning from Brown that Junior claimed the gun was unloaded. (TR23-24); (TR26:19).

Lt. Shea confirmed that, "[i]f Junior had told his father he was carrying a loaded handgun in the cabin of his car, he can be charged with possession of a weapon under the statute." (TR80:19) because Junior did not have a license to carry a handgun. (TR81:1). Interestingly, Lt. Shea noted that, twenty minutes after Junior told his father that he had had a loaded weapon in his car, he told Officer Brown that the gun was unloaded with a trigger lock on it. (TR81:19). Lt. Shea confirmed that Johnson should not have been involved in any way in the investigation of the theft of his son's weapon, because it was an obvious conflict, in addition to the fact that there were possible criminal charges against his son. TR84-85.

Lt. Shea testified that he would treat a suspect differently if he had been informed that the suspect was in possession of a stolen weapon which had been loaded, as opposed to the weapon being unloaded. (TR88:16). The witness explained the obvious reason for this difference: "[b]ecause if it's loaded, it can likely kill me if he fires it at me. If it's unloaded, it's not going to kill me – it's a piece of metal". (TR88:18). Lt. Shea's likelihood of using his own weapon in a street confrontation would be different based upon whether the gun was loaded or not. (TR89:1). Lt. Shea explained that, under Long Branch Police Department policy, a police officer "can use deadly force if you have an imminent belief that your life is in danger." (TR91:16).

Lt. Shea confirmed that the fact that a false report was issued at Lt. Johnson's direction is itself misconduct regardless of the potential significance of the false or misleading information. (TR97:15).

Lt. Shea testified concerning the use of Junior's weapon in a subsequent murder. (TR111-112). Lt. Shea explained that the weapon which had been stolen from Junior in Asbury Park was eventually recovered after it had been used in a fatal shooting. The shooter brought it to the Asbury Park Police Department and told them that "[t]his is a Long Branch Officer's gun, I used it to shoot somebody...." (TR120:18).

Anthony O'Blines, was arrested by the Long Branch Police Department and told Officer Yoo that he had information about how the weapon had actually been taken from Junior. (TR5:12). Lt. Shea interviewed O'Blines, but was not allowed to take a formal statement because the Monmouth County Prosecutor's Office did not permit it. (TR5:17). O'Blines told Shea that the gun was taken from Junior in Asbury Park and he was also robbed of money. (TR5:23). A few weeks after the interview, Lt. Shea learned that the weapon was used in a homicide. (TR6:7). This conclusion was subsequently confirmed by gun ownership records. (TR6:23). The original gun owner was Lyndon Johnson, Jr. (TR7:1).

Shea explained Exhibit (R-17), his Internal Affairs Report, and went through the events of the night in chronological order:

1. At 3:37 a.m., Junior calls his dad, and tells him that the gun had been taken from his car. (TR9:11).
2. At 3:43 a.m., Police Officer Bell called into Headquarters and asked if the gun was loaded. Lt. Johnson Senior stated, "yes." (TR9:21).
3. At 3:46 a.m., Dispatcher White, entered the CAD entry that the gun was loaded. (TR9:23; TR10:1).
4. At 3:48 a.m. on a dispatch line Hope White began calling other surrounding towns in the County to notify them that the gun had been stolen and was

loaded. Lt. Johnson was heard in the background yelling someone, asking what was in the backpack. (TR10:3).

5. At 3:50 a.m., White called Ocean Township Police Department, informing them that a gun had been stolen and that it was loaded. (TR10:22).

6. At 3:51 a.m., White called Deal Police Department and Asbury Park Police Department. Johnson is heard in the background yelling at his son. (TR10:24). During one of these phone calls, Johnson is heard yelling: "[h]ow are you going to explain to someone who is going to hire you? How are you going to explain that?" (TR11:3). At that time, Junior was seeking a career in law enforcement, including seeking employment as a Police Officer in the City of Long Branch.

7. At 3:57 a.m., White, again on a taped dispatch line speaking with Monmouth County Dispatch telling them the gun was loaded. TR11:20.

8. At 4:04 a.m., Officer Brown began typing his report concerning the interview with Junior. (TR12:2). Shea later learned that Brown spoke to Lt. Johnson about whether the gun was loaded or not. Brown had heard the information being broadcast that the gun was loaded, but Junior told them the gun was not loaded. (TR12:6). As evidenced by Exhibit (R-14), Brown's conversation with Junior occurred around 3:45 a.m. In response to whether the gun was loaded or not, Lt. Johnson told Brown that TRAX message was wrong and that it was going to be corrected. (TR13:1). Lt. Shea testified, however, that the message was never corrected. (TR13:6). Dispatcher White sends an NCIC report that the firearm was loaded. TR13:9.

9. At 4:19 a.m., White sent the TRAX message that the gun was loaded after the Brown/Johnson conversation Shea had just testified about earlier. (TR13:14).

10. At 4:21 a.m., Brown informed Shamrock that the stolen weapon was unloaded based on Junior's statement. (TR13:22-TR14:6).

Based on this information, some of the Police Officers on patrol thought the weapon was loaded but Shamrock believed it was unloaded. (TR15-16). When asked why this is significant, Lt. Shea testified:

> Because it's a discrepancy of reported facts and also there's a loaded handgun on the street that's tied to a Long Branch

> Police Officer who was a Watch Commander and listed [as] a victim in the report and his son was listed [as] a victim in the report. So, discrepancies could lend one to believe that --that they're not telling the truth. TR17:5.

This was confirmed by Junior after the O'Blines statement, when Junior eventually told Chaparro and Palone the truth about what had happened. (TR17:16).

Shea further testified that it was inappropriate for Lt. Johnson to be involved in his son's case because Lt. Johnson was the owner of the car where the weapon had allegedly been stolen. (TR19). Lt. Shea testified that "[i]t's common sense that you don't get involved in cases that involve your family." (TR19:19). Lt. Shea stated that "I have never seen an officer correct a report in which they themselves are listed as the victim." (TR20:11). It was also inappropriate for Johnson to have approved a report done by Brown which involved Johnson's son and the theft of a gun from Johnson's vehicle. (TR26).

Interestingly, Lt. Shea explained that the vehicle was a crime scene. (TR27:25). As such, the car should have been secured, and the Detective Bureau called out and dusted the vehicle for fingerprints, which the Long Branch Police Department on most car burglaries. (TR28:3). That night however, the crime scene was contaminated because Junior drove the car to Headquarters at his father's direction. (TR29:14; 16; 21). In addition to taking fingerprints, Police Officers could have searched the area and looked for footprints or any other kind of physical evidence. (TR30). However, because the car was driven to Headquarters and because Johnson never called the Detective Bureau out, no such investigation ever took place. (TR31).

Sergent Jeffrey Palone

Palone testified that he has been employed by the Long Branch Police Department for twenty years. (TR8:19). He had previously worked as a corrections officer in the Monmouth County Sheriff's Department. (TR9:9). Palone was promoted to Sergeant in 2005 and since 2010, he has been head of the Detective Bureau. (TR10:6).

He testified that even though the Detective Bureau was not called the night of this incident (TR14:14), Junior provided information that his gun had been stolen from his father's car. (TR15:13). During the January 17th interview, Junior did not state that any of the equipment a person would be expected to possess and bring to a shooting range was reported to be in the car or stolen. (TR17). Palone thought that this was "very strange." (TR17:25).

Junior told the Detectives the magazine stolen from his car was empty. (TR21:13). Palone reiterated that if you are going to leave a weapon in a car it should be in the trunk simply because it is more secure and "least accessible". (TR22:13). "For an incident like this", the Detective bureau would have responded to a call involving a theft of a weapon from "one of our guys... or their son's". (TR26:5). "There is no normal theft of a gun." (TR26:15). "I think at that moment, anytime a gun is stolen out of a house or a vehicle, detectives should be called, forensics should be set up, at least give it a try. . .". (TR27:11). As a Supervisor "I would want to send somebody out". (TR27:18). The theft of Junior's gun should have been handled by a Detective. (TR28:19). Palone testified that Lt. Johnson "should have removed himself from that. .

.". (TR30:17). Palone stated that it would be "wrong for me to be involved" in a case in which his child was making a complaint of having had a weapon stolen. (TR35:2).

Junior's "veracity" was in question after he told the Detectives his story. (TR 38:21). In fact, "at one point, I had a hard time believing his story." (TR 39:9). "Taking the gun in the middle of the night out of his house, a secure area, and putting it--wrapping it in a towel or--or an article of clothing and putting it in the backseat of a car didn't make any sense to me." (TR39:22). Also, the absence of any equipment – headphones, magazines, ammunition, cleaning kit – did not make any sense. (TR40:3). "I don't know what he takes to the gun range." (TR40:5). Junior's story "just didn't sound right". (TR40:8). Also, he gleaned from Junior's body language during the interview, that "I didn't believe he was being honest with me." (TR40:25).

Sgt. Palone eventually learned that Junior's story was not true when Anthony O'Blonze was arrested. (TR41:7). O'Blonze was a "frequent flier" and told Lt. Ray Chaparro "a different version of things that happened" than Junior told the Long Branch Police Department. (TR42:9). O'Blines had a personal relationship with Lt. Johnson's ex-wife (Junior's mother), and knew Junior as well. (TR44). O'Blines told Chaparro that, in fact, Junior had the handgun stolen from him in Asbury Park that night. (TR46).

As a result, on July 27, 2012, Junior was re-interviewed and a videotape of that recording was introduced into evidence in Exhibit (R-52:7). Present during the interview was Junior's attorney. (TR58-59). Sgt. Palone explained that the stolen weapon had eventually turned up, when a person walked into the Freehold Police Department and handed over a gun saying "I just used this gun to kill someone". (TR60:17). That was the same gun stolen from Junior.

On cross-examination, Palone acknowledged that even though there are no rules and regulations in the Long Branch Police Department prohibiting police officers from being involved in investigating their own family members, it is simply a matter of "common sense". You should not be involved in a criminal investigation involving your family. (TR62:3).

Officer Marshall Brown

Brown has been employed by the Long Branch Police Department for thirteen years and is currently serving as a Detective. (TR64:13). In January of 2012, Brown was a Patrol Officer working the overnight shift, 11:00 p.m. to 7:00 a.m. (TR66:4).

He was working patrol and driving his patrol car when he received a call at 3:46 a.m. from Lt. Johnson requesting him to come to Headquarters to investigate a burglary and theft relating to a motor vehicle. (TR68:17).

When he got to the Police Department, he met with Junior and took a report from him regarding the stolen gun. (TR69:2). Before taking the statement, Lt. Johnson advised him that a vehicle had been broken into and items had been stolen. (TR69:24). Brown testified, that the vehicle from which the theft had occurred was registered to Lt. Lyndon Johnson and the report was ultimately approved in writing by Lt. Johnson. (TR71:7).

Officer Brown's report is (R-14). (TR72:17). Junior told him that the weapon was not loaded with a trigger lock (TR74:1) and that there was also one ten round magazine in the backpack but the magazine had no ammunition. (TR74:6). Junior told Brown that the handgun and magazine were in his car in preparation to go to the shooting range the next day. (TR78).

Officer Brown testified that, when transporting a weapon, a gun owner is required to do it in a safe manner – "either in a lockbox or in the trunk of his vehicle." (TR79:11).

Junior had not done so in this case. (TR79:15). When asked, who would have decided whether to charge Junior criminally for his failure to properly secure the weapon, Brown stated that it would have been either a Sergeant or Lt. Johnson who was working that night. (TR80:13). Also, if a criminal complaint was issued it would have been approved by the Watch Commander, who was again Lt. Johnson. (TR80:17).

After taking the statement and going back on the road that night, Brown looked at the TRAX message, which indicated that the weapon was loaded. (TR83-84). Brown then "asked Lt. Johnson whether the gun was in fact loaded, because the information I had received from Lyndon Jr. was that the gun was not loaded." (TR84:14). Officer Brown testified that Johnson replied that "the gun was not loaded and that the TRAX message that was put out was done so in error, and that it was going to be later changed." (TR84:19). However, the TRAX message was never changed. (TR84:23).

Officer Brown testified that he was not aware of any Police Department Rules and Regulations which would prohibit police officers from being involved in a criminal matter involving a family member. (TR87:4). He has had a handful of situations in which a relative was involved, and he would have someone else take the report so that he would not be involved. (TR87:12). Johnson did not include any other Supervisor in the case nor did he call the Detective Bureau and eventually approved Brown's report. (TR88:14-21).

Officer Sergio Chaparro

Chaparro is employed as a Police Officer for the City of Long Branch. At the time of the deposition he had been an officer for four months. (TR10:25). At the time of this incident, he worked as a Dispatcher for the Long Branch Police Department for three or four years. (TR11:11). Chaparro worked the midnight shift, and his Watch Commander was Lt. Johnson. (TR12:1).

On January 16, 2012, he recalled that, Junior called the dispatch line and asked to speak with his father. (TR15:13). Junior sounded a little "panicked" in his

conversation, so Chaparro asked him if anything was the matter. Junior replied that someone had broken into his car. (TR16:4). Chaparro started to generate a CAD. (TR16:15) then transferred the call to Lt. Johnson. Shortly thereafter, Junior came to Headquarters. (TR17:8). Chaparro was able to overhear some of the conversation that Junior had with his father, and recalled that his father was "very, very angry and just was scolding his son". (TR18:16). "How could you be so stupid you left the gun in the car? What were you doing with the gun?" (TR19:12). Chaparro recalled Lt. Johnson asking his son if the gun was loaded but did not recall hearing Junior's answer. (TR19-20).

In the Internal Affairs statement (R-19), he recalled Lt. Johnson "venting and pacing" in the dispatch area, stating in a loud voice: "How could you be so stupid, why would you have a loaded gun in your car?" (TR21-22). Based upon this statement, Chaparro concluded that the stolen gun had been loaded with ammunition. (TR22:13). Chaparro recalls that Lt. Johnson told the Dispatchers "[h]ave everybody on the road call Headquarters or a 10-2." (TR23:6). A "call in for a 10-2" is ordered by the Watch Commander if there is something "sensitive you don't want to put out over the radio for anybody to have scanners." (TR24:10).

The TRAX message (R-10 and R-11) that was issued at Lt. Johnson's direction contained a picture of the Glock that had been stolen but the picture was taken off the internet. (TR28). Pursuant to departmental procedure, Chaparro gave Lt. Johnson the TRAX message for review and Johnson told him to include a better picture of the Glock. Then Chaparro asked Johnson if he wanted anything changed and Lt. Johnson replied: "No, it's okay, it's good." (TR30:21).

As Chaparro was creating the TRAX message, Officer Brown came in the station typed his report on the burglary of the vehicle. (TR31:24). Chaparro believes that he sent the TRAX message before Brown finished typing his report. (TR32:23). At no point after Chaparro sent out the TRAX (R-11) was he asked to amend it. (TR33:16). Chaparro recalls some conversation that night about whether the stolen gun had in fact been loaded or unloaded. (TR34:4). Chaparro recalls that he and Dispatcher White

both asked Lt. Johnson whether the gun was loaded or unloaded. (TR34:10). Junior was standing in the area when this question was asked. Upon hearing the question, Lt. Johnson turned to Junior and asked if the gun was loaded; Junior didn't really answer, and Johnson reiterated the question: "Was the fucking gun loaded?" (TR34:20). Chaparro looked over at Junior, who picked up his head and responded yes to the question. (TR34:25).

On cross-examination, Chaparro reiterated that he heard "with his own ears" Junior say to Lt. Johnson that the gun was loaded. (TR36:19).

Dispatcher Hope White

White has been a Dispatcher with the Long Branch Police Department since November 1, 1999. (TR106). She has known Lt. Johnson before that date, when she was an EMT. She worked on the midnight shift, with Lt. Johnson as her Watch Commander, for more than four years. (TR107).

When asked about the events of January 16, 2012 she explained that the original call from Junior came into dispatch and Chaparro took the call. (TR111:11_. She sat six or eight feet from Chaparro so she could hear Chaparro's side of the conversation, but not the party on the other end. (TR11:20). Her first involvement came when Lt. Johnson told her and Chaparro to call other local law enforcement agencies to inform them that his son's vehicle was broken into and that "a gym bag was stolen with a loaded gun." (TR112:14). As White began to call various departments, she was asked by other dispatchers if the gun was loaded; so, she asked Lt. Johnson if the gun was loaded, and he replied, "yes". (TR114:1).

Lt. Johnson was standing behind her when she made these calls (TR114:8) before Junior ever got to headquarters. (TR114:14). White continued conveying that the gun was loaded (TR114) and began preparing the NCIC entry and TRAX message. (TR114:11). White testified that she was the one who created the NCIC message. (TR115:2).

White recalled that Officer Brown said to Johnson that his son claimed the gun was unloaded. (TR123). Once the information about the gun being loaded was changed the entries and TRAX message should have been modified "if that was the truth". (TR128:15). If the statement about the gun being loaded was not the truth, then the entry should have stayed the same. (TR129:1). She explained that there is a great deal of difference between issuing various messages about a stolen gun having been loaded as compared to unloaded. (TR129-130). White specifically testified that "We don't enter every gun that is loaded. . .[e]very gun is not entered as a loaded gun." (TR130:12-15). At no time was she ever directed by Lt. Johnson to change the information. (TR135:6).

For Appellant

Lieutenant Lyndon Johnson

Lt. Johnson testified that, on January 16, 2012, Dispatcher Chaparro transferred a call from his son and he could tell something was wrong by the tone of his son's voice. (TR5). According to Lt. Johnson, Junior told him that he "fucked up" and that his gun was stolen out of his car. (TR6:1). Lt. Johnson testified that he got "very limited basic information surrounding the events" and told him to get to the station immediately. (TR6:10). Thereafter, Lt. Johnson had the Dispatchers call "all surrounding towns" to convey the information. (TR6:23).

Lt. Johnson had Officer Brown come to Headquarters to interview Junior, and "I turn my son over to him. . .". (TR7:4). Lt. Johnson said that he told Chaparro to start a TRAX message and to get it out to all the other towns as to what had occurred. (TR7:8).

He recalled going "going back and forth" with the Dispatchers about the details of the case (TR7:12) and he was not "concerned" "whether the gun was loaded, unloaded, trigger locked, un-trigger locked". "I was concerned that there was a loaded possible gun out in the street and that someone could be the victim of a shooting." (TR7:17).

At some point, Officer Brown came to him with his report, and Lt. Johnson approved it, sending it along to the Detective Bureau. (TR8:1). "[A]t that point, I didn't care. I was just concerned with trying to locate this gun." (TR8:6). His first concern was the gun, and that, as a Long Branch Police Department Watch Commander, "[m]y second responsibility was to my son. I thought about his career, his future career. I thought about how this could possibly, you know, be devastating to his career." TR13:10.

Lt. Johnson testified that, as far as he was concerned, ". . . a handgun. . . is always considered loaded." (TR14:19). "I would treat a stolen gun if I was making a report or any officer, I would like to believe that he would think to treat the gun as if it were loaded, because I wasn't there when it was taken, so I don't know its condition. For the safety of the public and all parties involved, you treat it as loaded." (TR16:1). Lt. Johnson then testified that he had "no idea" if the gun was loaded or unloaded (TR17:8) despite speaking to his son. But they did discuss whether or not the trigger lock was on it. (TR19-20).

Lt. Johnson admitted that there was discussion between he, Brown and Chaparro whether the gun was loaded. (TR21:17). Lt. Johnson testified that, because his son told him the car had been unlocked, there was no evidentiary value to checking for fingerprints on the car, because there was no forced entry. (TR24:1). But, if a police officer working that night suggested they dust the car, Lt. Johnson would not have stopped them. (TR24:16).

Brown's report was factually accurate (TR29:25) and he conceded that he was the victim of a theft, because he owned the car. (TR31:23).

On cross-examination, Lt. Johnson did not recall if his son told him the gun was loaded. (TR55:8). When confronted with the fact that the dispatchers heard the conversation, Johnson replied: "[i]t could have been true." (TR55:16). He had no facts to indicate that the conversation had not taken place (TR55:24) and agreed that the only way he would have known if it was loaded was if his son had told him. (TR57:23).

When asked why he conveyed to White and Chaparro that the gun was loaded he testified "[b]ecause it was a stolen gun." (TR64:3).

Johnson agreed that if his son had told him that the gun was loaded he should have been charged criminally (TR64:10) for an improperly stored gun in a car, even if the gun was unloaded. (TR72:2 4). He stated that the ammo and the gun would have to be properly stored together (TR72:12) and insisted that his son storing an unloaded weapon in a backpack could meet the requirement of the statute, which states "securely tied package". (TR75-76).

Lt. Johnson acknowledged that if his son had told him the gun was loaded and he later approved a report that said the gun was unloaded, he would have been approving a false report. (TR110:19). Lt. Johnson acknowledged that he did not fix the TRAX message, and felt no need. (TR113:7-11). There was no need because he could not rely on what Brown had told him. (TR113-115).

Lt. Johnson was confronted with the fact that his son said that he had stored his firearm and equipment for the shooting range in his car, (TR133:25), yet the equipment was not reported in his backpack in the car. (TR134:8); 11. Lt. Johnson said that his son had his own ear and eye protection for shooting his weapon. (TR138:16).

When shown (R-5), in which he reported as Watch Commander that there were no major incidents on his shift, (TR140:21), he did not consider the theft of a handgun to be a "major incident". (TR140:25). He also agreed that it was a mistake to approve Brown's report. (TR141:25). Johnson agreed that the teletype message he authorized went out at 4:19 a.m., which was forty-two minutes after the first call from his son. (TR143). The time was later corrected to 4:09 a.m., meaning there was a thirty-one-minute difference. (TR145-146). The TRAX message was sent out at 4:19 a.m., which is forty-two minutes after the initial call from Junior to his father. (TR148:22). Lt. Johnson agreed that Officer Brown spoke to him after he saw the TRAX message. (TR149:1) but did not speak to Brown about what Junior had told Brown. Certainly, not before he conveyed information to the Dispatchers about the contents of the telex

message. (TR149:22). Lt. Johnson also agreed that he never told Chaparro or White to change the information in the telex message or the TRAX message. (TR150:12). Johnson agreed that Brown's report was completed at 4:09 a.m. (TR152:11). In his opinion, it did not make any difference in terms of what his son said about the gun being unloaded (TR154:12) and believed his son's story. (TR157:10). The weapon was later used as a weapon in a murder. (TR158:8).

Lt. Johnson agreed that the Detective Bureau are experts in dusting for fingerprints (TR170:9) and did not call the Detective Bureau because "I felt that there was no evidential value to be retrieved." (TR171:17). Lt. Johnson immediately removed any conflict of interest when he "pushed enter on the computer." (TR171:25).

FINDINGS OF FACT

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J.Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

The testimony of respondent's witnesses: Lieutenant Thomas Shea, Sergeant Jeffery Palone, Officer Marshall Brown, Officer Sergio Chaparro and Dispatcher Hope White were especially credible and persuasive. Even from simply reading the transcripts, their testimony was clear and concise. It was obvious that they had concerns regarding their interaction with Lt. Johnson and his actions respecting his son. It was also clear from reading the testimony they had no axe to grind. In fact, it was apparent from the testimony that they simply wanted to do their jobs.

Conversely, Johnson's testimony was not credible. His own testimony appeared to support the respondent's arguments and assisted them in proving the facts of the case by a preponderance of the evidence. He admitted to being involved in the incident with his son and discussing the matter with him despite Junior possibly being subject to criminal prosecution.

Lt. Johnson approved the TRAX message that the gun was loaded and said, at that time, "I was concerned that there was a loaded possible gun out in the street and that someone could be the victim of a shooting." (TR7:17). Despite him failing to recall that while in the station, he asked Junior if the gun was loaded; Junior didn't really answer, and Johnson reiterated asking: "Was the fucking gun loaded?" (TR34:20). Chaparro testified that he looked at Junior, who picked up his head and responded, "yes" to the question. (TR34:25). This interaction was all witnessed by Chaparro. Clearly, Lt. Johnson knew early-on that the gun was loaded. Admittedly, "[m]y second responsibility was to my son. I thought about his career, his future career. I thought about how this could possibly, you know, be devastating to his career." (TR13:10). Then, Junior told Brown that the weapon was in a backpack in the backseat of his father's car and it was not loaded but there was ammunition in the same backpack. (TR51:12). Knowing this, the chronology of events surrounding this case provide clarity as to what Lt. Johnson knew or should have known.

- At 3:37 a.m., Junior called Lt. Johnson, and told him that his gun had been stolen. (TR9:11).

- At 3:43 a.m., Lt. Johnson told Bell the gun was loaded. (TR9:20).
- At 3:46 a.m., Dispatcher White, acting under the direction of Lt. Johnson, entered the CAD entry that the gun was loaded. (TR9:23; TR10:1).
- At 3:48 a.m., Hope White called surrounding towns notifying the gun was stolen and loaded. (TR10:3).
- At 3:50 a.m., White called Ocean Township Police Department, informing them that a gun had been stolen and it was loaded. (TR10:22).
- At 3:51 a.m., White called Deal Asbury Park Police informing them that a gun had been stolen and it was loaded. Johnson is heard in the background yelling at his son. (TR10:24). Johnson is heard yelling at his son: "[h]ow are you going to explain to someone who is going to hire you? How are you going to explain that?" (TR11:3).
- At 3:45 a.m., Brown interviews Junior who says the gun is not loaded.
- At 3:57 a.m., White, told Monmouth County that the gun was loaded. (TR11:20).
- At 4:04 a.m., Brown spoke to Lt. Johnson about whether the gun was loaded and heard information being broadcast that the gun was loaded. (TR12:6). As evidenced by Exhibit (R-14), Lt. Johnson told Brown that TRAX message was wrong and that it was going to be corrected. (TR13:1). Also, Dispatcher White sent an NCIC report that the firearm was loaded. (TR13:9).
- At 4:19 a.m., White sent out a TRAX message stating that the gun was loaded. (TR13:14).
- At 4:21 a.m., Brown informed Shamrock that Junior told him the weapon was unloaded. (TR13:22).

The appellant argues that he was not aware of any conflicting information while issuing the TRAX report. However, that is not the case. In fact, as of 4:04 a.m., Lt. Johnson had information that the gun was unloaded from his own son and he did nothing to correct the TRAX information. Uncontested is the fact that the person with the best knowledge of whether the gun was loaded or not was Junior and he told Brown the gun was not loaded at 4:04 a.m. The fact that some officers thought the gun was loaded and some thought that it was unloaded is extremely troublesome. Lt. Johnson's

failure to act or permit an investigation by the detectives allowed incorrect information to be entered in TRAX thereby endangering the lives of countless officers and civilians. The fact that he "felt that there was no evidential value to be retrieved" (TR171:17) by notifying the detective bureau is extremely suspect and impeded an appropriate third party investigation on whether the gun was loaded.

Lt. Johnson believes that he used good judgment and did nothing wrong despite never correcting the TRAX message and not calling the detective bureau to properly investigate. (TR13:6). In fact, Lt. Johnson stated that he removed the conflict when he "pushed enter on the computer", this refers to approving Officer Brown's report. However, that is not supported by any fact in the record. I found those actions, at the time, to be a self-serving.

It was obvious that Johnson attempted to "sell" his version of the facts to the trier of fact. Particularly, his recitation and demonstration of the contact with the officers and his son was not credible. It was not realistic to believe a competent police officer would ignore the conflict in the case and remain involved in a case where he and his son were the victims of a crime, relay incorrect information to neighboring agencies about a stolen loaded firearm and not call the detective bureau to investigate. Again, the only explanation was self-preservation.

Based upon the documents in evidence and testimony I **FIND,** by a preponderance of credible evidence, that on January 16, 2012, Lt. Johnson and his son were the victims of a crime. I **FURTHER FIND,** on the same date, Lt. Johnson remained involved in the investigation, failed to contact the Detective Bureau and approved the report officer Brown took from Junior. I **FURTHER FIND,** Lt. Johnson knowingly and purposefully approved a report in which he and his son were listed as victims and knew that it contained false information.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service

Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil-service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil-service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

This matter involves a major disciplinary action brought by the respondent appointing authority against the appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

The respondent sustained charges of violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause.

Initially, Lt. Johnson has been charged with a violation of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties. Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties." Although progressive discipline is the general rule, sheer incompetency can be the grounds for firing without progressive discipline.

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See, In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

"There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). (Note: Gaines had a substantial prior disciplinary history, but the case is frequently quoted as a threshold statement of civil service law.)

"In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a county treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that '[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest.' The court determined that Klusaritz's prior record is 'of no moment' because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the County.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

Lt. Johnson and his son were the victims of a crime and yet he remained involved in the investigation by directing the taking of statements and not calling the Detective Bureau. He knowingly and purposefully approved a report in which he and his son were listed as victims and aware that it contained false information. Lt. Johnson allowed incorrect information to be disseminated to the surrounding departments that could have endangered the lives of officers and civilians. Accordingly, I **CONCLUDE** that the respondent has met its burden in demonstrating support to sustain a charge of Incompetency, Inefficiency, Failure to Perform Duties. Charges of violation of N.J.A.C. 4A:2-2.3(a)(1) are hereby **SUSTAINED**.

Respondent sustained charges of N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties. An employee must be able to physically, intellectually, and psychologically perform his or her duties. Where an employer brings a charge under N.J.A.C. 4A:2-

2.3(a)(3) it is challenging the employee's ability to perform the duties associated with the position, and is seeking to remove the employee or demote him or her to a different position, but is bringing a charge that is not, strictly speaking, disciplinary in nature. However, from the employee's point of view, the outcome may be just as severe as if it were a disciplinary charge. Obviously, the outcome of this type of charge will turn on medical or performance based evidence. None of that was presented here. I **CONCLUDE** that the respondent has not met its burden in demonstrating support to sustain a charge of N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties. The charge of violating of N.J.A.C. 4A:2-2.3(a)(3) is hereby **DISMISSED**.

Respondent also sustained charges against appellant for Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Suspension or removal may be justified where the misconduct occurred while the employee was off duty. Emmons, supra, 63 N.J. Super. at 140.

It is difficult to contemplate a more basic example of conduct which could destroy public respect in the delivery of governmental services than the image of a police Lieutenant disseminating incorrect information about a stolen firearm. Also, knowingly and purposefully approving a report in which he and his son were listed as victims while being aware that it contained false information. I **CONCLUDE** that appellant's actions

constitute Unbecoming Conduct, and the charge of N.J.A.C. 4A:2-2.3(a)(6) is hereby **SUSTAINED**.

The respondent also sustained charges for a violation of N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty). Neglect of Duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

Again, it is difficult to contemplate a more basic example of Neglect of Duty than the image of a police lieutenant, as articulated above. I **CONCLUDE** that appellant's actions constitute Neglect of Duty, and the charge of N.J.A.C. 4A:2-2.3(a)(7) is hereby **SUSTAINED**.

Finally, the charge of N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause was sustained against Lt. Johnson. The definition of which is amorphous terminology taken literally constitutes insufficient notice to appellant of the charge faced and is impossible to prepare to defend. As such, standing alone without any other specifically lesser included offenses, I **CONCLUDE** that the respondent has not met its burden in demonstrating support to sustain a charge of N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause. The charge of violating of N.J.A.C. 4A:2-2.3(a)(12) is hereby **DISMISSED**.

CONCLUSION

I **CONCLUDE** respondent has met its burden of proof by demonstrating that on January 16, 2012, Lt. Johnson and his son were the victims of a crime, while Lt. Johnson remained involved in the investigation he failed to contact the Detective Bureau and allowed false information to be disseminated to surrounding police departments regarding the gun being loaded. Lt. Johnson knowingly and purposefully approved a report in which he and his son were listed as victims knowing that it contained false information

I **FURTHER CONCLUDE** for the reasons set forth herein respondent has proven by a preponderance of the evidence that petitioner acted in a manner that constituted violations of N.J.A.C. 4A:2-2.3(a)(1) Incompetency, Inefficiency, Failure to Perform Duties; N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming; N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty and those charges are **SUSTAINED**. Likewise, I **CONCLUDE** for the reasons set forth herein respondent has not proven by a preponderance of the evidence that petitioner acted in a manner that constituted violations of N.J.A.C. 4A:2-2.3(a)(3) Inability to Perform Duties and N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause and those charges are **DISMISSED**.

PENALTY

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, supra, 38 N.J. 523-24. Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and

immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. See Carter v. Bordentown, 191 N.J. 474 (2007).

The record reflects that appellant has a prior disciplinary history. It is noted that a single charge of Incompetency, Inefficiency or Failure to Perform Duties by itself, can be sufficient grounds for termination in the absence of any other disciplinary history. Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline).

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> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

Furthermore, police officers are held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576–77 (1990). Both police officers and correction officers represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Here, the general principles of progressive disciplinary standards make clear that removal can be imposed. Given the high standard of conduct required, I **CONCLUDE** that the respondent has demonstrated that the removal is warranted.

The record in the above case coupled with commonsense reflects inexcusable Incompetency, Inefficiency, Failure to Perform Duties, Conduct Unbecoming and Neglect of Duty. Considering the record in the present matter including the appellant's disciplinary record, the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action Terminating and Removing appellant was justified.

DECISION AND ORDER

I **ORDER** petitioner's appeal be **DENIED** and the charges levied against Lt. Johnson including Incompetency, Inefficiency, Failure to Perform Duties, Conduct Unbecoming and Neglect of Duty be **SUSTAINED**. I **FURTHER ORDER** respondent's imposition of removal is **AFFIRMED**.

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. 40A:14-204.

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.

August 23, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 8/23/17

Date Mailed to Parties: 8/23/17

/vj

APPENDIX

WITNESSES

For Appellant:

Lieutenant Lyndon Johnson

For Respondent:

Lieutenant Thomas Shea

Sergeant Jeffery Palone

Officer Marshall Brown

Officer Sergio Chaparro

Hope White

EXHIBITS

For Appellant:

None

For Respondent:

R-1	December 10, 2012, Preliminary Notice of Disciplinary Action
R-2	August 8, 2013, Final Notice of Disciplinary Action
R-3	January 27, 2012, letter from Assistant Prosecutor Gregory Schweers to Director Alphonse Muolo
R-4	February 22, 2012, letter from First Assistant Prosecutor Richard Incremona to Director Alphonse Muolo
R-5	January 16, 2012, memo from Lt. Johnson to Captain Peter Antonucci
R-6	January 16, 2012, CAD entry
R-7	January 16, 2012, NCIC Entry Form
R-8	January 16, 2012, message regarding stolen gun
R-9	Printout of "New Bulletin" summary
R-10	January 16, 2012, "TRAX" message

R-11	January 16, 2012, "stolen handgun" alert
R-12	January 16, 2012, transcription tape recording of conversation in Police Headquarters
R-13	January 16, 2012, "stolen gun" Incident Report
R-14	January 16, 2012, narrative of Patrol Marshall E. Brown
R-15	January 18, 2012, memo from Police Officer Brown to Lt. Shea
R-16	January 24, 2012, Narrative of Detective Michael Verdadeiro
R-17	August 29, 2012, Lt. Shea Investigative Report document regarding stolen gun
R-18	"Stolen Gun" documents
R-19	January 19, 2012, Statement of Sergio Chaparro
R-20	January 20, 2012, Supplemental Statement of Sergio Chaparro
R-21	January 20, 2012, Statement of Hope White
R-22	January 20, 2012, Statement of Marshall Brown
R-23	April 4, 2012, Statement of Richard O'Brien
R-24	February 26, 2012, memo from Lt. Shea to Lt. Johnson
R-25	March 7, 2012, letter from Stuart Alterman, Esq. to Lt. Shea
R-26	March 8, 2012, memo from Lt. Johnson to Lt. Shea
R-27	January 17, 2012, Statement of Lyndon Johnson Jr.
R-28	June 25, 2012, Arrest Report for Anthony O'Blines
R-29	August 2, 2012, letter from Gregory Schweers to Lt. Shea
R-30	August 30, 2012, videotaped statement of Lt. Lyndon Johnson
R-31	DVD recording of telephone conversations from January 16, 2012
R-32	November 26, 2013, Civil Service Commission Denial of Request for Interim Relief (seeking restraint of Johnson's suspension without pay)
R-33	"Trigger lock" pictures

R-34 "Cable lock" pictures

R-35 July 27, 2012, videotape recording of interview of Lyndon Johnson, Jr.

In the Matter of Eric Miller, East Jersey State Prison, Department of Corrections

CSC DKT. NO. 2013-1919
OAL DKT. NO. CSV 02647-13

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 18, 2017 JM

The Civil Service Commission, at its meeting of October 18, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 02647-13

IN THE MATTER OF ERIC MILLER,
EAST JERSEY STATE PRISON
DEPARTMENT OF CORRECTIONS.

Todd McConnell, Executive Vice President #2, PBA Local 105, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Christopher Weber, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of the State of New Jersey, attorneys)

Record Closed: September 15, 2017 Decided: September 20, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 29, 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Release and Settlement Agreement were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

September 20, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

Date Mailed to Parties: SEP 22 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

OAL DKT. NO. CSV 02647-2013N
AGENCY DKT. NO. 2013-1919

SETTLEMENT AGREEMENT

IN THE MATTER OF
ERIC MILLER
AND
DEPARTMENT OF CORRECTIONS,
EAST JERSEY STATE PRISON

The parties in this appeal, Appellant Eric Miller (hereinafter "Appellant"), and Respondent Appointing Authority Department of Corrections (East Jersey State Prison) (hereinafter "Respondent"), have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action, dated April 25, 2013, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming an employee)	Removal	April 26, 2013
2. N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause)	Removal	April 26, 2013
3. Human Resources Bulletin 84-17 (as amended), Section (C)(11) (conduct unbecoming an employee)	Removal	April 26, 2013
4. Human Resources Bulletin 84-17 (as amended), Section (E)(1) (violation of a rule, regulation, policy, procedure, order, or administrative decision)	Removal	April 26, 2013

B. The parties have agreed to the following:

1. The total number of days of suspended pay Respondent has imposed on Appellant to date is as follows: N/A.

2. The total number of days of backpay, if any, to be paid by Respondent to Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A .

4. Respondent will accept a General Resignation from Appellant, pursuant to N.J.A.C. 4A:2-6.3, effective April 26, 2013. Appellant agrees not to seek or accept employment with Respondent, or any of its subsidiaries, at any time in the future.

C. Appellant withdraws his appeal and request for a hearing, and Respondent agrees that the following result will occur with regard to each charge:
The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b). The parties acknowledge that pursuant to N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Respondent shall amend Appellant's personnel records to conform to the terms of this Settlement Agreement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude Respondent from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or

prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions.

J. This Settlement Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

8/4/2017
DATE

ERIC MILLER

8/4/2017
DATE

ON BEHALF OF APPELLANT UP#2 PB#105

9/13/17
DATE

ON BEHALF OF RESPONDENT

CERTIFICATION

I, Eric Miller, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/4/2017
DATE


ERIC MILLER

10-18-17

STATE OF NEW JERSEY

In the Matter of Phillip Morris and Tony Coleman, Burlington County Jail

CSC DKT. NOS. 2016-971 & 2016-1017
OAL DKTS. NO. CSV 17361-15 & 177363-15
(Consolidated)

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 20, 2017 BW

The appeals of Phillip Morris, County Correction Sergeant, 60 working day suspension, on charges and Tony Coleman, County Correction Officer, Burlington County Jail, 10 working day suspension, on charges, were heard by Administrative Law Judge Lisa James-Beavers, who rendered her initial decision on September 15, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 60 working day suspension to a 30 working day suspension for Phillip Morris and uphold the 10 working day suspension for Tony Coleman.

Since the penalty for Phillip Morris has been modified, he is entitled to 30 days of back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10. However, neither he nor Coleman are entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph*

Cozzino (MSB, decided September 21, 1989). In the case at hand, although Morris' penalty was modified by the Commission, charges were sustained and major discipline was imposed. Thus, neither he nor Coleman have prevailed on all or substantially all of the primary issues of the appeal. Consequently, as they have failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

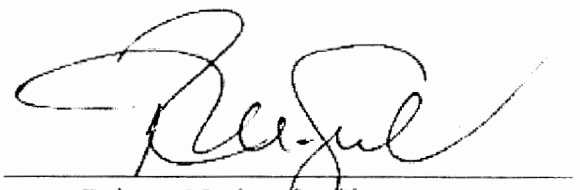
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining Phillip Morris and Tony Coleman was justified. The Commission therefore modifies Phillip Morris' 60 working day suspension to a 30 working day suspension and upholds Tony Coleman's 10 working day suspension. The Commission further orders that Phillip Morris be granted 30 days of back pay, benefits and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C.* 4A:2-2.10. An affidavit of mitigation shall be submitted by or on behalf of Morris to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 17361-15
AGENCY DKT. NO. 2016-971

IN THE MATTER OF
PHILLIP MORRIS,
BURLINGTON COUNTY JAIL.

IN THE MATTER OF
TONY COLEMAN,
BURLINGTON COUNTY JAIL.

OAL DKT. NO. CSV 17363-15
AGENCY DKT. NO. 2016-1017
(CONSOLIDATED)

Mark W. Catanzaro, Esq., for appellant Phillip Morris

Jeffrey N. German, Esq., for appellant Tony Coleman

Andrew C. Rimol, Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: July 29, 2016 Decided: September 15, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE

Appellants Phillip Morris and Tony Coleman appeal their suspensions for sixty days and ten days, respectively, imposed by respondent Burlington County Jail (Jail) as a result of an incident of excessive force by another corrections officer that occurred on July 12, 2015. The Jail alleges that the appellants failed to intervene and failed to

accurately report that the excessive force had occurred. Morris and Coleman are not charged with the excessive use of force. They argue that they had no knowledge of excessive force being used against an inmate at the time in question.

PROCEDURAL HISTORY

Phillip Morris

On July 15, 2015, the Jail served Morris with a Preliminary Notice of Disciplinary Action charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause. N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12). "Other sufficient cause" includes violations of sections 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1165, 1150 and 1170 of the Jail's Policy and Procedures Manual with regard to an incident that occurred at the Jail on July 12, 2015. On July 29, 2015, the Jail served Morris with an Amended Preliminary Notice of Disciplinary Action charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12), specifically, violation of Policy and Procedures Sections 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1065, 1150 and 1170, with regard to the above incident. On August 25, 2015, the Jail served Morris with a Final Notice of Disciplinary Action sustaining the charges and imposing a sixty working day suspension. On August 31, 2015, Morris appealed.

Tony Coleman

On July 21, 2015, the Jail served Coleman with a Preliminary Notice of Disciplinary Action charging him with incompetency, inefficiency or failure to perform duties; conduct unbecoming a public employee; neglect of duty; and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(1), (6), (7) and (12), specifically, violation of Policy and Procedures Sections 1021, 1023, 1036, 1043, 1044, 1065, 1150 and 1170, with regard to an incident that occurred at the Jail on July 12, 2015. On September 3, 2015, the Jail served Coleman with a Final Notice of Disciplinary Action, which sustained the charges

and provided for a ten working day suspension. On September 9, 2015, Coleman appealed.

The Civil Service Commission transmitted the two cases to the Office of Administrative Law (OAL) where they were filed as contested cases on October 28, 2015, pursuant to N.J.S.A. 11A:2-14, N.J.S.A. 52:14B-2(b), and N.J.A.C. 4A:2-2.8. I held hearings on June 28, 2016. The record closed after receipt of written summations on July 29, 2016.

STIPULATIONS OF FACT

1. Tony Coleman (Coleman) began employment with the Burlington County Department of Corrections in the position of County Corrections Officer on August 28, 2006.
2. Phillip P. Morris (Morris) began employment with the Burlington County Department of Corrections in the position of County Corrections Officer on September 30, 2002, and was promoted to Sergeant on August 23, 2009.
3. The Burlington County Jail (Jail) is located at 54 Grant Street, Mt. Holly, New Jersey 08060.
4. On September 27, 2012, Coleman received and acknowledged receipt of the Jail's Standard Operating Policies and Procedures.
5. On September 27, 2012, Morris received and acknowledged receipt of the Jail's Standard Operating Policies and Procedures.

FACTUAL DISCUSSION

The following facts are undisputed. On July 12, 2015, an inmate was brought in by the State Police to the Jail. The two appellants and Officer Salter were bringing him into the facility. The inmate became belligerent and the officers had to take him to the ground to restrain him. Officer Salter used excessive force while the inmate was on the ground. The incident was recorded by the jail cameras.

Respondent's Case

Captain Matthew Leith

Matthew Leith testified that he has been with the Burlington County Corrections Department for sixteen and a half years. He became administrative captain in June 2015 when he was promoted from administrative lieutenant. He handles disciplinary actions for the jail as well as handles department hearings, reviews incident reports and makes recommendations to the warden. He reviews video if it exists, reviews reports and makes recommendations of discipline.

On July 12, 2015, the medical department reported that an inmate said that he had been assaulted at the jail. The inmate had been taken to detention at night. Leith reviewed the video of the hallway in which the inmate said the incident occurred. (R-12.) He described what was shown on the video as the inmate was being led in through the sallie port. Booking is to the left at the entry way to the jail. Sergeant Morris was to the left of the screen and Salter was to the right. Trailing behind is Officer Coleman. After the mark of 1:21:08, the inmate began resisting the officers and Salter put his hand to the inmate's mouth. Sergeant Morris got the OC can out and sprayed. Salter, at 1:21:12, then applied his hand to the inmate's mouth a second time. Coleman was behind and Morris was trying to control the wrists of the inmate. They took the inmate down to the floor in a standard procedure. Salter was at the feet of the inmate and Morris was looking down toward the inmate when Salter delivered a kick to the inmate. That is the first incident of excessive force that Morris and Coleman witnessed. It is generally never necessary to kick or stomp an inmate except sometimes in self-defense. There was no legitimate purpose to Salter's deliberate kick to the midsection of the inmate at 1:21:14. The second kick delivered to the inmate he believes Morris saw. Again, there was no legitimate law enforcement purpose to the second kick. It appears that the inmate was sliding down the hallway on his back. Morris was stepping along with the movement of the inmate at 1:21:17. Morris then put away his OC can and, at 1:21:18, there was a third kick. Morris took a step to the left of the screen. It appears Morris could see the third kick since he was standing between Salter and the

inmate. Morris did not engage with the inmate during the fourth kick; however, there was nothing obstructing Morris' view as the kick was delivered with Morris looking over the inmate. Morris then went down to the floor to secure the inmate at 1:21:22. That is what he should have done and was trained to do. A code was called and officers responded to the call. In all, there were four kicks to the inmate that he believed were excessive use of force. He never saw Morris attempt to stop the conduct while he was there. Captain Leith concluded after reading all the reports associated with the incident that Morris witnessed excessive use of force and failed to report it or take action. He believes that Morris left out of his report facts regarding the excessive use of force by Salter. (R-6.)

Captain Leith testified to the various policies and procedures that he believed Morris violated in connection with the incident. He believes Morris violated Paragraphs 6, 7 and 14 of Policy Section 1006. (R-8.) The sergeant is responsible for those under him. Morris also violated Sections 1012, 1013, 1015 and 1018. (R-9.) He also violated Section 1043, which requires an officer to prevent injury to other persons. (R-9.) He violated Section 1044 because based on the video the officer should have been stopped. He also violated Section 1065 because he cannot make a false or misleading report and Captain Leith believes that he witnessed Officer Salter kicking the inmate, but did not note such action in his report.

Captain Leith testified that Morris violated the use of force policy, Section 1150, that by not reporting that it happened, it was like he did it himself. (R-10.) Similarly, he violated the policy on reporting incidents, Section 1170, in that a sergeant must submit clear and concise reports and not leave out crucial facts. He also believed Morris neglected his duty to report the actions of his subordinates. There is no dispute that Morris received a copy of the policies in question. (R-13.) Morris' duties, according to Captain Leith, are to prevent abuse from occurring and stop it if he sees it. Morris failed to do so in this instance.

Captain Leith then viewed the recording of the incident with regard to Officer Coleman. Although Coleman was trailing the inmate and Morris initially, Coleman

closed in to assist and restrain the inmate. Coleman was looking down toward the inmate as the kick was delivered. He did not appear to be doing anything that would prevent him from seeing the kick. When the second kick was delivered, Coleman was still bent over the inmate. When the third kick was delivered, he was still bending down over the inmate with no obstruction. The fourth kick was difficult to see where Coleman was as he was right behind Officer Salter. The video regarding Coleman starts at 1:21:07 and stops at 1:21:23. There were only six or seven seconds during which the actual action took place. He believed that Coleman had to see and, therefore, had an obligation to report excessive force. Coleman did not report any excessive use of force. Thus, Captain Leith believes that Coleman violated Policies 1021, 1023, 1036, 1043, 1044 and 1065. (R-9.) Coleman also should have reported the incident pursuant to Section 1150. (R-10.) He believes that Coleman omitted facts to cover up the excessive force. He has a duty to submit an accurate report under Policy 1170. (R-11.) There is no question that Coleman received the policies in question. (R-14.) Captain Leith testified that the primary task of the officers is the safety and security of the facility. The excessive use of force goes against that primary task. He and the warden discussed the penalties to be imposed for hiding that illegal activity took place. Morris had a greater duty to report than Coleman did. Coleman left out the use of force in his report. (R-7.)

Captain Leith further testified that the inmate was being moved to detention because he would not comply with questions being asked by Coleman. They were thus going to bypass the usual medical examination until the inmate calmed down. The Jail stresses the importance of inmates being checked out. It is also a crime for an inmate to cause bodily fluids to be placed on an officer due to possible infectious diseases. The inmate had threatened to spit on the officers. The inmate is shown in the tape turning his head to the left indicating a spitting motion. He agreed that there are approximately six or seven problematic seconds from 1:21:12 to 1:21:19 when the last kick is given by Salter. An officer or sergeant must pay attention to the inmate, the team and the other officers around. He agreed that at some point Morris used his left hand to call the Code 2 that there is a disruptive inmate. He does not know for sure what Morris saw; but he believes from the video that he saw the kicks.

Captain Leith testified that officers know that there is video throughout the jail and Morris knows that there were cameras especially at the point of intake where they were. The reports are made by the officers and sergeants involved and go up to the lieutenant, then to the captain's packet which contains all the reports. The other captain will also go over what occurred prior to Captain Leith coming on. The officers do not have access to the video prior to writing their reports. They have to prepare the reports by the end of their shift. A report by Nurse Mary Murphy indicates that following the Code 2 the inmate was brought to the infirmary, evaluated and returned to custody. Another nurse's report, that of Rachel Watson, notes that the inmate was pepper sprayed and also had a medium cut. Nothing in the report indicated that the inmate had been kicked or stomped. None of the parties to this incident were interviewed. The internal affairs department was disbanded in 2014, so interviews are not done. They are not trained investigators, so they do not investigate. He estimates he looked at the video three to five times before charging Morris and Coleman. When Captain Leith looked at the video he had already been told there was a potential problem. He agreed that reports are not always consistent with each other when an incident occurs and not every officer sees things that take place. He believes Morris was looking in the direction of the inmate being kicked.

Captain Leith testified that Coleman was not involved in the take down of the inmate. He watched the video three to five times because he wanted to be accurate. He saw the excessive use of force immediately upon watching the video. He agrees that Coleman's perspective is not the camera's perspective. Coleman's duty was to maintain control of the inmate and it appeared that he grabbed the back of the inmate's jumper. Coleman never said he was subject to OC spray. Coleman is not required to report what he does not see. He reviewed the recording again and it appears that at the time of the first kick, 1:21:14, Coleman's eyes are on the inmate and not on Salter. No one knows how the cut on the inmate's chin got there. He believes that it was part of Salter's kick of the inmate, but he does not know. Coleman did not report that the OC spray had any effect on his eyes. The facts set forth in Coleman's incident report are true, but he believes that there was an omission of the excessive use of force. He did report that the inmate was taken down and sprayed, which is use of force. Coleman's

shift was 6:00 p.m. to 6:00 a.m., twelve hours. The inability to take statements came from a union decision saying that they are not trained investigators and should not interview. They were asked to disband the internal affairs department.

In order to make his recommendation, Captain Leith reviewed the video, incident reports, inmate file and medical file. He believed that based on those items, there was enough for him to charge Officer Coleman and Sergeant Morris. Neither Coleman nor Morris sought any medical attention as a result of the OC spray. He noted that the camera in the jail does not record like a videotape, rather it is a series of still shots.

Sergeant Philip Morris' Case

Sgt. Philip Morris testified that he has been with the Department of Corrections for fourteen years, seven years as a sergeant. On July 12, 2015, he worked the shift from 6:00 p.m. to 6:00 a.m. That night, there were two night supervisors and one lieutenant on duty. His duty is to assign duties to the shift officers and ensure the safety and the security of the facility.

On July 12, 2015, Morris received a call from Intake that a rowdy inmate was coming in to the facility. The procedure for a new inmate is that they place him into a holding tank while processing. He went to the area where the inmate is strip searched and changed into a jail uniform. The inmate was noncompliant, so he had to get taken to segregation. The inmate was angry and may have been on drugs. Segregation is a more restrictive form of punishment.

Due to his belligerence, the inmate was handcuffed to be taken to prehearing detention. He got argumentative with Officer Salter when the escort began. The officers must hold onto him when escorting. They told him to stop resisting. He tried to spin away from the wall and spit at one of the officers. Morris got the OC spray and administered it. The inmate was taken to the ground. He called a Code Two with his other hand on a radio. After being taken down, the inmate was still resisting restraint. The inmate had been on his feet when the OC was sprayed. The inmate was squirming

and trying to resist the whole way. The inmate calmed down after several commands to do so. Sergeant Morris testified that he never saw Officer Salter kicking the inmate. He was aware that everything in that hallway was videotaped. He took the inmate straight to the clinic to be seen and evaluated for the OC spray. There were no injuries. After they finished in the infirmary, they took him to preliminary hearing segregation. He later submitted a report. (R-6.) He did not view the video, but wrote his report based on memory. The kick to the inmate was never reported to him either. He was never questioned about the event. The inmate only complained of the OC spray in his eyes.

Morris testified that if he witnessed excessive force being used, he would have an obligation to report it. He also would have an obligation to stop it. He was trying to call the code and control the inmate at the same time. When walking down the hall he was about one and one-half feet from the inmate. When Officer Salter's foot came down on the inmate, there was nothing blocking his view of the inmate. He agreed that the kicks to the inmate occurred at twenty-one minutes and fourteen seconds into the video going to approximately twenty minutes and eighteen seconds into the video. Thus, the whole incident took place within approximately four seconds. He agreed that his primary responsibility is the safety and security of the facility and that he has a duty to be aware of what is going on with his officers and inmates. He did not report any other person that was affected by the OC spray. He agreed that the inmate was treated for a cut on his chin, but does not agree that the inmate had actually complained of that. He heard the inmate complain only about the pepper spray. He only became aware of what he was accused of when the captain came to his house and served him with the charges. He then went to a hearing, but had never been questioned before that. As of the date of hearing, Salter had been suspended. (R-17.)

Appellant Tony Coleman's Case

Tony Coleman testified that he had been employed as a corrections officer for ten years. He was on workers' compensation at the time of the hearing. On July 12, 2015, he was working a 6:00 a.m. to 6:00 p.m. shift. He was assigned to the intake section called "Booking" where they process inmates. He travels with a team in order to

get the inmate to a cell after taking him to the clinic. It was approximately 1:20 a.m. when the inmate in question was brought in. He was irate and kicking on the door. The State Police were arguing with him and the inmate was belligerent, yelling, screaming and cursing. He was not involved at that time. Once the sergeant opened the door and started speaking to him, the inmate refused to answer his questions. Sergeant Morris was unable to get him processed. As they were escorting the inmate, he was walking approximately six to eight feet behind. Coleman saw the resistance the inmate was giving and he heard an officer say the inmate tried to spit on him. Although he was looking in the direction of Officer Salter, he could not see in front of them. He ran up to assist when the OC was sprayed. The OC spray affected him and he was coughing and his eyes were watering. He was part of the take down and his head was down in order to focus on the inmate's head. He put his hand on the inmate's shoulder to keep from getting spit on. That is what he was trained to do. He was trained to focus on the head and shoulders. The inmate was still struggling and resisting and trying to turn his head. He did not want to get bitten or spit on by the inmate. He tried to hold his collar to keep him from moving around. He did not see any contact between Officer Salter and the inmate. He did not see Salter kick the inmate. The incident lasted only seconds. He went to the clinic with the inmate. He heard the inmate complain of being sprayed with the OC spray. He wrote his report after the shift. (R-7.) It reflects what he saw. If he saw more, he would have written it. He did not omit any facts and he knew that his supervisor would review the video of the hallway when it occurred.

Officer Coleman noted that at the time of the first kick, twenty-one minutes and fourteen seconds into the video, he was standing over the inmate's head and there was nothing in between his view of the inmate. He was trying to hold the inmate down and was looking at the inmate's head and his hand was on the inmate's collar. Again, there was nothing between him, the inmate and Officer Salter. He agrees that if he witnessed excessive force he would have had to report it. He did not reference the OC spray in his report. He did not find out what he was accused of until two days later.

FINDINGS OF FACT

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself" in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521-522. See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Although it is true that the camera view is not the view that Morris and Coleman had at the time of the incident, their duty was to know what the inmate was doing as well as what was being done to the inmate. The best evidence is still the video itself, which demonstrates that Morris and Coleman were looking down at the inmate while the kicks were being delivered and the excessive force was occurring. Therefore, the self-serving testimony of Morris and Coleman is not credible when they say that they did not see any excessive use of force. The fact that they knew the camera was there does not mean that they knew the captain would actually view the video footage. Captain Leith testified that he does not view it regularly.

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following:

On July 12, 2015, Morris and Coleman became involved in an incident with an inmate where excessive force was used by Officer Salter. Officers Salter and Coleman

were under Morris' command at the time of the incident. The video of the incident, which is actually a series of still photographs, shows Morris and Coleman looking toward the inmate while the inmate is being kicked by Officer Salter. The CD shows that the entire incident took about six seconds. Sgt. Morris' primary responsibility is the safety and security of the facility. As the supervisor, he has a duty to be aware of what is going on with his officers and inmates. Morris had to have seen Officer Salter kick the inmate because the video shows him looking toward the action and because it was his duty to see it. Morris did not stop the excessive use of force or report that it occurred.

Coleman was initially way behind the inmate, but he came up to the inmate when Sgt. Morris sprayed the O.C. He put his hand on the inmate's shoulder to keep from getting spit on as he was trained to do. He had to have seen Officer Salter kick the struggling inmate when he came up to subdue the inmate. Coleman has a duty to report another officer's excessive use of force if he sees it. He saw the use of excessive force, but did not report it. Coleman's testimony that he was affected by the OC spray makes his testimony even less credible as he did not mention that he was so affected in his report.

Captain Leith did not undertake any additional investigation other than reading the reports and viewing the video.

CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a). Such a civil service employee

may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Morris

The Jail charged Morris with: N.J.A.C. 4A:2-2-3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically a violation of the BCDF Policy and Procedure Manual Section 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1165, 1150 and 1170. Morris argues in his defense that the Jail's belief that Morris committed these violations does not equal proof. The Jail conducted no investigation other than Captain Leith replaying the video taken from another angle many times. Now, using hindsight that Morris did not have, the Jail seeks to find his actions in violation of his duties. Morris denies having seen and perceived excessive force being used and denies misrepresenting his report.

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). Given that Morris had a duty to supervise the officers under his command and be aware of any actions taken against an inmate that is

under his control, he failed to perform those duties in failing to stop Officer Salter and failing to report what he had done. Morris managed to see everything that the inmate was doing, so it is less than credible that he did not see Officer Salter kick the inmate when he was down on the ground. I therefore **CONCLUDE** that the Jail proved this charge by a preponderance of the credible evidence.

One of the grounds for discipline of public employees is "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In addition to the arguments above, Morris argues that it is patently unfair to judge his actions and charge him on the basis of a video that had to be replayed over and over in order to determine that he failed to stop or report the excessive use of force. I disagree. First, Captain Leith testified credibly that he saw the excessive use of force on his first viewing of the video. Further, his duty is to know what the officers under his command are doing and to secure the inmates in his custody. He cannot act like an uninterested bystander who is not trained to pay attention to all aspects of the jail. For a sergeant to fail to stop and report an officer who commits excessive use of force is conduct that has a tendency to affect the morale or efficiency of a governmental unit. I **CONCLUDE** that the Jail met its burden of proving by a preponderance of the credible evidence that Morris committed conduct unbecoming a public employee.

As neglect is a failure to perform duties or failure to provide the standard of care that the position requires, for the same reasons that the Jail proved failure to perform duties under N.J.A.C. 4A:2-2.3(a)(6), I **CONCLUDE** that the Jail proved by a preponderance of the credible evidence that Morris neglected his duty as a sergeant pursuant to N.J.A.C. 4A:2-2.3(a)(7).

Last, the Jail charged Morris with violating N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically a violation of the BCDF Policy and Procedure Manual Section 1006, 1012, 1013, 1015, 1018, 1023, 1043, 1044, 1064, 1165, 1150 and 1170. Rather than go through each of these policies, which seems a bit like overkill, I note the following to be the most relevant to the conduct alleged. Captain Leith explained Sergeant Morris violated Paragraphs 6, 7 and 14 of Policy Section 1006 because the sergeant is responsible for those under him and these provisions require him to ensure that the officers comply with the rules of the Jail, stop rule infractions as they occur and supervise all corrections officers and inmate activities. I **CONCLUDE** that the Jail sustained its burden of proving that Morris violated those provisions of Section 1006. Sergeant Morris is also alleged to have violated Sections 1012, 1013, 1015 and 1018. (R-9.) These provisions collectively require the sergeant to accept and not evade responsibility for the conduct of his subordinates. I **CONCLUDE** that the Jail proved these charges. Section 1018 adds the duty to report any instance of misconduct or violation of rules on the part of a subordinate. By reporting only on the conduct of the inmate and not the conduct of Officer Salter other than taking him to the ground, he violated this provision as well and I so **CONCLUDE**. Although Captain Leith went on to describe how Morris also violated Section 1043, which requires an officer to prevent injury to other persons; Section 1044, because based on the video the officer should have been stopped; and Section 1065 because he cannot make a false or misleading report and he witnessed Officers Salter kicking the inmate, but did not note such action in his report, these charges are so similar to those I have already concluded were violated that I decline to make rulings on them. Suffice it to say that the Jail proved by a preponderance of the credible evidence that Morris violated N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

Coleman

The Jail charged Coleman with: N.J.A.C. 4A:2-2-3(a)(1), incompetency, inefficiency, or failure to perform duties; N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically a violation of the BCDF Policy and Procedure Manual Sections 1021, 1023, 1036, 1043, 1044, 1065, 1150 and 1170.

As set forth above, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Although Coleman's duty to intervene was not as great as that of Morris since Morris was his supervisor as well as the supervisor of Officer Salter, he still had a duty to report the use of excessive force. If Coleman saw the inmate taken down as he reported, he saw the kicks of Officer Salter. By only reporting on the conduct of the inmate and not that of Officer Salter, Coleman failed to perform his duty to report the conduct of Officer Salter. I therefore **CONCLUDE** that the Jail proved by a preponderance of the credible evidence that Coleman violated N.J.A.C. 4A:2-2.3(a)(1).

Because conduct unbecoming a public employee is conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services, Coleman also violated this provision. There is nothing more serious than the use of excessive force by those who have custody over inmates. Coleman saw his fellow officer's actions because it was his duty to see excessive use of force and report on it. The failure to report it certainly affects the efficiency of the Jail. Therefore, I **CONCLUDE** that the Jail proved Coleman violated N.J.A.C. 4A:2-2.3(a)(6).

The next charge, neglect of duty, is similar to that of incompetency, inefficiency or failure to perform duties. The video surveillance footage showed that Coleman had an unobstructed view of the inmate at the time that Officer Salter delivered the kicks. I **CONCLUDE** Coleman's failure to try to stop them and failure to report the excessive use of force was neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7).

The last charge, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically refers to a violation of the BCDF Policy and Procedure Manual Sections 1021, 1023, 1036, 1043, 1044, 1065, 1150 and 1170. Captain Leith testified Coleman violated Policies 1021, 1023, 1036, which require an officer to conduct himself professionally; comply with all rules and policies; and be respectful to all individuals, respectively. Although these policies are rather general, based on my findings that Coleman was aware of the use of excessive force and did not try to stop it and did not report it, these charges are supported by the evidence. Section 1043 refers to the actual use of force, which Coleman was not alleged or proven to have used, so this charge is dismissed. Section 1044 requires officers to protect the rights of all individuals and perform their duties with honesty. The last sentence of the policy references mistreatment of an inmate, which also sounds like Coleman is being alleged to have committed the excessive use of force. Therefore, I think this charge is overkill and is not sufficiently supported.

Policy 1065 prohibits the making of false or misleading statements or written reports by intentional omission or misrepresentation of information known to an officer. I have found that Coleman saw the excessive use of force and did not include that information in his report. Whether he did so intentionally is hard to say, but he certainly neglected his duty to do so. The Jail has proven that Coleman violated N.J.A.C. 4A:2-2.3(a)12, other sufficient cause. I am dismissing the violation of Section 1065.

The Jail charged that Coleman also should have reported the incident pursuant to Section 1150. Because this charge only speaks to the failure to report on the use of physical force, the Jail has proven this charge as set forth above. Policy 1170 requires that the report be "accurate, chronological and truthful." What Coleman's report said was accurate, but it left out that physical force was used on the inmate. This constitutes a violation of the policy, so this charge is sustained.

In summary, regarding the charge of "other sufficient cause," I **CONCLUDE** that the Jail proved by a preponderance of the credible evidence that Coleman violated Policy Manual Sections 1021, 1023, 1036, 1150 and 1170.

The primary duty of the officers and supervisors is the safety and security of the facility. This makes it all the more baffling that there is no current mechanism to professionally investigate incidents like this at the Jail when they occur. Viewing the video should be followed up with interviews. In the present case, the video was useful, but in many instances the video will be useless or at best, ambiguous. The Jail's current handling of situations like this is unsustainable and the Jail should rectify it as soon as possible. Nevertheless, in the present case, I **CONCLUDE** that it proved the charges against Morris and Coleman by a preponderance of the credible evidence in the record.

PENALTY

N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. In general, principles of progressive discipline apply to the discipline of officers. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board (now the Commission) considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Morris

The Jail suspended Morris for sixty days. Morris' conduct is worse than that of Coleman because he was the supervising officer at the time of the incident. As a

command officer, he sets an example for the other officers in the facility and is responsible for carrying out the goals and ideals of the administration. See Marino v. County of Union, CSV 7159-98, Initial Decision (March 19, 2001), <http://njlaw.rutgers.edu/collections/oal/>. His prior discipline consists of a letter reprimand and a five-day suspension for neglect in 2010.[1] (R-15.) In addition, he has many timeclock violations resulting in a letter. The Jail argues that Morris' conduct warrants a significant penalty that will both send a message that such conduct is not acceptable and deter any other officers from failing to report the use of excessive force on an inmate.

In West New York v. Bock, 38 N.J. 500, 523 (1962), the New Jersey Supreme Court stated that a public employee's prior disciplinary record may be referred to, where appropriate, in assessing the reasonableness of a penalty for a current offense. However, exceptions to the application of "progressive discipline" have been made where certain acts are "so egregious in nature and/or so detrimental to the public welfare that immediate termination is warranted, notwithstanding a good disciplinary history." Curtiss v. East Jersey State Prison, CSV 12007-96, Initial Decision (Dec. 17, 1997), aff'd., Merit System Bd. (Jan. 27, 1998) http://njlaw.rutgers.edu/collections/oal/. In addition, law enforcement officers are held to a higher standard than a civilian public employee. See Moorestown v. Armstrong, 89 N.J. Super. 560 (App. Div. 1965), certify. Den. 47 N.J. 80 (1966). The leap from a five-day suspension to a sixty-day suspension is a great one and does not lend itself to the term "progressive discipline." Nevertheless, allowing excessive use of force to occur without trying to stop it and failing to report it is very serious. Based on the foregoing I **CONCLUDE** that a thirty-day suspension meets the goals that the Jail set forth in arguing for the sustaining of the sixty-day suspension, while still adhering to the concept of progressive discipline.

Coleman

The Jail imposed a suspension of ten days on Coleman. The Jail argues that Coleman had an affirmative duty to take action to stop his fellow officer from using

[1] It was agreed at the hearing that I would not look at the appellants' prior disciplinary history until I had concluded that they had violated N.J.A.C. 4A:2-2.3. I abided by that agreement.

excessive force on an inmate and to report such an incident. Coleman's disciplinary history consists of four reprimands for abuse for incidents in 2009, 2010, 2013 and 2014 and a one-day suspension for abuse for an October 27, 2014 incident. In addition, he has several timeclock violations.

As set forth above, using the concept of progressive discipline, I **CONCLUDE** that a ten-day suspension was an appropriate penalty for the violations that the Jail proved.

ORDER

I hereby **ORDER** that the charges in the Final Notice of Disciplinary Action against Phillip Morris be **AFFIRMED.** However, I **ORDER** the penalty modified from sixty days to thirty days.

I hereby **ORDER** that the charges in the Final Notice of Disciplinary Action against Tony Coleman be **AFFIRMED** except the charges that he violated Sections 1043, 1044 and 1065 of the BCDC Policy and Procedures Manual, which are **DISMISSED**. The suspension of ten days is **AFFIRMED**.

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

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

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

September 15, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: September 15, 2017

Date Mailed to Parties: September 15, 2017

cmo

APPENDIX
WITNESSES

For Appellants:

Sergeant Philip Morris
Officer Tony Coleman

For Respondent:

Captain Matthew Leith

EXHIBITS

For Appellants:

AM-1 Identified not admitted
AM-2 Identified not admitted

For Respondents:

R-1 Preliminary Notice of Disciplinary Action (31-A) to Phillip P. Morris
R-2 Amended Preliminary Notice of Disciplinary Action (31-A) to Phillip P. Morris
R-3 Final Notice of Disciplinary Action (31-B) to Phillip P. Morris
R-4 Preliminary Notice of Disciplinary Action (31-A) to Tony L. Coleman
R-5 Final Notice of Disciplinary Action (31-A) to Tony L. Coleman
R-6 Memo/Incident Report by Sgt. P. Morris to Lt. T. Blango, dated July 12, 2015
R-7 Incident Report by T. Coleman, dated July 12, 2015
R-8 Burlington County Detention Center Policies and Procedures Section 1006
R-9 Burlington County Detention Center Policies and Procedures Sections

1012, 1013, 1015, 1018, 1021, 1023, 1036, 1043, 1044, 1064 and 1065

R-10 Burlington County Detention Center Policies and Procedures Section 1150

R-11 Burlington County Detention Center Policies and Procedures Section 1170

R-12 Burlington County Detention Center GVideo Surveillance from July 12, 2015

R-13 Standard Operating Policies and Procedures Acknowledgement by Phillip P. Morris, dated September 27, 2012

R-14 Standard Operating Policies and Procedures Acknowledgement by Tony L. Coleman, dated September 27, 2012

R-15 Employee Discipline History for Phillip P. Morris (R-15)

R-16 Employee Discipline History for Tony L. Coleman (R-16)

R-17 Letter to Phillip P. Morris from Mildred Scholtz, Jail Administrator/Warden, scheduling Loudermill Hearing for July 15, 2015

10-13-17

STATE OF NEW JERSEY

In the Matter of James Slyke
Monmouth County,
Department of Human Services

CSC DKT. NO. 2014-1419
OAL DKT. NO. CSV 17652-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 19, 2017 BW

The appeal of James Slyke, Human Services Specialist 1, Monmouth County, Department of Human Services, release at the end of the working test period, was heard by Acting Director and Chief Administrative Law Judge Laura Sanders, who rendered her initial decision on September 15, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on October 18, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in releasing the appellant at the end of the working test period was justified. The Commission therefore affirms that action and dismisses the appeal of James Slyke.

Re: James Slyke

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
OCTOBER 18, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 17652-13
AGENCY DKT. NO. 2014-1419

IN THE MATTER OF JAMES SLYKE,
MONMOUTH COUNTY DEPARTMENT
OF HUMAN SERVICES

James Slyke, appellant, pro se

Steven W. Kleinman, Special County Counsel, for respondent Monmouth County (Andrea I. Bazer, County Counsel)

Record Closed: February 2, 2016 Decided: September 15, 2017

BEFORE **LAURA SANDERS,** Acting Director and Chief ALJ:

STATEMENT OF THE CASE

James Slyke (Appellant, Slyke) appeals his termination from his position as Human Services Specialist 1 (HHS-1), at the respondent Monmouth County Department of Human Services (the County), following the working test period (WTP). The termination was effective on November 15, 2013. He contends that he was terminated in bad faith, because he was evaluated based on a group of tests, rather than his actual work in the daily operation of the office. He also feels that all of the tests did not fairly represent his training.

PROCEDURAL HISTORY

Slyke was notified of the termination through a letter dated November 15, 2013. By letter dated November 17, 2013, he requested a fair hearing, and the Civil Service Commission transmitted the contested case to the Office of Administrative Law (OAL), N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was filed with the OAL on December 9, 2013, and heard on February 2, 2016 by Administrative Law Judge John Schuster, III. Thereafter, Judge Schuster, who conducted the hearing, did not issue an Initial Decision, and the initial forty-five day period for issuing an initial decision expired on March 18, 2016, for unknown reasons ALJ Schuster neither submitted any requests for an extension or issued an initial decision prior to his retirement. An additional extension was granted to allow time to contact the parties pursuant to N.J.A.C. 1:1-14.13, to determine if the parties could settle or wished to relitigate it upon transfer to a new judge. The answer having been in the negative, the undersigned was assigned the case, and yet another extension was requested and received to allow time to request and receive the transcript and to review the entire record.

FACTUAL DISCUSSION AND FINDINGS

The following is not in dispute. Appellant began his ninety-day working test period or about August 19, 2013, when he signed a copy of the requirements for a successful completion of the WTP. Prior to transitioning to the position of HSS-1, Slyke served as a social service assistant at the County.

In order to successfully complete the WTP, a trainee must pass what the County characterizes as the performance-based examination, which comprises six sample cases. The candidate also must earn passing scores on a knowledge-based examination, and observations of interviews of actual clients. Additionally, the prospective employee must satisfactorily demonstrate the ability to accurately process and complete the work of a HHS-1 as outlined in the job description. (R-1.) If a trainee fails one of the four parts, he or she is not retained. Slyke passed the knowledge-based examination, but did not pass the performance-based examination, as he achieved passing scores on only two of the six

sample cases. (R-12.) He was notified by letter and in person by Granville LeMeune (LeMeunne), human resources administrator for the MCBSS, on November 15, 2013, who explained to Slyke why he did not pass the WTP, told him he would not be hired on a permanent basis, and provided him with information on his recourse. In this meeting, LeMeunne provided Slyke with a hard copy of the letter, which terminated him at close of business that day.

The dispute centers on whether Slyke was terminated in bad faith. Kathleen Vitale (Vitale), assistant training supervisor at the County, testified on behalf of the respondent. She stated that the responsibilities of the HHS-1 position are to determine an applicant's eligibility for benefits, including food stamps, Medicaid or cash assistance. Slyke's class of trainees was divided in half, with his group supervised by Eileen Corliss (Corliss), human resources 3. Vitale stated that the training for Slyke's particular group of trainees was primarily focused on Supplemental Nutrition Assistance Program benefits (food stamps). (Tr. at 15.)

The first three weeks of training were in a classroom environment where the trainees learned programs and general procedures, how to determine eligibility, and how to utilize the computer. After the classroom learning, the trainees began working under their immediate supervisor on the floor to learn the daily routine.

Vitale described the four criteria trainees need to meet to successfully complete the WTP. In the performance-based exam, trainees must achieve passing scores on four of six practical cases. On the knowledge-based examination, they must obtain a score of at least seventy-five to pass. In the interview observation, trainees are brought to the client intake and reception area, and their interviews are observed. Finally, trainees must satisfactorily demonstrate the ability to process and complete the daily work of an HSS-1.

The examinations are usually given within the last ten-days of the WTP, as occurred here. Vitale stated that performance examinations are utilized to demonstrate that HSS-1 can be self-sufficient. A HHS-1 must be able to take a case, go through the procedures, and determine if the person is eligible or ineligible. If this is not done correctly, the clients are very likely to suffer because they will be either receiving fewer benefits than they are

entitled to receive, or too many, which they will eventually have to pay back. Vitale testified that the requirements have been a part of the program at least back to her hiring in 2000, when she went through the same process. The County does not deviate from this process. People have failed before, and none have been retained as an HSS-1. She added that anyone who is not retained following the WTP can always reapply.

Vitale stated that Slyke was surprised and not happy when he was informed that he did not pass the performance-based examination, never said whether the test was fair or unfair, and signed the final progress report. (R-3.) She added that there were interim progress reports for Slyke that were adequate, and trainees met with supervisors every two weeks to assess their progress. Finally, Vitale stated that Slyke was present for all training, except for the training on benefits, which he did not need as he was a current employee of the County.

Corliss testified that she supervised Slyke and dealt with him regularly. She trained appellant on the floor, set up packets, and live cases for trainees to go through. Corliss added that the main objective of the training was for food stamps, since the primary job responsibility for the trainees was to learn all the various aspects of the food stamp program.

Corliss explained the details of Slyke's performance examination, and why he did not pass. (R-12.) The first test case is the interim referring form (IRF), which she described as a form a client sends in reporting changes. The test requires the worker to review the form with the client to verify the information, and enter the information into the system. Corliss stated that the information is important as it will determine whether the client will continue to receive benefits. Slyke's errors in the IRF test included missing the certification period, which caused the client to not receive benefits. He received a non-passing score of sixty (R-5).

The second test case was for a prior General Assistance/food stamp client reapplying for food stamps only. (R-12.) Multiple errors led to deductions of thirty-five points for a non-passing score of thirty-five. In one calculation, the General Assistance income was left out, which would have led to a real-world consequence of a lower calculation for food stamp benefits. Other errors included incorrect segment and person types. (R-5.) By way of

comparison, Corliss referred to an example of a passing score on the same test by one of Slyke's classmates. (R-9.)

Although Slyke passed tests three and four (R-12), he received a non-passing score of fifty-five on test five, which required him to put an application into the system in a way that if a client calls in, there would be an application pending. It was commonly referred to putting a new case in "app status." Because of the kind of errors Slyke made, the system would not have recognized that an application was pending, and eventually, the system would have deleted the application, such that the County would no longer have a record that a valid, pending application existed. In real life, this would have caused a deserving client to have to start a new application and to lose back benefits to which they were entitled. (R-7.)

The final test was an application for food stamps. Slyke received a non-passing score of sixty. Based upon Slyke's incorrect calculations, the applicant would not have received the correct benefits. (R-8.)

Corliss referred to examples of passing scores by one of Slyke's classmates for tests five and six to demonstrate that the trainees who received the same training during the WTP were able to obtain passing scores. (R-10, R-11.)

Corliss stated that no one else in Slyke's class failed this exam, but others have failed in the past. No one has ever been granted an exemption from the requirement to pass at least four of the six parts of the performance exam. Thus, Corliss, said, the appellant was treated in the same manner as any other trainee. Corliss acknowledged that she was surprised he did not pass the test. (Tr. at 67.) She added that there is only one correct way to pass the examination, and the examples of passing examinations were introduced only to demonstrate this, not to compare Slyke to others. On redirect, Corliss stated that everyone was trained on the subject matter that was tested on.

Appellant Slyke testified on his own behalf. He stated that he knows that this is an uphill battle, and wanted to have his opinion heard. As an example of unfairness, he pointed in particular to a test case in which "GA cases . . . (were) being turned into Food

Stamp cases that they took back from us because they had to go to GA workers to try and figure out what the error was. We were told to do some a certain way, and when done on the test, it was considered wrong." (Tr. at 76, 77.) Additionally, he stated that, "because two of the six cases (were not) strictly food stamps, I just felt like I didn't have a fair advantage of passing all six." (Tr. at 77.) This is because he was trained primarily in food stamps. On cross examination, he admitted that he received the same training as everyone else, was not singled out unfairly, and was given the same opportunities as everyone else to pass the test.

Having heard the testimony of the witnesses and reviewed the documentary evidence, I **FIND** as **FACT** that Slyke did not pass the performance-based examination. I **FIND** that the County has established that others with the same training passed the examination. I **FIND** that the County has long used the four-part criteria without deviation, and therefore, I **FIND** that he did not successfully complete the working test period.

LEGAL ANALYSIS AND CONCLUSION

The purpose of the working test period under the Civil Service system is to enable the appointing authority to evaluate an employee's fitness through observed job performance under actual working conditions. Cipriano v. Dep't of Civil Serv., 151 N.J. Super. 86, 89 (App. Div. 1977). On appeal to the Civil Service Commission, the only issue is whether the appointing authority exercised good faith in determining that the employee was not competent to perform satisfactorily the duties of that position. Briggs v. Dep't of Civil Serv., 64 N.J. Super. 351 (App. Div. 1960). Thus, it is up to the employee to demonstrate that the appointing authority has acted in bad faith. N.J.A.C. 4A:2-4.3(b); Devine v. Plainfield, 31 N.J. Super. 300 (App. Div. 1954); Fitzpatrick v. Civil Serv. Comm'n, 91 N.J. Super. 535, 539 (App. Div. 1966). Bad faith is "not simply bad judgment or negligence, but implies the conscious doing of a wrong because of dishonest purpose." Brown v. State Dep't of Educ., 97 N.J.A.R.2d (CSV) 537, 541 (citations omitted).

To prove "bad faith" in a working test period case, the employee must prove sinister motive or conscious doing of a wrong because of a dishonest purpose. The fact that the appointing authority's determination was not entirely accurate or even that the facts allow for

a determination different than that of the appointing authority is not alone sufficient to prove bad faith. Broughton v. Woodbine Dev'l Ctr., CSV 4179-02, Initial Decision (Oct. 1, 2003), adopted, Merit System Board (Nov. 24, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>.

The evidence does not support a conclusion of bad faith. While the appellant has offered general grievances with the performance-based examination, he has provided no evidence of unfair treatment. Rather, the County demonstrated that it utilized standard criteria, that all candidates were provided with the same training and the same opportunity to successfully complete the WTP.

A showing of bad faith by the appellant is a high standard to meet, and I **CONCLUDE** that Slyke has not been able to meet that burden.

ORDER

The termination at the end of the working test period is hereby **AFFIRMED**.

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

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

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

September 15, 2017
DATE

Laura Sanders
LAURA SANDERS
ACTING DIRECTOR AND CHIEF
ADMINISTRATIVE LAW JUDGE

Date Received at Agency: September 15, 2017

Date Mailed to Parties: September 15, 2017

/nd

APPENDIX

WITNESSES

For appellant:

James Slyke

For respondent:

Kathleen Vitale

Eileen Corliss

EXHIBITS

For appellant:

None

For respondent:

R-1 Successful Completion of the Working Test Period for the On-the-Job Training Program, dated August 19, 2013

R-2 Notice of Counseling, County of Monmouth, dated September 17, 2013

R-3 Monmouth County Division of Social Services, Report on Progress of Probationer form, dated November 15, 2013

R-4 Termination Letter from Granville LeMeune, Human Resources Administrator, County of Monmouth, Department of Human Services, Division of Social Services, to appellant, dated November 15, 2013

R-5 Appellant's Performance Based Examination (IRF Test) #1

R-6 Appellant's Performance Based Examination #2

R-7 Appellant's Performance Based Examination #5

R-8 Appellant's Performance Based Examination #6

R-9 Sample Answers to Performance Based Examination #2

R-10 Sample Answers to Performance Based Examination #5

R-11 Sample Answers to Performance Based Examination #6

R-12 Training Class Test Results form for appellant, dated November 12, 2013

In the Matter of Evelyn Acevedo, New Jersey Veterans Memorial Home, Vineland Department of Military and Veterans Affairs

CSC DKT. NO. 2018-436
OAL DKT. NO. CSV 11973-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11973-17

AGENCY DKT. NO. 2018-436

IN THE MATTER OF EVELYN ACEVEDO, NEW JERSEY VETERANS MEMORIAL HOME, VINELAND, DEPARTMENT OF MILITARY AND VETERANS AFFAIRS.

Robert C. Little, AFSCME New Jersey, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Susan C. Sweeney, Esq., Administrator, for respondent New Jersey Department of Military and Veterans Affairs, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: September 26, 2017 Decided: September 27, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Evelyn Acevedo, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on August 18, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

September 27, 2017 — Lisa James-Beavers
DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 10/11/17

Date Mailed to Parties: 10/11/17

/nd

OAL DKT. NO. CSV 11973-2017S
AGENCY DKT. NO. 2018-436

SETTLEMENT AGREEMENT

IN THE MATTER OF

evelyn acevedo

AND

NJDMAVA NJ Veterans Home @ Vineland

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 7/19/17 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)6		
2. (a)11	Removal	7/19/17
3. DD230.05 A(11)		
4. DD230.05 C(8)		
5. DD230.05 (C13)		
DD230.05 (e1)		

B. The Appellant evelyn acevedo withdraws his/her appeal and request for a hearing, and the Respondent appointing authority NJDMAVA agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. NJAC 4A:2-2.3(a)6	Dismissed	
2. (a)11		Resignation in good standing
3. DD230.05 (a)11, (c)8, (C13)(e1)		
4.		
5.		

OAL DKT. NO. CSV 11973-2017S

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of N/A days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until ~~return to work~~ shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.
4. (Strike if not applicable) The appellant agrees to a

X resignation in good standing

____ general resignation

which shall be effective 7/19/17 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

Leave of Absence w/o pay personal reasons

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. NJDMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority NJDMAVA will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

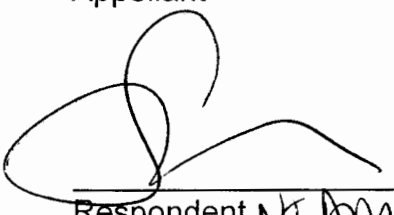
F. Except for the assessment of Evelyn Acevedos 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, NJDMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

9/26/2017 DATE	Evelyn Acevedo Appellant
9/26/17 DATE	 Respondent NJ DMAVA NJ Veterans Home Vineland
9-26-17 DATE	Robert C Gilbert III ON BEHALF OF APPELLANT
DATE	ON BEHALF OF

OAL DKT. NO. CSV 11973-2017S

CERTIFICATION

I, Evelyn Acevedo, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/26/17
DATE

Evelyn Acevedo
NAME

11-1-7

In the Matter of James Boelhower,
Woodbridge Fire District No. 1

CSC DKT. NO. 2015-1924
OAL DKT. NO. CSR 00568-15

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSR 00568-15

IN THE MATTER OF JAMES BOELHOWER,
WOODBRIDGE FIRE DISTRICT 1.

Michael G. Kane, Esq., appearing for appellant

Philip G. George, Esq., for respondent

Record Closed: October 17, 2017 Decided: October 17, 2017

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

The matter was transmitted to the Office of Administrative Law (OAL) on January 13, 2015, for determination as a contested case pursuant to N.J.S.A. 40A:14-202(d).

The parties have agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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. 40A:14-204.

October 17, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency:

Mailed to Parties: OCT 18 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

attachment

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereafter "Release") is made between Plaintiff James R. Boelhower ("Plaintiff or Releasor") and Defendant Board of Commissioners of Fire District No. 1 of Woodbridge Township, and its affiliates, former and present departments (including, but not limited to, its Fire Department), divisions, employees (both paid and voluntary), servants, agents, directors, officers, officials, elected officials, insurers, third party administrators, owners, managers, administrators, legal and personal representatives, and all predecessors, successors and assigns ("Fire District"), Defendant Todd Howell ("Howell") in his individual and official capacities, Defendant John Kenny ("Kenny") in his individual and official capacities, Howell's and Kenny's respective agents, legal and personal representatives, predecessors, successors, affiliates, assigns, heirs, executors, administrator (all collectively "Releasees"); the Fire District, Howell, Kenny collectively known as "Defendants"; Plaintiff and Defendants collectively known as "Parties".

RECITALS

WHEREAS, Plaintiff was an employee of the Fire District and asserted certain claims against the Defendants arising out of his dealings with Defendants in a lawsuit entitled James R. Boelhower v. Board of Commissioners of Fire District No. 1 of Woodbridge Township, Todd Howell, Individually, John Kenny, Individually, filed in the Middlesex County Superior Court, under Docket No.: MID-L-01199-16 ("Civil Lawsuit") and in an Office of Administrative Law proceeding entitled I/M/O James Boelhower, Woodbridge Fire District 1, OAL Docket No. CSR 00568-15 ("OAL Lawsuit"); the Civil Lawsuit and the OAL Lawsuit collectively referred to as the "Lawsuits";

WHEREAS, the Parties have reached an agreement to fully and finally settle all of the Plaintiff's claims, including those asserted and not asserted in the Lawsuits, against the Defendants arising out of Plaintiff's dealings with Releasees, and all other actions and claims, which the Plaintiff has, had or may have against the Releasees up to the date of this Release; and

WHEREAS, Plaintiff understands and agrees that the Defendants, by reason of payment and other terms made on behalf of the Releasees, do not admit any liability nor have they made any agreement to make any payment or to take any action not reflected in this Release. Further, Plaintiff understands that the allegations contained in these Lawsuits remain disputed and denied by Defendants and that the Fire District and its insurer underwent a cost benefit analysis, made a business decision, and have agreed to settle in order to avoid the inherent uncertainties associated with legal proceedings and the additional legal fees and expenses of continuing these disputes, but that this Release represents a compromise of disputed claims and any liability, wrongdoing, malfeasance, misfeasance or negligence on the part of Defendants is expressly denied.

NOW, IN CONSIDERATION, of the payment to the Plaintiff, provided for herein, and other good and valuable consideration and the promises and covenants contained herein, the receipt and sufficiency of which is acknowledged, the Plaintiff agrees as follows:

1. Subject to and contingent on the Fire District's approval, subject to and contingent upon the receipt of approval of the Settlement Agreement and General Release by and from the Office of Administrative Law and subject to and contingent upon receipt of approval of the Settlement Agreement and General Release by and from the Civil Service Commission pursuant to *N.J.A.C.* 1:1-19.1, and not before sixty days after the Fire District's approval and the approvals by the Office of Administrative Law and the Civil Service Commission, receipt by defense counsel of this Release and attached Exhibits A and B duly executed by Plaintiff, receipt of an executed Stipulation of Dismissal with Prejudice from Plaintiff's counsel, receipt

of W-9s from Plaintiff and Plaintiff's counsel, receipt of a negative Charles Jones Patriot Act search for Plaintiff and receipt of a negative Charles Jones Child Lien search for Plaintiff, the Plaintiff understands and agrees that payment shall be made on behalf of Releasees by checks made payable as follows: 1) a check in the amount of $258,333 made payable to Cashdan and Kane, LLC, with a 1099 to issue to the law firm with attorney box 14 checked; (2) a check in the amount of $258,333.50 made payable before December 15, 2017 to Plaintiff, with a 1099 to issue to the Plaintiff and recorded as "other income" on the 1099 for the tax year 2017; and (3) a check in the amount of $258,333.50 made payable after January 1, 2018 but before January 30, 2018 to Plaintiff, with a 1099 to issue to Plaintiff and recorded as "other income" on the 1099 for the tax year 2018. Neither Plaintiff nor Defendants shall file exceptions or otherwise appeal any Initial and/or Final Decision entered by the Office of Administrative Law and/or the Civil Service Commission approving the Settlement Agreement and General Release; and the above payments are strictly contingent on this provision.

The checks described in (1) and (2) will be sent to the law offices of Cashdan and Kane c/o Michael G. Kane, Esq. 226 St. Paul Street, Westfield NJ 07090 prior to December 20th 2017. The check described in (3) will be sent to Mr. Kane after January 1, 2018 but before January 31, 2018.

The Fire District will also provide a neutral reference letter for Plaintiff, setting forth only Plaintiff's dates of employment, titles held at the Fire District, salary and last date of employment. Plaintiff's point of contact for prospective employers in this regard will be the Career Chief.

The Fire District will not file the Stipulation of Dismissal with Prejudice until all of the checks described in (1), (2) and (3) have been received by Mr. Kane.

The Fire District will also segregate Plaintiff's PNDAs and FNDAs from Plaintiff's personnel file maintained by the Fire District and will keep Plaintiff's PNDAs and FNDAs in a separate file

which the Fire District will keep confidential. Plaintiff's PNDAs and FNDAs will not be disseminated by the Fire District unless the Fire District is served with a lawfully issued subpoena, court/administrative order, OPRA request and/or any other valid legal mechanism. If the Fire District receives a subpoena, court order, OPRA request and/or other legal mechanism seeking Plaintiff's PNDAs and/or FNDAs, the Fire District will provide notice to Plaintiff via his email address, Boelhowers@gmail.com and by certified mail, return receipt requested to James Boelhower, 24 South Robert Street, Sewaren, NJ 07077 as soon as practicable prior to the release of such information.

The above payments/consideration to Plaintiff and Plaintiff's attorneys represent full, final and complete payment of all claims made in these Lawsuits, or that could have been made against Releasees including, but not limited to, claims for all related attorneys' fees, any potential fee shifting and/or any attorney fee enhancements.

Plaintiff understands and agrees that pursuant to N.J.S.A. 2A:17-56.23(b), the settlement sum will not be released until such time as Plaintiff provides defense counsel with a certified copy of a child support judgment search, performed by a private judgment search company, reflecting that Plaintiff is not a child support judgment debtor. Plaintiff further understands and agrees that in the event it is revealed that Plaintiff is a child support judgment debtor, Plaintiff will not receive any of the proceeds of the settlement until all outstanding New Jersey child support judgments are satisfied. Plaintiff also understands and agrees that if any child support judgment exceeds the net proceeds of the settlement sum, the entire settlement proceeds will be utilized to satisfy any outstanding child support judgment.

Plaintiff understands and agrees that pursuant to Executive Order 13224, as amended by Executive Order 13268 and Executive Order 13608, a settlement sum will not be released until such time as Plaintiff provides defense counsel with a certified copy of a Patriot Act Search, performed by a private judgment search company, reflecting that Plaintiff is not on the list of prohibited individuals

as compiled by the federal government. Plaintiff further understands and agrees that in the event it is revealed that Plaintiff is on such list, Plaintiff will not receive any of the proceeds of the settlement.

Plaintiff further understands and agrees that he will have resigned his employment with the Fire District effective February 15, 2011, and will execute the resignation letter attached as Exhibit A to this Release contemporaneously with Plaintiff's execution of this Release.

Plaintiff further understands and agrees that any potential sick, vacation, compensatory and personal days remaining to Plaintiff, up to the date of Plaintiff's resignation from employment, i.e., February 15, 2011, will be extinguished and no monies will be paid to the Plaintiff by Releasees from extinguished sick, vacation, compensatory and personal days; that is, Plaintiff cannot obtain cash for any remaining sick, vacation, compensatory and personal time; and Plaintiff waives, without condition, any rights he may have against Releasees in this regard up to the date of Plaintiff's full execution of this Release and attached Exhibits.

Plaintiff further understands and agrees that any potential pension monies that may be owed to Plaintiff up to the date of Plaintiff's resignation, i.e., February 15, 2011, will be extinguished and no monies will be paid to the Plaintiff or any other applicable party by the Defendants in this regard now or in the future. This provision does not affect any monies to which Plaintiff may be entitled to receive from the Police and Firefighters Retirement System (PFRS) itself. Plaintiff waives, without condition, any rights he may have against Releasees in this regard up to the date of Plaintiff's resignation from employment.

Further, Plaintiff understands and agrees that any medical and health insurance coverage and/or fringe benefits to which Plaintiff may be entitled and/or any medical and health insurance coverage and/or fringe benefits that Plaintiff may currently be receiving from the Fire District ceases immediately for Plaintiff, any current/past spouse and any dependents. Plaintiff understands and agrees that the Fire District has no future obligation to Plaintiff, any spouse and any dependents with

respect to coverage for medical and health insurance and/or fringe benefits and waives, without condition, any rights he may have against Releasees in this regard.

Further, Plaintiff acknowledges that he is ineligible pursuant to this Release to hold any position with the Fire District now or in the future, and shall not apply in the future for employment, either paid with the Fire District or voluntary with Woodbridge Fire Co. No.1. Plaintiff understands and agrees that should he apply for employment with the Fire District and/or Woodbridge Fire Co. No. 1, neither will have any obligation to hire or rehire him either for a paid position with the Fire District or voluntary position with Woodbridge Fire Co. No.1. Plaintiff understands and agrees that if he is denied employment, he will not initiate any type of legal action alleging discrimination or retaliation, given that this is a negotiated clause of this Release and not evidence of retaliation.

Plaintiff agrees to cooperate fully in having this matter dismissed with prejudice against the Defendants immediately after the final payment is made to the Plaintiff.

2. Plaintiff understands and agrees that the above payments made to Plaintiff and Plaintiff's attorneys by the Fire District and its insurer, on behalf of the Releasees as set forth in paragraph 1 above, shall be the sole and only payment on behalf of Releasees and shall not be enhanced or altered in any way by reason of any further imposition of taxes of any kind or type on the proceeds of Plaintiff's settlement for any reason. Plaintiff understands and agrees that the Releasees make no representations regarding the federal or state tax consequences of any of the payments referred to herein and shall not be responsible for any tax liability, interest or penalty incurred by the Plaintiff, which in any way arises out of or is related to said payments. The Plaintiff and/or Plaintiff's attorneys shall pay the federal and/or state taxes, if any, which are required by law to be paid by the Plaintiff and/or Plaintiff's attorneys with respect to this settlement. The Plaintiff shall indemnify the Releasees for any tax liability and related costs, penalties and interest incurred by the Plaintiff in connection with this settlement. Plaintiff has not relied upon any representations, expressed or

implied, made by the Releasees as to the possible tax consequences of this Release and releases the Releasees from any and all liability in connection with such tax consequences.

3. Plaintiff, for himself, his heirs, executors, administrators, legal and personal representatives, agents, beneficiaries and assigns, does irrevocably and unconditionally release and forever discharge and dismiss the Releasees, from the beginning of time up to and through the date this Release is executed by Plaintiff, of and from any and all debts, obligations, grievances, claims, charges, demands, suits, judgments, or cause of action of any kind whatsoever, whether known or unknown, seen or unforeseen, which are raised or could have been raised against the Releasees in these Lawsuits, or in any other cause of action of any kind whatsoever, related to and/or arising out of these Lawsuits, in tort, contract, by statute or on any other basis for compensatory, punitive, treble or other damages, expenses, costs, reimbursements, disbursements, attorneys' fees, enhanced fees, fees resulting from fee shifting, damages and interest or costs of any kind including, but not limited to, all rights and claims, whether in law or in equity, in any federal, state, county, local or municipal court, administrative agency or board, which Plaintiff or anyone acting through or on behalf of Plaintiff have had, have asserted or could have asserted, including, but not limited to, claims under the Constitutions of the United States and the State of New Jersey, the Centers for Medicare and Medicaid Services (CMS) guidelines, Title VII of the Civil Rights Act of 1964, the Civil Rights of 1991, the Civil Rights Act of 1886, 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1988, the Equal Pay Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974, the National Labor Relations Act, the Fair Credit Reporting Act, the Americans with Disabilities Act, the Rehabilitation Act, the Occupational Safety and Health Act, the federal Family and Medical Leave Act, the Older Worker Benefit Protection Act, the Dodd-Frank Act, the federal Age Discrimination in Employment Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Family Temporary Disability Act, the New Jersey Law Against

Discrimination, the New Jersey Civil Rights Act, the New Jersey Equal Pay Act, the New Jersey State Wage and Hour Law, the New Jersey Wage Payment Law, the New Jersey Fair Credit Reporting Act, New Jersey Worker's Compensation Act N.J.S.A. 34:15-1 et seq., the New Jersey statutory provision regarding retaliation/discrimination for filing a worker's compensation claim, claims for vacation, sick, compensatory or personal leave pay, short term or long term disability benefits or payment pursuant to any collective bargaining agreement, contract, practice, policy, handbook or manual utilized by the Fire District, employment laws, pension laws, public policies and all federal, state and local claims, whether constitutional, statutory, regulatory, policy, procedure, contractual, common law or public policy including, but not limited to discrimination/retaliation, personal injury, bodily injury, vicarious liability, assault, battery, emotional and/or physiological distress, reputation and professional development damage, pain and suffering, mental anguish, humiliation, embarrassment, anxiety, back-pay, front pay, wages, economic losses, loss of income, loss of benefits, loss of fringe benefits, loss of prospective economic benefit, loss of seniority or other employment benefits, loss of future employment opportunities, impairment of future earning capacity, continuous and permanent interference with the prospect of future economic advantage and ability to obtain future employment, medical expenses, disparate treatment, pattern and policy of unlawful employment practice, whistle blowing claims, hostile work environment, discrimination of any kind including, but not limited to disability and marital status, aiding and abetting, wrongful discharge, failure to comply with state and/or federal family medical leave requirements, interference with/violations of the federal Family and Medical Leave Act, interference with/violations of New Jersey's Family Leave Act, bias, harassment of any kind, retaliation of any kind, failure to investigate, failure to properly and timely investigate, breach of and/or interference with contract, non-renewal of contract, breach of implied covenant of good faith and fair dealing, violation of any collective bargaining agreement, violation of any federal, state or municipal policy, violation of public policy, vicarious liability, respondent

superior, wanton misconduct, willful misconduct, intentional misconduct, negligence, negligence per se, carelessness, recklessness, gross negligence, negligent hiring and training, failure to accommodate a disability or to engage in the interactive process, which are raised or could have been raised against the Releasees in these Lawsuits.

4. Notwithstanding the provisions set forth in paragraph 3 above, Plaintiff understands and acknowledges that even though he is voluntarily executing this Release and dismissing both of his Lawsuits, he is not prohibited from filing a charge with the Equal Employment Opportunity Commission or a comparable state agency, and that he is not prohibited from participating in any investigation or proceeding conducted by the Equal Employment Opportunity Commission or a comparable state agency. In such case, however, Plaintiff agrees and voluntarily waives any right to monetary damages against the Releasees. Furthermore, nothing in this Release shall be construed to bar Plaintiff from reporting anything where the prohibition would be precluded by law.

5. Subject to the provisions set forth in paragraph 4 above, Plaintiff on behalf of himself, his heirs, executors, administrators, legal and personal representatives, agents, beneficiaries and assigns covenants and promises that neither he nor they will file or cause to be filed any charge, complaint, legal or administrative action of any nature before any court, board or administrative agency to assert any claim against the Releasees, arising out of Plaintiff's dealings with Releasees, except as may be necessary to enforce this Release.

6. Plaintiff understands and agrees that this Release expresses a full and complete statement of any and all alleged liabilities, which have been denied by Defendants and are not now admitted, and regardless of the adequacy of the compensation to be paid under this Release, this Release is intended to avoid any existing or future litigation, and Plaintiff as binding on himself, his heirs, executors, administrators, legal and personal representatives, agents, beneficiaries and assigns agrees that neither he nor they will seek any other payment whatsoever from Releasees.

7. Plaintiff understands and agrees that this Release does not constitute an admission by the Defendants of any wrongful action or violation of any federal or state Constitution, federal or state code, statute, regulation, policy or procedure, common law, public policy or contractual right and that this Release is a settlement of disputed claims so that neither this writing nor the fact of settlement constitutes an admission of liability or wrongdoing or breach of duty. It is understood and agreed by Plaintiff that the Releasees, by reason of the payment to Plaintiff, do not admit any liability, nor have they made any agreement to make any payment or take any action not reflected in this Release. Plaintiff understands that the Fire District and its insurer underwent a cost benefit analysis, made a business decision, and have agreed to settle in order to avoid the inherent uncertainties associated with legal proceedings and the additional legal fees and expenses of continuing these disputes, but that this Release represents a compromise of disputed claims and any liability, wrongdoing, malfeasance, misfeasance or negligence on the part of Releasees is expressly denied.

8. Plaintiff for himself, his heirs, executors, administrators, personal and legal representatives, agents, beneficiaries and assigns agrees to satisfy from the proceeds of this settlement and be solely responsible for any and all liens, rights of subrogation, defense claims, losses, liability, actions, damages, causes of action, judgments, costs and expenses, including attorneys fees or enhancements, whatsoever made by or sustained by or arising from any person, corporation, partnership, state or federal government, governmental agency including, but not limited to, the Social Security Administration, Medicare or Medicaid, any hospital, or any other medical provider, health care provider, disability or insurance benefits provider, workers compensation carriers, Medicare provider, Medicaid provider or any other entity arising in whole or in part out of these Lawsuits, or in any way connected to these Lawsuits.

Notwithstanding the above, Plaintiff affirms that Plaintiff was not enrolled in Medicare as of the date of Plaintiff's resignation from employment, i.e., February 15, 2011, has not enrolled in

Medicare since his employment resignation and that Medicare has no lien, as set forth in Exhibit B. Accordingly, Plaintiff affirms that Medicare has no interest in the payments under this Release.

Nonetheless, if the Centers for Medicare and Medicaid Services or any related agency representing Medicare's interests determine that Medicare has an interest in the payment to Plaintiff under this Release, Plaintiff agrees to indemnify, defend and hold Releasees harmless from any action by the Centers for Medicare and Medicaid Services relating to medical consultation/evaluation/treatment rendered to Plaintiff. Plaintiff further understands and agrees that satisfaction of any potential interest of Medicare from the proceeds payable under this Release shall be the sole and exclusive responsibility of Plaintiff and Plaintiff agrees to provide proof of such satisfaction to the Fire District and its insurer upon request. Plaintiff agrees that the duties stated in this paragraph are non-delegable and failure to perform such duties shall provide the Fire District and its insurer with a right to recover any monies paid caused by the failure to satisfy any potential interest of Medicare, including any additional expenses incurred and attorney fees and enhanced fees.

Specifically, Plaintiff agrees to indemnify and hold harmless the Releasees, their insurers, attorneys, third party administrators and other in privity with them from any claims by, through and/or under Plaintiff including, but not limited to, any past, present or future claims, private causes of action, liens, rights of subrogation, indemnification claims, contribution claims, defense claims, losses, actions, damages, demands, suits, liabilities, denial of coverage actions, protection of interest actions, judgments, costs and expenses, including attorneys fees and enhanced fees, whatsoever made by or sustained by or arising from any person, corporation, partnership, state or federal government, governmental agency including, but not limited to, the Social Security Administration, Medicare, Medicaid, any hospital, or any other medical provider, health care provider, disability or insurance benefits provider, workers compensation carrier, Medicare provider, Medicaid provider or any other

entity arising in whole or in part out of these Lawsuits, or in any way connected to these Lawsuits, even though not a signatory to this Agreement.

Further, even though Plaintiff is not currently enrolled in Medicare, should Plaintiff so enroll in the future, then Plaintiff shall set aside funds necessary in an approved Medicare Set Aside Account, to pay for any anticipated future medical and/or health care needs of Plaintiff, if Plaintiff holds any belief that he may require treatment that is related to and/or arises from these Lawsuits, Moreover, Plaintiff avers and covenants that if Plaintiff determines not to set aside funds in an approved Medicare Set Aside Account then, in conjunction with his affirmations set forth above and in his Certification attached as Exhibit B, it is because he does not at all expect that he will require medical and/or health care treatment for any conditions related to and/or arising from these Lawsuits and/or for the exacerbation of any medical and/or health care conditions for which Plaintiff may currently receive medical benefits, which exacerbation is related to and/or arises from these Lawsuits. Further, should funds not be placed in an approved Medicare Set Aside Account for Plaintiff, and if care and treatment for conditions related to and/or arising out of these Lawsuits are subsequently sought, then Plaintiff covenants and represents to the Releasees, their insurers, attorneys, third party administrators and others in privity with them, that Plaintiff will not submit or seek payment, for said medical care, from Medicare and/or any other government funded program.

Finally, even though Plaintiff is not currently enrolled in Medicare, should Plaintiff so enroll in the future, Plaintiff agrees to reasonably cooperate with the Fire District upon request with respect to (1) any reporting requirements under Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 and (2) any claim that the Centers for Medicare and Medicaid Services may make for which Plaintiff is required, under this paragraph, to indemnify Releasees, their insurers, attorneys, third party administrators and others in privity with them.

Plaintiff further affirms that he was not enrolled in Medicaid as of the date of Plaintiff's resignation from employment, i.e., February 15, 2011; and has not enrolled in Medicaid since his employment resignation and that Medicaid has no lien, as set forth in Exhibit B.

Further, Plaintiff affirms that he has never applied for Social Security Disability Insurance for medical and/or health care conditions, and/or the exacerbation thereof, related to and/or arising out of Plaintiff's claims in these Lawsuits, as set forth in Exhibit B.

9. Plaintiff represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Release except as otherwise set forth in this Release, and that Plaintiff has the sole right and exclusive authority to sign this Release and receive the sum specified in it; and that Plaintiff has not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of actions referred to in this Release.

10. In exchange for the consideration received from Releasees, and from the date of the Mediation forward, Plaintiff for himself, and on behalf of his heirs, executors, administrators, legal and personal representatives, agents, beneficiaries, assigns and attorneys, agrees that neither he nor they will disclose the terms of settlement, any discussions and negotiations leading to the settlement or to this Release, or the underlying claims of these Lawsuits to any person or entity including, but not limited to, the news media, digital media, internet correspondence/website/blogs, or any other persons or entities other than to Plaintiff's spouse, accountant, attorneys, income tax preparer or similar professional or the Internal Revenue Service, unless otherwise requested to do so by a court, by subpoena or by an administrative agency of competent jurisdiction. If asked, Plaintiff may say that "the matter has been resolved."

Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that Plaintiff for himself, and his spouse, his heirs, executors, administrators, assigns, agents,

servants, legal and personal representatives, beneficiaries and attorneys will not disparage Defendants and will not take any action to publicize the terms of settlement, any discussion and negotiations leading to the settlement or to this Release or the underlying claims of these Lawsuits.

If Plaintiff for himself, his spouse, his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys discloses any information concerning the settlement, the discussion and negotiations leading to this Release, or the underlying claims of these Lawsuits, to the enumerated others set forth in this paragraph, the Plaintiff for himself, his spouse, his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys, agrees to advise anyone to whom the information is disclosed that such information must be treated confidentially, pursuant to the terms of this Release.

Defendants, Howell and Kenny will not disparage Plaintiff. The Plaintiff understands and agrees that the Fire District is a public entity, and that Howell and Kenny are public employees, and as such, disclosure of this Release by the Fire District may be compelled under the Open Public Records Act, N.J.S.A. 47:1A-1, et seq. ("OPRA"), other statute or common law. The Fire District may also be required to disclose the Release in relation to its approval or in relation to its compliance with the terms of the Release. Notwithstanding any other term in this Release, the Plaintiff understands and agrees that the Fire District, as a public entity and employer of numerous public employees, cannot guarantee non-disclosure.

Plaintiff for himself, his spouse, his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys, agrees that should he or they receive a demand for information, or are served with a subpoena, from the Internal Revenue Service, by an administrative agency, board or court of competent jurisdiction, notice of the demand or service of subpoena will be provided as soon as practicable prior to the release of such information. The notice of the request shall be sent by certified mail to Jacqueline A. DeGregorio, Esq., c/o Weiner Law

Group LLP, 629 Parsippany Road, P.O. Box 438, Parsippany, New Jersey 07054. Plaintiff for himself, his spouse, his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys agrees to submit to the jurisdiction of the State of New Jersey in any action brought to enforce the confidentiality provision of this Release.

Further, unless required by law or legal process, Plaintiff for himself, his spouse, his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys agrees that both he and they shall refrain from assisting, cooperating or participating in any manner in any lawsuit, administrative proceeding, arbitration, investigation or claim of any kind relating to any matter that involves the claims which were or could have been the subject of these Lawsuits. Plaintiff for himself, his spouse, his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys agree that if he or they are asked for information in connection with any such matter or to assist, cooperate or participate in any manner in it, he and they will decline to communicate further with the inquirer and will immediately provide written notice to Jacqueline A. DeGregorio, Esq. advising her of the identity of the person who made the inquiry and the nature of the inquiry.

11. This Release shall be binding upon and inure to the benefit and obligation of the Plaintiff and any of the Plaintiff's heirs, executors, administrators, legal or personal representatives, beneficiaries, agents, servants, predecessors, successors and assigns.

12. Plaintiff understands and agrees that he shall bear his own attorneys fees and costs incurred in these Lawsuits up to and through the date of Plaintiff's execution of this Release. Should any Party seek to enforce the terms of this Release, the prevailing Party shall be entitled to reasonable attorneys' fees and costs expended.

13. The provisions of this Release are severable and if any part is found to be unenforceable, the other portion(s) shall remain fully validated and enforceable. This Release shall

survive the terminations of any arrangements contained within the severed and/or unenforceable portions.

14. This Release shall be construed in accordance with the laws of the State of New Jersey, without regard to its conflict or choice of law rules.

15. Plaintiff represents and acknowledges as follows:

a. Plaintiff has carefully read and fully understands all of the provisions of this Release, which is written in a manner that Plaintiff understands and/or, if necessary as determined by counsel for Plaintiff, has been explained to Plaintiff through the services of an interpreter;

b. Through this Release, Plaintiff for himself and on behalf of his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys, is releasing Releasees from any and all claims Plaintiff may have against the Releasees arising up to and through the date of Plaintiff's execution of this Release;

c. The compensation/consideration that Plaintiff receives from the Releasees pursuant to this Release is valuable consideration to which Plaintiff would not otherwise be entitled and the consideration is sufficient and adequate to support his promises, covenants and releases as set forth in this Release;

d. Plaintiff was advised to consult and has consulted with attorney of his choice, Michael G. Kane, Esq. prior to executing this Release;

e. Plaintiff had a reasonable time of at least 21 days (the "Consultation Period") within which to consider this Release before executing it. Plaintiff also acknowledges that he has been advised by his attorneys that any changes to this Release that may be agreed upon by the parties after he has received this Release, whether material or immaterial, do not restart this Consultation Period.

Moreover, Plaintiff represents that if he executes this Release at any time prior to the end of the Consultation Period, such early execution was a knowing and voluntary waiver of his right to consider the Release for 21 days, and was not induced by Releasees through fraud, misrepresentation, a threat to alter or withdraw the offer prior to the expiration of the 21 day period, or by providing different terms for signing the Release prior to the expiration of such period. Rather, Plaintiff agrees and represents that any early execution of this Release resulted from Plaintiff's desire to expedite the processing of the consideration/payment provided and to be timely paid herewith and Plaintiff's belief that he had ample time in which to consider and understand the Release and in which to review the Release with his attorneys;

f. Plaintiff for himself and on behalf of his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys knowingly and voluntarily agrees to all the terms in this Release and intends to be legally bound by this Release.

By:_____ Attest:_____
Plaintiff, James R. Boelhower

Dated:_____ Dated:_____

1291045

Defendant, Board of Commissioners of District No. 1 of Woodbridge Township

By:_____
John Kenny, President

Attest:_____

Dated:_____

Dated:_____

By:_____
Defendant, John Kenny, in his individual and official capacities

Attest:_____

Dated:_____

Dated:_____

By:_____
Defendant, Todd Howell, in his individual and official capacities

Attest:_____

Dated:_____

Dated:_____

Moreover, Plaintiff represents that if he executes this Release at any time prior to the end of the Consultation Period, such early execution was a knowing and voluntary waiver of his right to consider the Release for 21 days, and was not induced by Releasees through fraud, misrepresentation, a threat to alter or withdraw the offer prior to the expiration of the 21 day period, or by providing different terms for signing the Release prior to the expiration of such period. Rather, Plaintiff agrees and represents that any early execution of this Release resulted from Plaintiff's desire to expedite the processing of the consideration/payment provided and to be timely paid herewith and Plaintiff's belief that he had ample time in which to consider and understand the Release and in which to review the Release with his attorneys;

f. Plaintiff for himself and on behalf of his heirs, executors, administrators, assigns, agents, servants, legal and personal representatives, beneficiaries and attorneys knowingly and voluntarily agrees to all the terms in this Release and intends to be legally bound by this Release.

By: _____
Plaintiff, James R. Boelhower

Dated: 10/6/2017

Attest: _____

Dated: 10/6/2017

1291045

Defendant, Board of Commissioners of District No. 1 of Woodbridge Township

By: _____
John Kenny, President

Attest: _____

Dated: 10/9/17

Dated: 10/9/17

By: _____
Defendant, John Kenny, in his individual and official capacities

Attest: _____

Dated: 10/9/17

Dated: 10/9/17

By: _____
Defendant, Todd Howell, in his individual and official capacities

Attest: _____

Dated: Oct. 9, 2017

Dated: Oct 9, 2017

October 6 , 2017

Board of Commissioners
Fire District No. 1
Woodbridge Township
109 Green Street
Woodbridge, NJ 07095

Dear Sirs:

Please be advised that I hereby resign my employment with Fire District No. 1 of Woodbridge Township effective February 15, 2011.

Very truly yours,

James R. Boelhower
24 South Robert Street
Sewaren, New Jersey 07077
email address: Boelhowers@gmail.com

EXHIBIT A

Michael G. Kane, Esq.
Cashdan & Kane, LLC
324 East Broad Street
Westfield, New Jersey 07090
Ph: (908) 264-9331
Email: mkane@cashdankane.com

Attorneys for Plaintiff, James R. Boelhower
Docket No.: MID-L-01199-16
OAL Docket No.: CSR 00568-15

James R. Boelhower, certifying in lieu of oath, deposes and says:

1. I am fully familiar with the facts and circumstances hereinafter set forth.
2. I have never applied for and/or received Medicaid benefits for medical and/or health care conditions, and/or the exacerbation thereof, related to and/or arising out of my claims set forth in the within Lawsuits.
3. I have never applied for and/or received Medicare benefits for medical and/or health care conditions, and/or the exacerbation thereof, related to and/or arising out of my claims set forth in the within Lawsuits.
4. I have never applied for and/or received Social Security Disability Insurance for medical and/or health care conditions, and/or the exacerbation thereof, related to and/or arising out of my claims set forth in the within Lawsuits.
5. Neither Medicaid, Medicare nor Social Security have or ever had any lien against me for medical and/or health care conditions, and/or the exacerbation thereof, related to and/or arising out of my claims set forth in the within Lawsuits.
6. I do not expect to receive medical and/or health care treatment for any medical and/or health care conditions related to and/or arising out my claims set forth in the within Lawsuits.
7. I do not expect to receive medical and/or health care treatment for exacerbation of any medical and/or health care conditions, for which I currently receive medical benefits, which exacerbation is related and/or arising out of my claims set forth in the within Lawsuits.
8. I was not enrolled in Medicare as of the date of my resignation from employment with Fire District No. 1 of Woodbridge Township – February 15, 2011, nor am I enrolled in Medicare as of the execution of the Release and this Certification.

I certify that the within statements made by me are true. I am aware that if the foregoing statements made by me are false, I am subject to punishment.

Dated: 10/6/2017

James R. Boelhower

EXHIBIT B

11-1-17

STATE OF NEW JERSEY

In the Matter of Daryl Lindsey
Newark Police Department

CSC DKT. NO. 2013-96
OAL DKT. NO. CSV 10680-12

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 3, 2017 BW

The appeal of Daryl Lindsey, Police Officer, Newark Police Department, 45 working day suspension, on charges, was heard by Administrative Law Judge Leslie Z. Celentano, who rendered her initial decision on October 16, 2017, granting the appeal for the appointing authority's failure to prosecute and reversing the 45 working day suspension.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 1, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 45 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to 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, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

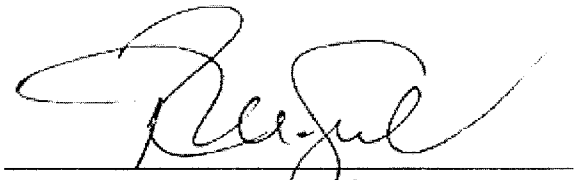
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Daryl Lindsey. The Commission further orders that appellant be granted 45 days back pay, benefits, and seniority. 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 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 or counsel fees.

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
THE 1ST DAY OF NOVEMBER, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myeres
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, Northern Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. CSV 10680-12
AGENCY DKT. NO. 2013-96

IN THE MATTER OF DARYL LINDSEY,
CITY OF NEWARK, POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., for appellant (Fusco & Macaluso, attorneys)

France Casseus, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: October 2, 2017 Decided: October 16, 2017

BEFORE **LESLIE Z. CELENTANO,** ALJ:

Petitioner appealed his forty-five (45) working day suspension. Petitioner was suspended without pay on November 11, 2010, effective November 6, 2010, through November 24, 2010, and again from July 16, 2012 through until August 24, 2012. Following the first suspension, a suspension hearing was held on November 22, 2010 and petitioner was reinstated effective November 25, 2010. No Final Notice of Disciplinary Action (FNDA) was provided to or served upon petitioner for this fifteen (15) working day suspension. He was then suspended again without pay effective July 16, 2012 through August 24, 2012, pursuant to FNDA dated June 9, 2012.

The matter was transmitted to the Office of Administrative Law on August 1, 2012 and scheduled for hearing on May 8, 2013. That date was adjourned at the request of the City and rescheduled for January 13, 2014.

The January 2014 hearing was adjourned, again at the request of the City which indicated that the attorney of record would be out of the office for eight weeks. Accordingly, the matter was rescheduled for July 21, 2014.

The July 21, 2014, date was adjourned, again at the request of the City which indicated that its chief witness and investigator, Sergeant Hill, would be on vacation until August 2014. The matter was rescheduled for hearing on March 6, 2015.

The March 6, 2015, hearing was then adjourned as none of the witnesses were available, according to a telephone conference held on that date. The matter was rescheduled for August 3, 2015. The August 2015 date was adjourned, again at the request of the City, as the assistant corporation counsel then assigned to the matter was attending to family matters.

The hearing was rescheduled for April 18, 2016, however that date was adjourned, again at the request of the City which indicated it "inadvertently did not calendar the matter for a hearing" and did not subpoena its witnesses to appear.

The matter was then rescheduled for October 25, 2016, on which date the parties appeared at long last for hearing. The City appeared with its witnesses, and petitioner's counsel also appeared but indicated that the subpoenaed witnesses had not appeared, and asked for an adjournment. The City represented that there had been extensive communications with counsel and no mention of communication issues with witnesses, and as such, the City objected to the adjournment. The adjournment was granted when petitioner's counsel indicated enforcement of the subpoenas would be sought, and also because until that time there had been no adjournment requests from petitioner. The parties were advised that the new dates assigned, February 16 and 17, 2017, were peremptory dates which would not be adjourned.

On January 17, 2017, correspondence was received from the City requesting an adjournment of the peremptory February dates, as the assistant corporation counsel then assigned to the matter, Mr. Saunders, indicated that he would be on a medical leave of absence from January 23, 2017 until March 3, 2017. The February dates were therefore adjourned, and the matter rescheduled for October 2, 2017, nearly eight months later.

By letter dated September 25, 2017 and faxed to the undersigned on September 26, 2017, the City yet again requested an adjournment, four (4) days before the scheduled October 2 date, indicating it "is not prepared to move forward on said trial date." The matter has now lingered for over five years and been adjourned nine times, and accordingly, the adjournment request was DENIED and all parties were ordered to appear on October 2, 2017, for hearing. On that date, petitioner appeared at 9:00 am ready to proceed. No one appeared on behalf of respondent, and there was no communication of any kind whatsoever explaining the failure to appear for hearing related to suspensions from seven (7) years ago.

Based upon all of the foregoing, I **FIND** that this matter should be and is hereby **DISMISSED WITH PREJUDICE**. Appellant is entitled to back pay from November 6, 2010 through November 24, 2010, and from July 16, 2012 through August 24, 2012; and to seniority to the actual date of reinstatement, August 25, 2012.

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 16, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 10-16-17

Date Mailed to Parties: OCT 17 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

STATE OF NEW JERSEY

In the Matter of Erica Moffitt
Woodbine Developmental Center,
Department of Human Services

CSC DKT. NO. 2016-3340
OAL DKT. NO. CSV 05036-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 3, 2017 BW

The appeal of Erica Moffitt, Cottage Training Technician, Woodbine Developmental Center, Department of Human Services, removal effective March 3, 2016, on charges, was heard by Administrative Law Judge John S. Kennedy, who rendered his initial decision on September 1, 2017. Exceptions were filed on behalf of the appellant, a reply to exceptions was filed on behalf of the appointing authority and a cross reply was filed on behalf of the appellant.

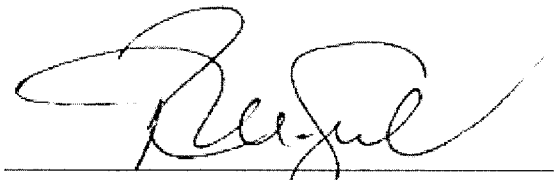
Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of November 1, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Erica Moffitt.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05036-16
AGENCY DKT. NO. 2016-3340

IN THE MATTER OF ERICA MOFFITT,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Nicole T. Castiglione, Deputy Attorney General, for appellant (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: July 18, 2017 Decided: September 1, 2017

BEFORE **JOHN S. KENNEDY,** ALJ:

STATEMENT OF THE CASE

Cottage Training Technician (CTT) Erica Moffitt appeals the action by the Department of Human Services, Woodbine Developmental Center (Woodbine) terminating her employment on grounds of neglect of duty, serious mistake due to carelessness which would result in danger and/or injury to persons or property, conduct unbecoming and other sufficient cause, specifically.

PROCEDURAL HISTORY

CTT Moffitt (appellant) was served with an Amended Preliminary Notice of Disciplinary Action (PNDA) on December 22, 2014 (R-13). A departmental hearing was held on March 1, 2016 and appellant was advised by a Notice of Final Disciplinary Action (FNDA) dated March 8, 2016, that she had been terminated effective March 3, 2016. Moffitt appealed the termination to the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), as required under N.J.S.A. 40A:14-202(d). The matter was heard on April 27, 2017. The record closed after the parties filed written summations on July 18, 2017.

FACTUAL DISCUSSION

Appellant, Erica Moffitt, was employed by Woodbine as a Cottage Training Technician ("CTT"). One of the residents appellant was assigned to care for "M.S.," an eighty-five-year-old woman with extremely fragile, paper-thin skin. Because M.S.'s skin was subject to tearing with any type of shearing or abrasion, an Injury Review meeting was held on November 18, 2014, to discuss ways to prevent further injury to her. It was decided at that meeting that a mechanical lift would now be used to lift her out of bed and a draw sheet would be used any time M.S. needed to be moved or repositioned while in bed. Padded bed rails were also used to protect M.S. from injury. (R-1; R-2).

M.S.'s client card was updated with the new information, and all staff members received in-service instruction regarding the use of a mechanical lift and draw sheet. A client card is a snapshot of each resident and sets forth a summary of what services and care they require. Staff members are expected to know and understand the information contained in a resident's client card, and, therefore, if they do not understand a service or the type of care described therein, they are instructed to ask their supervisor. Supervisors are present during every shift. (R-1; R-4).

During the in-service instruction, staff members were instructed to utilize two people and a draw sheet whenever M.S. needed to be moved. (R-4). A draw sheet is a bed sheet that is folded in half and placed underneath a resident. Because draw sheets

do not require staff members to directly touch a resident, they are used to move residents who have fragile, thin skin. To move or reposition a resident, two staff members hold each end of the draw sheet.

On November 28, 2014, appellant was assigned to care for Group 1 in Cottage 18, which included M.S. (R-5; R-67). Appellant's shift began at 11:15 p.m. (R-67). As part of her assignment, appellant was given M.S.'s client card, which included the updated information regarding the use of a mechanical lift and a draw sheet. Appellant was familiar with M.S. and had cared for her on at least one other occasion after she received in-service instruction regarding the use of the draw sheet.

Appellant changed M.S. with the help of another staff member during the night. They did not use a draw sheet despite having to "rotate" M.S. to change her. Appellant also repositioned M.S. twice during the night without help from another staff member and without using a draw sheet. To reposition M.S., appellant had to move her from one side to the other and adjust the pillows underneath her head, shoulders, arms, knees, and lower legs. Appellant did not notice that one of M.S.'s padded bed rails was on backwards, leaving the metal bed rail exposed.

At approximately 6:25 a.m., appellant went into M.S.'s room to check on her and change her diaper. Appellant took down the bed rail closest to her, leaving the bed rail that was against the wall in place. Without the help of a second staff member or the use of a draw sheet, appellant "rolled" and "turned" M.S. from side to side to undress her and change her diaper. As appellant was rolling and turning M.S. to re-dress her, M.S. hit her head on the metal bed rail that was against the wall. At this point, seven hours into her shift, Appellant noticed that the padded bed rail was on backwards. Appellant alerted her supervisor and accompanied M.S. to Cape May Regional Medical Center. (R-67). M.S. required five sutures to treat the five-inch laceration on her head. (R-7; R-8; R-9; R-10; R-11). A CT scan was also taken of her head and x-rays of each of her knees. (R-9). Upon appellant's return to Woodbine, she was immediately suspended with pay. (R-12).

Testimony

Gene Meloy:

Meloy testified that he is a Charge Nurse at Woodbine for eight years. He described the population at Woodbine and provided examples of direct care duties. His duties are vast and include in-servicing (training) of staff. He conducts approximately five in-services per week. In-service instruction is an interactive process used to educate staff members about the services and standard of care at Woodbine. Staff members are encouraged to ask questions of their in-service instructors to ensure their understanding and comprehension of the subject matter. To document when staff members have received in-service instruction, each person must sign an Event Registration Roster Form. Appellant received in-service instruction on the use of a draw sheet on November 19, 2014. She signed the Event Registration Roster form documenting the in-service instruction.

Meloy provided a written statement (P-1) and testified that M.S. was delicate, and that her skin easily tore. She had to be repositioned in her bed every two hours. He was not working on the date of the incident and did not have any personal observations of the incident with M.S. During his direct examination, Meloy testified that he trained appellant. On cross examination, he corrected his testimony that he did not personally in-service appellant and that in-service of many staff was delegated to others. He did not know if the delegated in-service was simply handing R-4 to the trainees to read or whether the delegated trainer demonstrated the training. The in-service training reflected in R-4 was not a policy or procedure and did not constitute a training course.

Appellant reported the incident to her supervisor and an incident report was prepared (R-6). The recommendation on the Incident Report was for all staff to be more cautious in putting padding on bed rails. The Cape Regional Medical Center nursing notes stated there was no evidence of abuse or neglect.

Ryan Broughton:

Broughton is a Supervisor of Professional Residential services at Woodbine. He described the various duties of a direct care staff. Each patient has a direct care reference card (R-1) that gives instructions to employees on the needs of clients. These reference cards are kept in dorm watch binders along with a client turning schedule. Shift supervisors are responsible to ensure that employees on their shift understand what is required of each client. Employees are instructed to consult employees if they do not understand what is required to properly care for a patient. Broughton did not train appellant on the use of a draw sheet for M.S. and did not know who provided that training. He did not know whether or not the shift supervisor made sure that appellant was properly in-serviced on M.S.

Maggie Wallace:

Wallace worked for respondent as a CTT from 1978 to 2015. The first time assigned to a patient, staff is provided with the client cards. If a new procedure is implemented, sometimes a supervisor reviews the changes and other times, they are given a packet to review on their own while they work during the shift. If they do not understand, they are instructed to ask a supervisor. Supervisors are not always available to ask questions. Staff is required to follow what is stated on the in-service sheet and is not permitted to expand on it.

Erica Moffit:

Appellant is a graduate of Millville High School and has worked for the State of New Jersey since September 2000 at Woodbine. She was hired as a direct care staff. Her last title was cottage training technician (CTT). She was assigned the overnight shift from 11:15 p.m. until 7:00 a.m. the next morning. She mainly works with high functioning consumers. Here, she was assigned to M.S. who is a low functioning consumer. Prior to the date of the incident, she had worked with M.S. She was never in-serviced on M.S. but was provided her patient card prior to the date of the incident. She was never provided with M.S.'s revised card (R-1) and was never informed that it

was revised. The prior card contained no provision for using a draw sheet to reposition M.S. in bed. Appellant testified that on the date of the incident, they were understaffed. She was provided a stack of in-service sheets including one (R-4) pertaining M.S. which she read and signed. She understood the in-service only to require a draw sheet to move M.S. "up and down in bed." She understood R-4 literally and did not believe it was confusing. Prior to the incident, she was not made aware that the IHP (R-3) existed for M.S. Prior to the incident, she was aware of the Physical Management sheet for M.S. (R-2) which did not require a draw sheet be used for M.S. She was never informed that the Physical Management sheet was revised. On the date of the incident, she rotated M.S. and asked another staff to assist her. She needed another staff because M.S. was tight and "balled up". At approximately 5:45-6:30 a.m., appellant entered the room and it was dim. She did not turn the lights on as another consumer was shared the same room and was sleeping. M.S.'s bed was up against the wall. She removed the pillows from the side and removed her diaper. There was no draw sheet underneath of M.S. No one trained appellant on what to do when there is no draw sheet on the bed. Appellant then began dressing M.S. As appellant was putting pants on M.S., this is when M.S. rolled and hit the bed rail. The padding side on the bed pad was facing the wall and not facing M.S. The padding color blended with the wall and in the dark, she did not notice that the pad had been improperly installed. M.S. has pillows around her and these cover up the bed pad and she had not noticed that the staff in the previous shift did not properly install the bed pad. She immediately notified her supervisor of what happened. She completed the Incident Report (R-6) and went with M.S. to the ER. She remained with M.S. the entire time even beyond her shift time for a few hours.

Appellant testified that she was never in-serviced by Meloy or anyone else face to face on the use of a draw sheet. She signed the Event Registration Roster form documenting the in-service instruction "because [she] read the in-service." During her shift with M.S., there was no occasion which required her to move M.S. up and down. After the injury occurred, appellant's supervisor did not mention anything about a draw sheet or whether or not a draw sheet was to be used. Prior to the incident, appellant had observed M.S.'s group leader change M.S. without using a draw sheet. Despite receiving in-service instruction regarding the use of a draw sheet on November 19,

2014, appellant apparently had no knowledge of what a draw sheet was until she was interviewed by Woodbine on December 5, 2014. Appellant did not ask her supervisor any questions about the in-service instruction or for clarification regarding when a draw sheet should be used to move M.S.

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Having considered the testimonial and documentary evidence offered by the parties, I deem that the testimony offered by the appellant is not credible. She insists that she did not receive adequate in-service training on how to use a draw sheet or that a draw sheet was required when changing M.S. She admits that she read the in-service and signed the Event Registration Roster form documenting the in-service instruction. She understood that a draw sheet was only needed when moving M.S. "up and down" but not when turning her from side to side. On the date of the incident, she rotated M.S. and asked another staff to assist her. Appellant was familiar with M.S. and had cared for her on at least one other occasion after she received in-service instruction regarding the use of the draw sheet. Therefore, I **FIND** as **FACT** that the appellant received in-service training on how to use a draw sheet and should have understood that a draw sheet was required when changing M.S. I also **FIND** as **FACT** that if appellant had any question about the care of M.S., she was instructed to ask a supervisor.

Based upon due consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional **FACTS**:

M.S. is an eighty-five-year-old woman with extremely fragile, paper-thin skin. It was decided at an Injury Review meeting held on November 18, 2014, that a mechanical lift would be used to lift M.S. out of bed and a draw sheet would be used any time M.S. needed to be moved or repositioned while in bed. Padded bed rails were also used to protect M.S. from injury. M.S.'s client card was updated with the new information, and appellant received in-service instruction regarding the use of a mechanical lift and draw sheet. Staff members are expected to know and understand the information contained in a resident's client card, and, therefore, if they do not understand a service or the type of care described therein, they are instructed to ask their supervisor. Supervisors are present during every shift.

On November 28, 2014, appellant was assigned to care M.S. Appellant's shift began at 11:15 p.m. and she was given M.S.'s client card, which included the updated information regarding the use of a mechanical lift and a draw sheet. Appellant was familiar with M.S. and had cared for her on at least one other occasion after she received in-service instruction regarding the use of the draw sheet. Appellant changed M.S. with the help of another staff member during the night. They did not use a draw sheet despite having to "rotate" M.S. to change her. Appellant also repositioned M.S. twice during the night without help from another staff member and without using a draw sheet.

At approximately 6:25 a.m., appellant went into M.S.'s room to check on her and change her diaper. Without the help of a second staff member or the use of a draw sheet, appellant "rolled" and "turned" M.S. from side to side to undress her and change her diaper. M.S. hit her head on the metal bed rail that was against the wall. M.S. required five sutures to treat the five-inch laceration on her head.

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

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

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge of conduct unbecoming was appellant's neglectful treatment of M.S. Though the term "neglect of duty" is not defined in the New Jersey Administrative Code, it has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military & Veterans' Affairs, 97 N.J.A.R.2d 564; Ruggiero v. Jackson Twp. Dep't of L. & Pub. Safety, 92 N.J.A.R.2d 214. Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. See generally State v. Dunphy, 19 N.J. 531, 534 (1955). "Carelessness" is similarly defined as "[t]he fact, condition, or instance of a person's either not having done what he or she ought to have done, or having done what he or she ought not to have done; heedless inattention." In re Leaks, CSV 03913-13, Initial Decision (Aug. 15, 2013), adopted (Sept. 18, 2013) (quoting Black's Law Dictionary (9th ed. 2009)).

Woodbine's policy governing the treatment of individuals served defines "neglect" as:

> The failure of a caregiver (person responsible for the individual's welfare) to provide the needed services and supports to ensure the health, safety, and welfare of the individual. These supports and services may or may not be defined in the individual's plan or otherwise required by law or regulation. This includes acts that are intentional, unintentional, or careless regardless of the incidence of harm. Examples include, but are not limited to, the failure to provide needed care such as shelter, food, clothing, supervision, personal hygiene, medical care, and protection from health and safety hazards. (R-16).

I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee. Appellant's conduct was neglectful, careless, and unbecoming of a public employee. Appellant received in-service instruction on the use of a draw sheet on November 19, 2014. She admitted that she received in-service instruction and signed the Event Registration Roster Form "because I read the in-service." Appellant also admitted that she was given, M.S.'s updated client card at the beginning of her shift. Appellant's conduct placed the patient at risk and was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Specifically, appellant has been charged with violating Woodbine policy B-2.1: neglect of duty, loafing, idleness, or willful failure to devote attention to tasks which could result in danger to persons or property, and B-7.2: serious mistake due to carelessness which would result in danger and/or injury to persons or property. Respondent asserts that as appellant violated both B-2.1 and B-7.2, she has also violated E-1.5: violation of a rule, regulation, policy, procedure, order or administrative decision. In re Fahnbulleh, CSV 6080-13, Initial Decision (Sept. 29, 2014), adopted, (Nov. 6, 2014). These violations likewise amount to a violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause. I **CONCLUDE** that the Appointing Authority has met its burden of proof that appellant committed an act in violation of B-2.1, B-7.2 and E-1.5.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. "Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The question to be resolved is whether the discipline imposed in this case is appropriate.

In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33

(2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The record reflects that appellant was suspended from duty without pay for six months from March 20, 2014, until September 20, 2014, following a separate incident where her alleged carelessness resulted in an injury to a patient. (R-19; R-20). Upon her return to duty on October 4, 2014, appellant was given several in-service instructions to educate her about the services and standard of care that the residents in the facility required. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense and her prior discipline carelessness which resulted in an injury to a patient, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the Appointing Authority is **AFFIRMED**, as set forth above.

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.

9/1/17
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 9/1/17

Date Mailed to Parties: 9/1/17

/lam

WITNESSES

For Appellant:

Maggie Wallace, CTT
Erica Moffitt, appellant

For Respondent:

Gene Meloy, Charge Nurse
Ryan Broughton, Supervisor of Professional Developmental Services

EXHIBITS

For Appellant:

P-1 Witness Statement of Gene Meloy, RN, dated 12/8/14

For Respondent:

R-1 M.S. Client Card
R-2 M.S. Positioning Plan, dated 4/10/14
R-3 M.S. Individual Habitation Plan, dated 3/4/14
R-4 M.S. Draw Sheet In-service Records, dated 11/19/14
R-5 Dorm Watch Checklist, Cottage 18, 11/27/14 – 11/28/14
R-6 Confidential Incident Report, dated 11/28/14
R-7 M.S. Active Treatment Notes, 11/25/14 – 12/2/14
R-8 M.S. Physician's Orders, 11/28/14 – 12/1/14
R-9 M.S. Emergency Room Reports, Cape May Medical Center, 11/28/14
R-10 M.S. Neuro Checklist, 11/28/14 – 12/1/14
R-11 M.S. Body Outline, 11/28/14

R-12 Preliminary Notice of Disciplinary Action ("PNDA"), dated 12/19/14

R-13 Amended PNDA, dated 12/22/14

R-14 Final Notice of Disciplinary Action ("FNDA"), dated 3/8/16

R-15 Notice of Appeal, dated 12/22/14

R-16 Administrative Policy 1:20 – Treatment of Individuals Served

R-17 E. Moffitt Disciplinary History

R-18 PNDA, dated 11/9/15

R-19 FNDA and addendum, dated 10/2/14

R-20 Disciplinary Action Appeal Settlement Agreement, signed 9/23/14

R-21 Notice of Official Reprimand, dated 3/24/14

R-22 PNDA, dated 11/25/13

R-23 Disciplinary Action Appeal Settlement Agreement

R-24 Written Warning, dated 2/12/14

R-25 Written Warning, dated 2/11/14

R-26 Written Warning, dated 11/1/13

R-27 Notice of Official Reprimand, dated 12/31/13

R-28 Notice of Official Reprimand, dated 11/6/13

R-29 FNDA, dated 1/29/14

R-30 Disciplinary Action Appeal Settlement Agreement, signed 11/21/13

R-31 FNDA, dated 1/29/14

R-32 Disciplinary Action Appeal Settlement Agreement, signed 11/21/13

R-33 FNDA, dated 1/7/13

R-34 Disciplinary Action Appeal Settlement Agreement, signed 2/14/13, and Notice of Suspension from Duty Without Pay, dated 3/12/13

R-35 Disciplinary Action Appeal Settlement Agreement, signed 4/14/13, and Notice of Official Reprimand, dated 2/20/13

R-36 Written Warning, dated 11/26/12

R-37 Written Warning, dated 7/23/12

R-38 Written Warning, dated 11/16/11

R-39 Written Warning, dated 11/15/11

R-40 Written Warning, dated 11/15/11

R-41 PNDA, dated 6/6/11

R-42 Disciplinary Action Appeal Settlement Agreement, signed 7/27/11, and Notice of Official Reprimand, dated 8/17/11

R-43 FNDA, dated 3/17/11

R-44 Disciplinary Action Appeal Settlement Agreement, signed 2/16/11

R-45 FNDA, dated 8/17/10

R-46 PNDA, dated 4/7/09

R-47 Disciplinary Action Appeal Settlement Agreement, signed 8/6/09, and Record of Oral Counseling, dated 12/10/09

R-48 Notice of Suspension from Duty Without Pay, dated 4/8/08

R-49 Notice of Official Reprimand, dated 1/25/08

R-50 FNDA, dated 12/31/07

R-51 Disciplinary Action Appeal Settlement Agreement, signed 11/13/07

R-52 Notice of Official Reprimand, dated 1/11/07

R-53 FNDA, dated 7/11/06

R-54 Disciplinary Action Appeal Settlement Agreement, signed 6/29/06

R-55 FNDA, dated 4/14/05

R-56 Disciplinary Action Appeal Settlement Agreement, signed 3/31/05

R-57 PNDA, dated 11/25/04

R-58 Return to Duty, dated 12/20/04

R-59 Written Warning, dated 11/16/04

R-60 Written Warning, dated 11/16/04

R-61 Disciplinary Action Appeal Settlement Agreement, signed 11/16/04

R-62 Notice of Suspension from Duty Without Pay, dated 4/21/04

R-63 Record of Oral Counseling, dated 8/7/03

R-64 Notice of Official Reprimand, dated 6/24/03

R-65 Written Warning, dated 5/9/02

R-66 Notice of Official Reprimand, dated 6/26/01

R-67 Statement signed by Appellant, dated 12/5/14

In the Matter of Monday Ojemen, Greystone Park Psychiatric Hospital, Department of Human Services

CSC DKT. NO. 2017-1263
OAL DKT. NO. CSV 19370-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-
SETTLEMENT
OAL DKT. NO. CSV 19370-16

IN THE MATTER OF MONDAY OJEMEN,
DEPARTMENT OF HUMAN SERVICES,
GREYSTONE PARK PSYCHIATRIC HOSPITAL

James H. Wolfe, III, Esq., for Appellant Monday Ojemen

Elizabeth A. Davies, Deputy Attorney General, for Respondent Department of Human Services, Greystone Park Psychiatric Hospital (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Record Closed: October 12, 2017 Decided: October 12, 2017

BEFORE **THOMAS R. BETANCOURT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Monday Ojemen, appeals a Final Notice of Disciplinary Action, dated October 12, 2016, providing for a penalty of removal.

The matter was referred to the Office of Administrative Law (OAL) by the Civil Service Commission as a contested case where it was filed on December 27, 2016.

The matter was referred to the Office of Administrative Law (OAL) by the Civil Service Commission as a contested case where it was filed on December 27, 2016.

Respondent filed a motion for summary decision with the OAL on April 5, 2017. Appellant filed his brief in opposition on May 11, 2017. The motion was denied by the Honorable Leland S. McGee by Order dated May 16, 2017.

A Consent Confidentiality and Protective Order was entered July 11, 2017.

A hearing was scheduled for November 2, 2017, whereupon the parties advised the undersigned that the matter was settled. A copy of the signed settlement agreement was submitted to the undersigned on September 20, 2017. On October 12, 2017 the undersigned was advised that the Settlement Agreement was provided with only electronic signatures, therefore an original signed Agreement was never sent. The record closed that day.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Appellant's appeal is withdrawn with prejudice.

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 12, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: October 12, 2017

Date Mailed to Parties: October 12, 2017

OAL DKT. NO. CSV 19370-16

SETTLEMENT AGREEMENT

IN THE MATTER OF
MONDAY OJEMEN
AND
GREYSTONE PARK PSYCHIATRIC HOSPITAL, DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The Final Notice of Disciplinary Action dated October 12, 2016 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Admin. Order 4:08 B-2 Neglect of duty, loafing, idleness, or willful Failure to devote attention to tasks which Could result in anger to person or property.	Removal	August 3, 2016
2. Admin. Order 4:08 E-1 Violation of a rule, regulation, policy Procedure, order, or administrative Decision.	Removal	August 3, 2016
3. Admin. Order 4:08 C-8 Falsification: Intentional misstatement of Material fact in connection with work, Employment, application, attendance or in Any record, report, investigation, or other Proceeding.	Removal	August 3, 2016

4. N.J.A.C. 4A:2-2.3(a)6	Removal	August 3, 2016
Conduct unbecoming a public employee.		
5. N.J.A.C. 4A:2-2.3(a)12	Removal	August 3, 2016
Other sufficient causes.		

B. The parties have agreed to the following:

The Appellant, Monday Ojemen withdraws his appeal for a hearing and the Respondent Appointing Authority, Department of Human Services agrees that the following result will occur with regard to each charge:

The Final Notice of Disciplinary Action dated October 6, 2016

Charge	Disposition
1. Admin. Order 4:08 B-2	6 month suspension effective August 3, 2016.
2. Admin. Order 4:08 E-1	6 month suspension effective August 3, 2016.
3. Admin. Order 4:08 C-8	6 month suspension effective August 3, 2016.
4. N.J.A.C. 4A:2-2.3(a)6	6 month suspension effective August 3, 2016.
5. N.J.A.C. 4A:2-2.3(a)12	6 month suspension effective August 3, 2016.

C. The parties have agreed to the following:

The Appellant agrees to one 6 month suspension and shall not receive any back pay as a result of this agreement.

1. To date, appellant has served a total of 6 months without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: No back pay .
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: voluntary leave of absence without pay .
4. Appellant will return to the position of Human Services Technician.

The parties acknowledge that under N.J.A.C. 17:1-2.18(b), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability

benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

09/10/2017
DATE

Monday Ojemen, Appellant

9/10/17
DATE

James H. Wolfe, III, Esq.
ON BEHALF OF Appellant

9/19/17
DATE

James L. Frey
ON BEHALF OF Respondent

9/20/17
DATE

Elizabeth A. Davies
Deputy Attorney General

CERTIFICATION

I, Monday Ojemen, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

09/10/2017
DATE

Monday Ojemen

STATE OF NEW JERSEY

In the Matter of Marisha Penn, Hudson County, Department of Family Services

CSC DKT. NO. 2017-2632
OAL DKT. NO. CSV 03111-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 3, 2017 BW

The appeal of Marisha Penn, Human Services Specialist 4, Hudson County, Department of Family Services, 20 working day suspension, on charges, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on October 3, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 1, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 20 working day suspension to a 10 working day suspension.

Since the penalty has been modified, the appellant is entitled to 10 working days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C.* 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel,* Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained and major discipline was

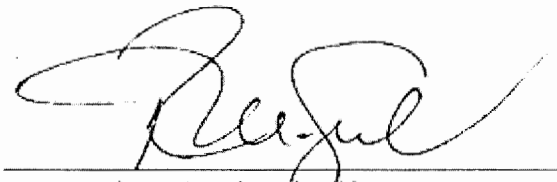
imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12(a), counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 20 working day suspension to a 10 working day suspension. The Commission further orders that appellant be granted 10 days of back pay, benefits, and seniority. 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 shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017



Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Unit H
Trenton, New Jersey 08625-0312

attachment

STATE OF NEW JERSEY

In the Matter of Daryl Lindsey
Newark Police Department

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2013-96
OAL DKT. NO. CSV 10680-12

ISSUED: NOVEMBER 3, 2017 BW

The appeal of Daryl Lindsey, Police Officer, Newark Police Department, 45 working day suspension, on charges, was heard by Administrative Law Judge Leslie Z. Celentano, who rendered her initial decision on October 16, 2017, granting the appeal for the appointing authority's failure to prosecute and reversing the 45 working day suspension.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 1, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the penalty has been reversed, the appellant is entitled to 45 days of back pay, benefits, and seniority, pursuant to *N.J.A.C.* 4A:2-2.10. Further, since the appellant has prevailed, he is entitled to 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, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay and counsel fees are finally resolved.

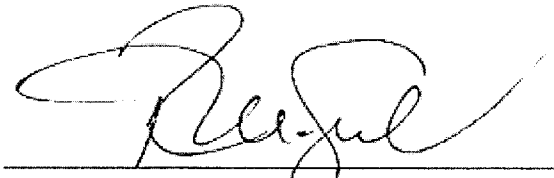
ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Daryl Lindsey. The Commission further orders that appellant be granted 45 days back pay, benefits, and seniority. 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 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 or counsel fees.

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
THE 1ST DAY OF NOVEMBER, 2017



Robert M. Czech, Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03111-17
AGENCY DKT. NO. 2017 2632

IN THE MATTER OF MARISHA PENN, HUDSON COUNTY DEPARTMENT OF FAMILY SERVICES,

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Merick Limsky, Esq., for appellant (Limsky Mitolo, attorneys)

John A. Smith, Esq., for respondent (Office of the County Counsel, Donato J. Battista, County Counsel), for respondent

Record Closed: September 6, 2017 Decided: October 3, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

STATEMENT OF THE CASE

Appellant, Marisha Penn, a Human Service Specialist IV Supervisor, appeals a twenty-day suspension issued by respondent, Hudson County Department of Family Services (Respondent or County), effective February 14, 2017. Respondent alleges that appellant's conduct was unbecoming a public employee on December 13, 2016, when she raised her voice at her employee Marc Percella, resulting in a loud altercation. This conduct unbecoming interfered with the order and effective direction of

public service thus constituting insubordination and a neglect of her duty to the respondent.

PROCEDURAL HISTORY

On January 10, 2017, respondent issued a Preliminary Notice of Disciplinary Action against appellant and an administrative hearing was held on January 27, 2017. A Final Notice of Disciplinary Action issued on February 7, 2017 sustaining the charges of insubordination, conduct unbecoming a public employee and neglect of duty.

On March 6, 2017, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The hearing scheduled for June 13, 2017 was adjourned at the request of the County. The hearing was then held on September 6, 2017, on which date the record closed.

ISSUE

Did the respondent carry its burden of proving the charges referenced above by a preponderance of the credible evidence? If so, what disciplinary action, if any, is appropriate?

TESTIMONY

The testimony of the witnesses presented is not intended to be a verbatim report. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented.

Roger Quintana

Roger Quintana, personnel officer with the Hudson County Department of Family Services, testified on behalf of respondent. He stated the policy for supervisors directs them not criticize employees in front of their peers or clients, but rather wait until the worker's interview. R-2 In the alternative, speak in a calm but firm manner and direct the employee to the office in as low as possible tone of voice. Quintana testified that appellant did not get along with a social worker, Marc Percella, and directed both employees to cease and desist any further contact with each other.

Regarding the verbal altercation between appellant and Percella on December 13, 2016, Quintana testified that he can only make a recommendation for a penalty. A hearing officer determines the discipline imposed. Appellant has not had any prior disciplines in her position as supervisor, but had received a written warning on February 9, 2010, while a social worker HSSI for insubordination, prior to her promotion. The substance of that prior charge was that appellant and two other employees did not leave an area when directed to do so. Appellant entered into a settlement agreement with Hudson County in September 2012 for a second charge accepting a reduction of a ten-day suspension to seven days for exhibiting a public disturbance when appellant slammed her hand on the reception desk and yelled at the security guard.

Debra Picariello

Debra Picariello, assistant administrator and appellant's supervisor, testified on behalf of respondent with regard to the incident on December 13, 2016. Picariello testified that she and appellant went into the office of assistant administrator Janet Wraga to discuss Percella being in appellant's office. The office door to Wraga's office was ajar when Percella entered and at which time he started yelling at appellant, calling her a baby. Percella and appellant left the office, yelling at each other. Percella exited first and appellant followed him. He yelled at her and she yelled back. There were workers and clients present.

Picariello testified that there are employment memoranda, which discuss the appropriate conduct of both employees and supervisors. She stated that this incident should never have escalated, and that appellant as a supervisor, should never have yelled back. She further stated that appellant and Percella always seemed to have an issue with each other.

Janet Wraga

Janet Wraga, assistant administrator with respondent, testified on behalf of respondent regarding the December 13, 2016 incident. She stated that appellant first went to Picariello's office to complain that Percella had entered her office. Both appellant and Picariello then went to Wraga's office to discuss Percella. Percella followed appellant into the office after which a loud argument ensued between appellant and Percella outside her office. Wraga stated that appellant could have handled the matter differently, despite Percella's conduct, which she felt was also inappropriate.

Jason Collazo

Jason Collazo, a Human Service Specialist I with the Hudson County Department of Family Services, testified on behalf of respondent. He stated that on December 13, 2016, he heard appellant and Percella yelling at each other from a distance. He noticed that appellant was following Percella, who was shouting at appellant that she should grow up and stop acting like a baby.

Marisha Penn

Appellant testified on her own behalf. She has been an employee of Hudson County for fourteen years and is currently a Human Service Specialist 4 Supervisor. Appellant stated that sometime in May 2015 an issue arose with Percella when he did not comply with her directive to handle many clients from her unit due which was understaffed. After that incident, both parties disliked each other to the point where a

directive was put in place that each was not to have any contact with the other. At or about the same time, Percella's direct supervisor was placed in Penn's office to share space. Appellant advised the supervisor that she and Percella were not to have contact with each other and it was agreed that Percella would not come into the office unless his supervisor was present.

On December 13, 2016, when appellant was alone, Percella entered her office to drop off paperwork for his supervisor. Appellant immediately left the office and went to Picariello's office. Picariello and appellant then went to Wraga's office. Percella also entered Wraga's office and began yelling at appellant, calling her names. They both exited the office and appellant yelled at him to stay out of her office. There were clients and co-workers in the area. Appellant had, on several occasions, complained to her supervisors that Percella needed to stop coming into her office while she was alone or, in the alternative, to move his supervisor's basket or his supervisor elsewhere. Appellant has a written warning and a seven-day suspension, neither of which occurred while she was a supervisor.

I **FIND** the testimony offered by all witnesses to be consistent straightforward and uncontroverted.

FACTS:

Based on the evidence presented at the hearing and the testimony of all witnesses and appellant which testimony is essentially undisputed, I make the following findings of relevant fact in this matter:

1. Appellant is employed by respondent as a Human Services Specialist IV supervisor.
2. Appellant's supervisor had issued a cease and desist order of contact between appellant and social worker Percella since an argument ensued between them in 2015.
3. On December 13, 2016, Percella entered appellant's office while she was alone, in violation of the terms of the cease and desist order.

4. As a result, appellant and Percella became involved in a loud altercation with each other.
5. Appellant, a supervisor, inappropriately raised her voice with this employee in front of co-workers and clients, rather than attempting to quietly resolve their dispute.
6. Appellant was given a twenty-day suspension for her inappropriate conduct, effective February 14, 2017.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

An appointing authority may discipline an employee on various grounds, including insubordination, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, 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." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

In the present matter, appellant was charged with insubordination and conduct unbecoming a public employee, violating Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6) for raising her voice at an employee in front of co-workers and clients in violation of respondent's policy and procedure, which reads in part:

> "Do not criticize any employee, especially subordinates, in front of their peers or clients. If possible wait until after the workers interview if not then instruct the worker in a non-judgmental tone of voice to report to you at the conclusion of the interview calmly explain your concerns/observations to the employee and ask for an explanation." R-3

I **FIND** that appellant failed to follow this procedure when she raised her voice at an employee in front of clients and employees, rather than take him aside and speak to him calmly.

"Unbecoming conduct" is broadly defined as any conduct that adversely affects the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Conduct unbecoming need not be predicated on violations of the employer's rules or policies, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Karins v. City of Atlantic City, 152 N.J. 555 (1998). Accordingly, I **CONCLUDE** that appellant's inappropriate loud tone of voice and her following a worker into a common office with her voice raised, deviated from the "standard of good behavior" expected of every public employee.

Insubordination is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; and disrespect or use of insulting or abusive language. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Id. at 802. Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined. Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002).

Based upon the **FACTS** provided, the record does not show that appellant was willfully disobedient to a supervisor, and as such, I **CONCLUDE** that respondent has not demonstrated by a preponderance of the legally competent and credible evidence that appellant committed acts of insubordination.

Lastly, appellant was also charged with neglect of duty, violating N.J.A.C. 4A:2-2.3(a)(7). Neglect of duty can arise from an omission to perform a duty or failure to perform or discharge a duty and includes official misconduct or misdoing, as well as negligence. Steinel v. City of Jersey City, Initial decision, 7 N.J.A.R. 91, 95 (March 21, 1983), modified on other grounds, Civ. Serv. Comm'n, 7 N.J.A.R. 100 (May 12, 1983), modified on other grounds, 193 N.J. Super. 629 (App. Div. 1984), aff'd, 99 N.J. 1 (1985). Generally, the term neglect connotes a deviation from normal standards of conduct. In re Suspension or Revoc. of the License of Kerlin,151 N.J. Super. 179, 186 (App. Div. 1977).

I **CONCLUDE** that respondent has not met its burden of proving, by a preponderance of the competent and credible evidence, that appellant failed to perform her job duties. The only evidence and testimony in the record dealt with an altercation that occurred on December 13, 2016 and nothing else.

PENALTY

Factors determining the degree of discipline to be imposed include the employee's prior disciplinary record and the gravity of the misconduct in the instant case, as well as the concept of progressive discipline. W. New York v. Bock, 38 N.J. 500, 522-524 (1962). The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter,

supra, 191 N.J. at 484. Progressive discipline is not a necessary consideration "when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest." Herrmann, supra, 192 N.J. at 33.

Under the facts presented, a suspension is appropriate. While appellant did have a prior discipline, it was not in her position as a supervisor. In light of appellant's inappropriate conduct and behavior as a supervisor when she followed an employee, raising her voice at him in front of employees and clients, a ten-day suspension is appropriate, and I so **CONCLUDE**.

ORDER

Based upon the above, I **ORDER** that appellant be suspended without pay for a period of ten days.

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

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

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 3, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Date Mailed to Parties: OCT 4 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses:

For appellant:

Marisha Penn

For respondent:

Roger Quintana

Debra Picariello

Janet Wraga

Jason Collazo

Exhibits:

For appellant:

None

For respondent:

R-1 Human Services Specialist job description

R-2 County of Hudson Employee Handbook

R-3 Correcting/Counseling Subordinate Employees policy

R-4 Personnel Order (for identification only)

R-5 Final Notice of Disciplinary Action dated March 26, 2012

R-6 non-disciplinary counseling notice

R-7 Written Warning dated February 9, 2010

R-8 Final Notice of Disciplinary Action dated February 7, 2017

R-9 Memo dated December 13, 2016

R-10 Memo dated December 13, 2016

R-11 a-b Memo dated December 13, 2016

11-1-17

STATE OF NEW JERSEY

In the Matter of Ericson Rivera,
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2018-488
OAL DKT. NO. CSV 12934-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 12934-17

AGENCY DKT. NO. 2018-488

IN THE MATTER OF ERICSON RIVERA,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert C. Little, AFSCME New Jersey, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: October 17, 2017 Decided: October 18, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Ericson Rivera from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on September 5, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 18, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 10/19/17

Date Mailed to Parties: 10/19/17

/nd

OAL DKT. NO. CSV 12934-2017 / 12935-2017
AGENCY DKT. NO. 20 – 2018-488 / 2018-489

SETTLEMENT AGREEMENT

IN THE MATTER OF

Ericson Rivera

AND

Ancora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 7/20/2017 (2) contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	B2-1/E.1.4; NJAC(a)6,7+12 (4A:2-2.3)	Removal	5/17/2017
2.	B2-2/E.1.5; NJAC(a)6,7+12	Removal	5/17/2017.
3.			
4.			
5.			

B. The Appellant Ericson Rivera withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge (amended to E.1.3 ↙ 4A:2-2.3)	Disposition	New Penalty
1.	B.2.1/E.1.3; NJAC(a)6,7,12	~~Dismissed~~ Sustained	2 months suspension
2.	B.2.2/E.1.4; NJAC(a)6,7,12	Sustained	4 months suspension
3.			

(↑ amended to E.1.4)

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of without pay since 5/17/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: NONE.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: LEAVE WITHOUT PAY.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ericson Rivera 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. APPELLANT SHALL ADHERE TO TANCMA'S CELL PHONE USAGE POLICY. ANCMA SHALL PROVIDE A COPY OF THE POLICY UPON HIS RETURN.

J. APPELLANT UNDERSTANDS THAT ANY FURTHER INCIDENT OF NEGLECT WILL BE CAUSE FOR HIS REMOVAL AND IMMEDIATE SUSPENSION.

OAL DKT. NO. CSV 12934/12935-2017

CERTIFICATION

I, Ericson Rivera, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-17-17
DATE

Ericson Rivera
NAME

OAL DKT. NO. CSV 12934-2017
12935-2017

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10-17-17
DATE

Erica Price
Appellant

10/17/17
DATE

Danna Brown
Respondent

10-17-17
DATE

Robert C Little Jr
ON BEHALF OF APPELLANT

10-17-17
DATE

Mary Murphy
ON BEHALF OF AGENCY

10-17-17
DATE

Cynthia Simpson
DHS REP

11-1-17

STATE OF NEW JERSEY

In the Matter of Ericson Rivera,
Ancora Psychiatric Hospital,
Department of Human Services

CSC DKT. NO. 2018-489
OAL DKT. NO. CSV 12935-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 12935-17

AGENCY DKT. NO. 2018-489

IN THE MATTER OF ERICSON RIVERA,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert C. Little, AFSCME New Jersey, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: October 17, 2017 Decided: October 18, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Ericson Rivera from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on September 5, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 18, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 10/19/17

Date Mailed to Parties: 10/19/17

/nd

OAL DKT. NO. CSV 12934-2017 / 12935-2017
AGENCY DKT. NO. 20 – 2018-488 / 2018-489

SETTLEMENT AGREEMENT

IN THE MATTER OF

Ericson Rivera

AND

Ancora Psychiatric Hospital
DEPARTMENT OF Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 7/20/2017 (2) contained the following charges and proposed discipline:

Charge (4A:2-2.3)	Discipline	Dates Effective
1. B2-1/E.1.4; NJAC(a)6, 7+12	Removal	5/17/2017
2. B2-2/E.1.5; NJAC(a)6, 7+12	Removal	5/17/2017.
3.		
4.		
5.		

B. The Appellant Ericson Rivera withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge (4A:2-2.3) (amended to E.1.3)	Disposition	New Penalty
1. B.2.1/E.1.3; NJAC(a)6, 7, 12	Sustained	2 months suspension
2. B.2.2/E.1.4; NJAC(a)6, 7, 12	Sustained	4 months suspension
3.		

(amended)

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Without pay since 5/17/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: NONE.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: LEAVE WITHOUT PAY.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ericson Rivera 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. APPELLANT SHALL ADHERE TO ANCORA'S CELL PHONE USAGE POLICY. ANCORA SHALL PROVIDE A COPY OF THE POLICY UPON HIS RETURN.

J. APPELLANT UNDERSTANDS THAT ANY FURTHER INCIDENT OF NEGLECT WILL BE CAUSE FOR HIS REMOVAL AND IMMEDIATE SUSPENSION.

OAL DKT. NO. CSV 12934/12935-2017

CERTIFICATION

I, Ericson Rivera, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-17-17	Ericson Rivera
DATE	NAME

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10-17-17
DATE

Erica Rice
Appellant

10/17/17
DATE

Donna Brown
Respondent

10-17-17
DATE

Robert C Kittbott
ON BEHALF OF APPELLANT

10-17-17
DATE

Mary Murphy
ON BEHALF OF ANCORA

10-17-17
DATE

Cynthia Lambert
DHS REP.

11-1-17

STATE OF NEW JERSEY

In the Matter of Angel Romero,
Newark Police Department

CSC DKT. NO. 2017-307
OAL DKT. NO. CSV 11824-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 11824-16

AGENCY DKT. NO. 2017-307

IN THE MATTER ANGEL ROMERO,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Esq., for appellant, Angel Romero (Fusco & Macaluso, attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent City of Newark Police Department pursuant to N.J.A.C. 1:1-5.4(a)(8) (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: October 3, 2017 Decided: October 6, 2017

BEFORE **JEFFREY A. GERSON**, ALJ:

On August 5, 2016, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for September 22, 2017, but was adjourned because the parties agreed to settle the matter. A Settlement Agreement and General Release indicating the terms of settlement was signed by parties and forwarded to the

undersigned on October 3, 2017. A copy of the Settlement Agreement and General Release is attached hereto and made a part hereof.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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 Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

October 6, 2017

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 10-11-17

Date Mailed to Parties: OCT 11 2017
sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DOCKET NO. CVS 11824-2016N

RECEIVED

ANGEL ROMERO,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
	:	
Appellant,	:	
v.	:	**OAL DOCKET NO. CVS 11824-2016N**
CITY OF NEWARK,	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	:	

2017 OCT -3 P 4:37

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

2017 SEP 29 A 9:55

RECEIVED
LAW DEPARTMENT
CITY OF NEWARK, N.J.

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Angel Romero ("Romero" or "Appellant"), Newark Fraternal Order of Police, Lodge 12 ("Union") and the City of Newark ("City "or "Respondent") (collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Romero by the City. This Agreement is made and entered into by the Parties in full settlement of Romero's appeal regarding the above matter.

On June 6, 2016, the Newark Department of Public Safety, Police Division ("Department of Public Safety") brought departmental disciplinary charges against Romero in the form of a Preliminary Notice of Disciplinary Action ("PNDA") stemming from his actions on June 17, 2015 to June 25, 2015 making eighteen (18) cell phone communications with a person wanted in a shooting. Romero pled not guilty, waiving his opportunity for a Hearing before the Trial Board. On July 12, 2016, Final Notice of Disciplinary Action and Specifications (hereinafter referred to as "FNDA") were issued with the following charges: Disobedience of Orders, in violation of Newark Police Department Rules and Regulations Chapter 18:14; Management of Confidential Informants, in violation of Newark Police Department Rules and Regulations Chapters 97-6, specifically section VI, subsection G. A copy of the July 12, 2016 FNDA is attached herein as Exhibit A. Based on these charges, the Department of Public Safety suspended Romero for ninety (90) days beginning August 1, 2016 to December 2, 2016 pursuant N.J.A.C. 4A:2-2.4 (e).

After further negotiations, the Parties have agreed to resolve this matter as follows:

1. The charges listed in the FNDA are merged into one charge, Responsibility for One's Own Actions, Newark Police Department Rules and Regulations Chapter 7, specifically section 7:2.
2. Romero's suspension is reduced from ninety (90) to fifteen (15) days. The City will amend his FNDA to reflect a fifteen (15) day suspension.
3. The City will pay Romero seventy-five (75), days back pay and make the appropriate adjustments to his pension and seniority.
4. Romero waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
5. Romero and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
6. Romero and the Union each further agree that there is no consideration due, his counsel and/or Union, including, but not limited to, any claim for additional back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.
7. Except for the assessment of Romero's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Party.
8. Romero and the Union acknowledge that this Agreement precludes them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

9. Romero is bound by this Agreement. Anyone who succeeds to Romero's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
10. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees or the Union.
11. Romero and the Union each agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
12. This Agreement contains the sole and entire agreement between Romero, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Romero specifically represents and acknowledges that in executing this Agreement, he has not relied upon any representations, with regard to the subject matter in this Agreement, which are not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
13. Romero agrees and acknowledges that he has been fully and fairly represented by his Union and counsel in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
14. Romero agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representative and he enters into this Agreement knowingly and voluntarily.
15. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
16. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the Civil Service Commission shall not interfere with the rights of either Party to pursue the matter further.
17. By signing this Settlement Agreement, Romero states that:

a) He has read it;

b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the

Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;

c) He agrees with everything in it;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) He has been given at least twenty-one (21) days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of seven (7) days following the execution of this Agreement, he may revoke this Agreement; the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

9-27-17
Date

BY: _____
Director Anthony Ambrose,
City of Newark
Department of Public Safety, Police Division

9/20/17
Date

BY: _____
Anthony J. Fusco, Esq., FOP Attorney

9/20/17
Date

A Romero
Angel Romero, Police Officer

Approved as to Form and Legality:

10/2/17
Date

Joyce Clayborne, Esq
Joyce Clayborne, Esq.
City of Newark Law Department

CERTIFICATION

I, Angel Romero, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement and General Release by signing below. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement and General Release voluntarily.

I also understand that if this Settlement Agreement and General Release are approved by the **CIVIL SERVICE COMMISSION**, then my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/20/17
DATE

A Romero
Angel Romero

EXHIBIT A

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five working days less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or certified or registered mail.

FROM:	Employing Agency Name Newark Police Department – Fifth Precinct	Address/Phone Number 31 Green Street, Newark, NJ 973-733-5618	Date 07/12/16
	Attorney representing your agency should this matter be appealed Corporation Counsel-Law Department	Address/Phone number/Email address 920 Broad Street/973-733-3800/parkerw@ci.newark.nj.us	
TO:	Employee Name Angel Romero	Permanent Civil Service Title Police Officer	Social Security Number 153 72 8479
	Address/Phone Number 656 Parker Street, Newark, New Jersey 07104 973-396-7099		

On 06/29/16 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ You requested a hearing which was held on July 12, 2016 CAP 2016-105 IOP 2015-531

☐ You did not request a hearing.

☐ You requested a hearing and did not appear at the designated time and place.

Sustained Charges: Disobedience of Orders	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
Officer Romero entered a plea of Not Guilty and waived his opportunity for hearing before trial board. His attorney advised the trial board of the Officer Romero's intention to file an appeal from the discipline with the NJ Civil Service Commission. Disposition: Guilty	
☑ If checked, charges are continued on attached page	☐ If checked, specifications are continued on attached page

The following disciplinary action has been taken against you:

☑ Suspension for 90 days, beginning August 01, 2016 and ending December 02, 2016

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____

☐ Fine $ _____ (Amount) which is equal to _____ (Number) days pay ☐ other disciplinary action:

Appointing authority or authorized agent's signature and title.

SIGNATURE Anthony F. Ambrose III 7-18 TITLE PUBLIC SAFETY DIRECTOR

This form must be personally served on the employee or sent by certified or registered mail.

☑ Certified or Registered Mail ☑ Receipt Number 7015 3010 0001 5140 1779

☑ Signature of Server _____ ☑ Date of Personal Service 7/31/16

APPEAL PROCEDURE TO THE EMPLOYEE: You have a right to appeal Within 20 Days From Receipt of this form. All appeals must include a copy of this form and must be sent to the Civil Service Commission, 44 S. Clinton Avenue, PO Box 312, Trenton, NJ 08625-0312. Your appeal cannot be processed until a copy of this form is received. DO NOT GIVE YOUR APPEAL TO YOUR PERSONNEL OFFICE FOR FORWARDING TO THE CIVIL SERVICE COMMISSION. ANY APPEAL POSTMARKED AFTER THE 20 DAY STATUTORY TIME LIMIT WILL BE DENIED. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail.

DPF-31 B / Revised 07-09-09 Distribution: Employee, Union Representative or Attorney, Management, Civil Service Commission.

POLICE DEPARTMENT

Newark, N. J., ...June 07, 2016...

To the Honorable, the Public Safety Director,

Sir:

I Hereby Charge POLICE OFFICER ANGEL ROMERO, FIFTH PRECINCT, OFFICE OF THE CHIEF OF POLICE

ROC 2016-105 IOP 2015-531

CHARGES MAYBE ADDED OR AMENDED AT A LATER DATE

CHARGE: Violation of Newark Police Department Rules and Regulations, Chapter 18:14 – DISOBEDIENCE OF ORDERS – Department members shall not willfully disobey lawful orders.

SPECIFICATION: Police Officer Angel Romero, did disobey a lawful written order from the Police Director, to wit: General Order 97-6, SUBJECT: MANAGEMENT OF CONFIDENTIAL INFORMANTS, specifically section VI, subsection G, in that Police Officer Romero, did violate the above order when it was discovered that he had frequent contact with Mr. Rasheem King, wanted for a shooting incident that took place on June 27, 2015, who also assisted Law Enforcement in the past. Approximately eighteen (18) conversations were logged between Police Officer Angel Romero and Mr. Rasheem King between June 17, 2015 and June 25, 2015. Police Officer Romero violated the above rule when he maintained a social relationship with a CI while off duty or otherwise became personally involved with CI.

ANTHONY F. AMBROSE III
PUBLIC SAFETY DIRECTOR

11-1-17

STATE OF NEW JERSEY

In the Matter of T.M., Department of Education

CSC DKT. NO. 2013-3207
OAL DKT. NO. CSV 02994-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 02994-16

AGENCY DKT. NO. 2013-3207

IN THE MATTER OF TREVOR MELTON, NEW JERSEY DEPARTMENT OF EDUCATION .

Walter R. Bliss, Jr., Esquire, for appellant, Trevor Melton

Caroline Jones, Deputy Attorney General, for respondent, New Jersey Department of Education (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Record Closed: September 29, 2017 Decided: October 2, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on February 24, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties filed a fully executed Consent Order in this matter. The Order is attached and fully incorporated herein. (J-1).

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures to J-1.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 2, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10/5/17

Date Mailed to Parties: 10/5/17

/dw

LIST OF EXHIBITS

J-1 Agreement and Complete Release

Walter R. Bliss, Jr., Esquire - Attorney I. D. No. 261711970
Law Offices – Walter R. Bliss, Jr.
310 W. State Street
Trenton, New Jersey 08618
(609) 695-2111
e-mail: walter.bliss@gmail.com

T.M.,	:	OFFICE OF ADMINISTRATIVE LAW
Appellant,	:	OAL Docket No. CSV 02994-2016 S
	:	Agency Ref. No. 2013-3207
v.	:	Transmitting Agency: Department of Personnel
New Jersey Department of Education,	:	
	:	
Respondent.	:	**CONSENT ORDER**

This matter arising from the investigation, determination, and discipline of T.M. for violation of the State Policy Prohibiting Discrimination in the Workplace, and this matter having been the subject of proceedings in the Superior Court of New Jersey, Appellate Division, Docket No. A-4628-11T1, on appeal from disciplinary action by the Department of Education upheld in part by the Civil Service Commission, and the Appellate Court, on May 28, 2013, having reversed the subject discipline and without retaining jurisdiction having remanded the matter for further proceedings in accordance with the Court's opinion, the Court also impounding the record on appeal, and on February 24, 2016, the Civil Service Commission having sent the matter for hearing before the Office of Administrative Law, a hearing date having then been scheduled, and the parties now wishing to resolve the matter amicably by terminating the

proceedings and clearing the employment record of T.M., and the parties having agreed to the terms of settlement set forth below, and same being acceptable, it is

On this _____ day of _____, 2017,

ORDERED, upon the agreement of the parties, as follows:

1. All discipline of T.M. relating to events on November 15, 2010, as set forth in the letter to T.M. dated February 4, 2011 by Acting Commissioner Christopher D. Cerf (hereafter referred to collectively as "Discipline") is hereby rescinded.

2. The Department of Education shall ensure that T.M.'s employment record does not reflect the rescinded determination that T.M. violated the State Policy Prohibiting Discrimination in the Workplace or contain any reference to the investigation and determination thereof.

3. The Department of Education shall ensure that T.M.'s personnel file does not contain any documents relating to the investigation, determination, and the rescinded Discipline described in paragraph 1.

4. The Department will keep confidential any files of the Department of Education's Equal Employment Opportunity/Affirmative Action Officer relating to the investigation, determination, and the rescinded Discipline described in paragraph 1. The confidential EEO/AA file will be amended to include a copy of this agreement reflecting the rescission of the disciplinary action.

5. T.M. shall take such course in work place policies as the Department may determine.

6. This settlement is entered without admission of wrongdoing by either party

7. The settlement of this matter shall not constitute precedent in other pending or\

future litigation or controversy and nothing in this agreement shall constitute or be given precedential effect.

8. The parties agree that the consent order fully resolves all issues between them arising from the investigation, determination, and the rescinded discipline referenced in paragraph 1.

9. The parties acknowledge that this Consent Order is subject to approval by the Civil Service Commission.

Hon. Dean J. Buono, Judge

We agree to the form and entry of the above Consent Order.

NEW JERSEY DEPARTMENT OF EDUCATION

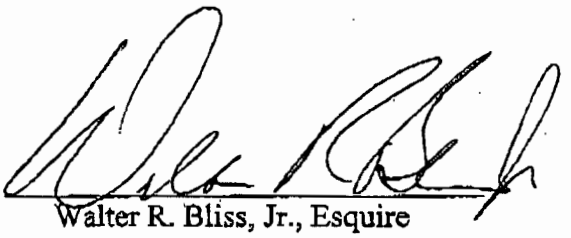
By: _____
(name) Christopher Huber
(title) Acting Chief Legal Affairs Officer

T.M.

T.M.
Appellant

Acknowledgment

On this 17th day of **September, 2017, T.M.,** whom I know to be the person named as Appellant in the matter encaptioned T.M., Appellant v. Department of Education, Respondent, appeared before me and signed the above Consent Order as his voluntary act, intending to be bound by it.



Walter R. Bliss, Jr., Esquire
Attorney at Law of New Jersey

11-1-17

STATE OF NEW JERSEY

In the Matter of Luis Velez, Newark Police Department

CSC DKT. NO. 2015-2913
OAL DKT. NO. CSV 07147-15

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 1, 2017 JM

The Civil Service Commission, at its meeting of November 1, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07147-15

AGENCY DKT. NO. 2015-2913

IN THE MATTER OF LUIS VELEZ,
CITY OF NEWARK, POLICE DEPARTMENT.

Amie E. DiCola, Esq., for appellant Luis Velez (Law Offices of Fusco & Macaluso, LLC, attorneys)

France Casseus, Assistant Corporation Counsel, for respondent City of Newark Police Department pursuant to N.J.A.C. 1:1-5.4(a)8 (Kenyatta Stewart, Esq., Acting Corporation Counsel)

Record Closed: October 3, 2017 Decided: October 5, 2017

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 15, 2015, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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 Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

Oct. 5, 2017
DATE

IRENE JONES, ALJ

Date Received at Agency: 10-13-17

Date Mailed to Parties: OCT 13 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

Luis Velez, Appellant,	:	**STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW**
v.	:	**OAL DOCKET NO.: CSV 07147-2015 N**
CITY OF NEWARK, Respondent.	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Luis Velez ("Velez" or "Appellant"), the Newark Fraternal Order of Police ("FOP" or "Union") and the City of Newark ("City" or "Respondent") (collectively referred to hereinafter as the "Parties"). This agreement is made and entered into by the Parties in full settlement of Velez's appeal regarding the above matter.

The Department of Public Safety, Police Division brought disciplinary charges against Velez on February 11, 2015 by way of Preliminary Notice of Disciplinary Action ("PNDA"). The Final Notice of Disciplinary Action and Specifications dated April 21, 2015 (hereafter "FNDA"), contained the following charges: Conduct in Public and Private, Conduct Unbecoming a Public Employee and Neglect of Duty, in violation of Newark Police Department Rules and Regulations Chapters 3:1.1 and 18:6, as well as New Jersey Civil Service Rules N.J.A.C. 4A:2-2.3(a) 6 and 4A:2-2.3(a) 7; for which Velez was suspended fifteen (15) days beginning May 11, 2015 and ending May 29, 2015.

The parties have agreed to resolve this matter as follows:

1. The charges listed in the FNDA are upheld.
2. Velez's suspension is reduced from fifteen (15) days to seven (7) days. The City will amend his disciplinary record to reflect the 7-days suspension.

3. The City agrees to pay Velez eight (8) days back pay. Velez will receive the 8-days adjustment to his pension and seniority.

4. Velez waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.

5. Velez and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

6. Velez and the Union each further agree that there is no consideration due Velez, his counsel and/or Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

7. Except for the assessment of Velez's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either party.

8. Velez and the Union further acknowledge that this Agreement precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

9. Velez is bound by this Agreement. Anyone who succeeds to Velez's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.

10. This Agreement shall not constitute a precedent or practice in any matter involving the City, other City employees or the Union.

11. Velez and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

12. This Agreement contains the sole and entire agreement between Velez, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Velez specifically represents and acknowledges in executing this Agreement he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

13. Velez agrees and acknowledges that he has been fully and fairly represented by his Union and counsel in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

14. Velez agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representative and he enters into same knowingly and voluntarily.

15. The parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

16. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

17. By signing this Settlement Agreement, Velez states that:

a) He has read it;

b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

c) He agrees with everything in it;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) He has been given at least 21 days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of 7 days following the execution of this Agreement he may revoke this Agreement and

the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

8-11-17
Date

BY:
Department of Public Safety Director

9/29/17
Date

BY:
Union Representative/Attorney

9/27/17
Date

Luis Velez

Approved as to Form and Legality:

8/16/17
Date

Law Department

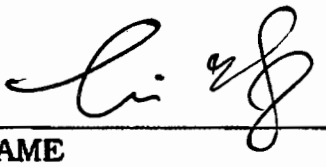
CERTIFICATION

I, Luis Velez, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9/27/17
DATE


NAME

Luis

11-13-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 12, 2018

Nicholas J. Palma, Esq.
1425 Broad Street
Clifton, New Jersey 07013

Courtney M. Gaccione, Esq.
Essex County
465 Martin Luther King Blvd. – Rm 535
Newark, New Jersey 07102

Re: *Frank James v. Essex County* (CSC Docket No. 2016-3573 and OAL Docket No. CSV 5746-16) - **SETTLEMENT**

Dear Mr. Palma and Ms. Gaccione:

The appeal of Frank James, a County Correction Officer Police Officer with Essex County, Department of Public Safety and Corrections, of his removal effective March 10, 2016, was before Administrative Law Judge Richard McGill (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 13, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on December 30, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than February 13, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to vote. Based on this information, the parties were asked, as required, to consent to a second extension. However, the appointing authority did not provide consent. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective February 14, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Richard McGill, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 05746-16
AGENCY DKT. NO. 2016-3576

IN THE MATTER OF FRANK JAMES, COUNTY OF ESSEX DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS.

Nicholas J. Palma, Esq., for Frank James

Jill Caffrey, Assistant County Counsel, for Essex County Department of Public Safety and Corrections (Courtney M. Gaccione, Essex County Counsel, attorney)

Record Closed: October 12, 2017 Decided: November 13, 2017

BEFORE **RICHARD McGILL**, ALJ:

Frank James appeals from a removal on charges from the position of Corrections Officer with the Essex County Department of Public Safety and Corrections. The matter was transmitted to the Office of Administrative Law on April 13, 2016, for determination as a contested case.

Prior to the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement and Last Chance Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that proceedings in this matter be concluded.

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.

Nov. 13, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

11-15-17

Date Mailed to Parties:

NOV 15 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

COURTNEY M. GACCIONE, ESSEX COUNTY COUNSEL
BY: JILL CAFFREY, ASSISTANT COUNTY COUNSEL
HALL OF RECORDS - ROOM 535
NEWARK, NEW JERSEY 07102
973-621-4428
Attorney for the County of Essex

Frank James Jr.,

v.

Essex County Department of Public Safety and Corrections.

OAL DKT. NO.: CSV 05746-2016

STIPULATION OF SETTLEMENT AND LAST CHANCE AGREMEENT

It is hereby stipulated and agreed to by and between, the County of Essex (the "County") and Frank James, Jr. (the "Employee") (collectively the "Parties"), that the above-captioned matter be and same is hereby settled upon the following terms and conditions:

1. Employee hereby acknowledges being charged as specified in the Final Notice of Disciplinary Action dated March 11, 2016, which was duly served upon employee in accordance with the Civil Service Rules.

2. In lieu of Removal, the Parties hereby agree to allow the Employee to attend the next available Police Academy, if the appeal of the Employee's academy dismissal is successful. Employee agrees and understands that the County cannot guarantee where or when the next available Police Academy will take place; of which the cost of attendance shall be borne by the County. All expenses, including transportation, parking, tolls, etc., relating to the attendance at said Police Academy will be borne by employee. Employee understands that, prior to Police Academy admittance, s/he must also comply with the Police

Training Commission's medical clearance requirements in accordance with N.J.A.C. 13:1-8.1(a)5.

3. Employee understands and agrees that the period which s/he has been out of work shall be deemed a leave of absence without pay and thus shall not seek back pay of any kind. Employee further understands that s/he will be permitted to return to work only upon successful completion of the Police Academy. The County will not make any back payment for any pension contributions during the period of time prior to his return to active duty.

4. Employee further understands and accepts that this is the employee's last and final opportunity to successfully attend and complete the Police Academy. Failure to be medically cleared to attend the Police Academy in accordance with N.J.A.C. 13:1-8.1(a)5 or dismissal from the Police Academy for any reason whatsoever, including but not limited to work related accident or injury, shall result in termination.

5. The Employee and the County agree that the terms and conditions of this Stipulation of Settlement and the discussions and negotiations leading up to it shall be kept absolutely confidential hereafter and shall not be disclosed by the employee to any other employee or former employee of the County or other persons or the general public unless compelled to do so by the judicial process. However, the employee may make disclosures to members of her immediate family, attorney, union representative and as may be required by her accountant in connection with the discharge of the latter's duties in preparation of tax returns or financial statements. Employee's failure to comply with the confidentiality

provisions of this program may result in the dissolution of the within Stipulation of Settlement at the sole and exclusive option of the County.

6. In the event that an action is brought by the County for the employee's breach of the confidentiality conditions set forth in paragraph 5 hereof, in addition as to such other relief as is appropriate, the County shall be entitled to reasonable attorneys fees and costs.

7. This Stipulation of Settlement and General Release is not and shall not in any way be construed as an admission by the County of any violation of any federal or state constitutional prohibition or any federal or state or local law or ordinance or regulation, or any express or implied contract of employment, or in violation of any other legal duty owed to employee, but instead constitutes the good faith settlement of a disputed claim and the County specifically disclaims any liability to employee or any other person. The parties have entered into this Stipulation of Settlement and General Release with the County, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation. No findings of any kind have been made or issued by any court and employee does not purport to be the prevailing party in any threatened or pending litigation.

8. Employee represents and certifies that s/he has carefully read and fully understands all of the provisions of and effects of this Stipulation of Settlement and General Release and has thoroughly discussed all aspects of this Stipulation of Settlement and General Release with his/her attorney. Further, the employee certifies that s/he has voluntarily entered into this Stipulation of

Settlement and General Release and that the County has not made any representations concerning the terms of effects of this Stipulation of Settlement and General Release other than those contained herein.

9. This Stipulation of Settlement shall neither set a precedent nor constitute a past practice.

10. This Stipulation of Settlement and General Release is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey. The language of all parts of this Stipulation of Settlement and General Release shall, in all cases, be construed as a whole according to its fair meaning and strictly for or against any of the parties.

11. Should any provision of this Stipulation of Settlement and General Release be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Stipulation of Settlement and General Release.

12. This Stipulation of Settlement shall not be considered binding and/or final until approved by and executed by the County Administrator.

13. Employee agrees that this Stipulation of Settlement and General Release shall operate as a complete and final disposition of this matter. In consideration for the County's satisfactory action in resolving the disciplinary offenses, employee agrees to release and forever discharge the County, the County's officers, agents, officials, employees, attorneys, administrators,

representatives, elected officials, departments, boards, officers and all persons acting by, though, under or in concert with, both in their official and individual capacities, from any and all claims she has now to any relief of any kind from the County, whether or not she now knows about those rights, arising out of her/his employment with the County, including, but not limited to, claims for breach of contract; fraud or misrepresentation; violation of Title VII or the Civil Rights Acts of 1964, or other federal, state or local civil rights law based on age or other protected class status including sex, race, color, national origin; the Americans with Disabilities Act; defamation; slander; libel; invasion of privacy; intentional or negligent infliction of emotional distress; breach of covenant of good faith and fair dealing; promissory estoppel; negligence; violation of public policy; Conscientious Employment Protection Act; New Jersey Law against Discrimination; Equal Pay Act; New Jersey Employer-Employee Relations Act; New Jersey Family Leave Act and any other claims for unlawful employment practices. It is emphasized that employee is waiving all claims, and the right to a trial by jury of all possible claims, against the County, in relation to this matter, from the beginning of employee's employment with the County to the date this Stipulation of Settlement and General Release is executed by employee.

14. Employee shall withdraw the pending appeal, against the County, in this matter.

15. Employee shall not request relief with respect to this matter, in any forum beyond that which is contained herein.

16. This Stipulation of Settlement and General Release may not be

modified, altered or changed, except upon the prior express written consent of the parties.

17. This Stipulation of Settlement and General Release the result of negotiations with employee and employee's attorney and/or union representative with whom employee had an opportunity to consult prior to signing the same.

Dated: 9/6/17

JILL CAFFREY ESQ.
ASSISTANT COUNTY COUNSEL

Dated: 9/20/17

ROBERT D. JACKSON
COUNTY ADMINISTRATOR

Dated: 9-7-17

ALFARO ORTIZ, DIRECTOR
DEPARTMENT OF CORRECTIONS

Dated: 8/25/17

NICHOLAS J. PALMA, ESQ.
ATTORNEY FOR EMPLOYEE

Dated: 8/29/17

FRANK JAMES, JR.
EMPLOYEE

11-X-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 7, 2018

Anthony J. Jusco, Jr., Esq.
Fusco & Macaluso Partners, LLC
150 Passaic Avenue, P.O. Box 838
Passaic, New Jersey 07055

Joyce Clayborne, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Alonzo Herran v. City of Newark* (CSC Docket No. 2013-987 and OAL Docket No. CSV 15480-12) - **SETTLEMENT**

Dear Mr. Fusco and Ms. Clayborne:

The appeal of Alonso Herran, a Police Officer with the City of Newark Police Department, of his 45 working day suspension, was before Administrative Law Judge Leslie Z. Celentano (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 15, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on December 30, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than February 13, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to vote. Based on this information, the parties were asked, as required, to consent to a second extension. However, the appointing authority did not provide consent. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective February 14, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Leslie Z. Celentano, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 15480-12

IN THE MATTER OF ALONZO HERRAN,
CITY OF NEWARK, POLICE DEPARTMENT.

Anthony J. Fusco, Esq., for appellant (Fusco & Macaluso, LLC, attorneys)

Joyce Clayborne, Esq., for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: November 2, 2017 Decided: November 8, 2017

BEFORE **LESLIE Z. CELENTANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 8, 2012, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Release and Settlement Agreement were submitted indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

November 8, 2017
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 11-13-17

Date Mailed to Parties: NOV 13 2017

dr

~~DIRECTOR AND~~
CHIEF ADMINISTRATIVE LAW JUDGE

OAL DOCKET NO. CVS 15480-2012N

RECEIVED

2017 NOV -2 A 11:31

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ALONZO HERRAN,	:	**STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
v.	:	**OAL DOCKET NO. CVS 15480-2012N**
CITY OF NEWARK,	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Alonzo Herran ("Herran" or "Appellant"), Newark Fraternal Order of Police, Lodge 12 ("Union") and the City of Newark ("City "or "Respondent") (collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Herran by the City. This Agreement is made and entered into by the Parties in full settlement of Herran's appeal regarding the above matter.

On March 22, 2012, the Newark Department of Public Safety, Police Division ("Department of Public Safety") brought departmental disciplinary charges against Herran in the form of a Preliminary Notice of Disciplinary Action ("PNDA") stemming from his actions on January 10, 2011, involving an alleged assault of a civilian with the butt of his gun and subsequent false statements made by Herran concerning the incident. Herran pled not guilty, waiving his opportunity for a Hearing before the Trial Board. On October 2, 2012, Final Notice of Disciplinary Action and Specifications (hereinafter referred to as "FNDA") were issued with the following charges: Conduct, in violation of Newark Police Department Rules and Regulations Chapter 5:1.1; New Jersey Civil Service Rule N.J.A.C. 4A:2-2.3 (a) 6; Disobedience of Orders, in violation of Newark Police Department Rules and Regulations Chapter 18:14; Official Inefficiency or Incompetency, in violation of Newark Police Department Rules and Regulations Chapter 18:29.1; New Jersey Civil Service Rule N.J.A.C 4A:2-2.3(a) 1; False Statement, in violation of Newark Police Department Rules and Regulations Chapter 18:22. A

copy of the October 2, 2012, FNDA is attached herein as Exhibit A. Based on these charges, the Department of Public Safety suspended Herran for forty-five (45) days beginning October 22, 2012 to December 21, 2012 pursuant N.J.A.C. 4A:2-2.4 (e).

After further negotiations, the Parties have agreed to resolve this matter as follows:

1. The charges listed in the FNDA are upheld.
2. Herran's suspension is reduced from forty-five (45) days to fifteen (15) days.
3. The City will amend his FNDA to reflect a fifteen (15) day suspension.
4. The City will pay Herran thirty (30), days back pay and make the appropriate adjustments to his pension and seniority.
5. Herran waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
6. Herran and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
7. Herran and the Union each further agree that there is no consideration due, his counsel and/or Union, including, but not limited to, any claim for additional back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.
8. Except for the assessment of Herran's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Party.
9. Herran and the Union acknowledge that this Agreement precludes them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

10. Herran is bound by this Agreement. Anyone who succeeds to Herran's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
11. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees or the Union.
12. Herran and the Union each agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
13. This Agreement contains the sole and entire agreement between Herran, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Herran specifically represents and acknowledges that in executing this Agreement, he has not relied upon any representations, with regard to the subject matter in this Agreement, which are not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
14. Herran agrees and acknowledges that he has been fully and fairly represented by his Union and counsel in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
15. Herran agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representative and he enters into this Agreement knowingly and voluntarily.
16. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
17. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the Civil Service Commission shall not interfere with the rights of either Party to pursue the matter further.
18. By signing this Settlement Agreement, Herran states that:

a) He has read it;
b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the

Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;

c) He agrees with everything in it;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) He has been given at least twenty-one (21) days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of seven (7) days following the execution of this Agreement, he may revoke this Agreement; the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

11/1/17
Date

BY: _____
Director Anthony Ambrose,
City of Newark
Department of Public Safety, Police
Division

10/25/17
Date

BY: _____
Anthony J. Fusco, Esq., FOP Attorney

10/25/17
Date

_____
Alonzo Herran, Police Officer

Approved as to Form and Legality:

11/1/17
Date

_____
Joyce Clayborne, Esq.
City of Newark Law Department

OAL DOCKET NO. CVS 15480-2012N

CERTIFICATION

I, Alonzo Herran, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement and General Release by signing below. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement and General Release voluntarily.

I also understand that if this Settlement Agreement and General Release are approved by the **CIVIL SERVICE COMMISSION**, then my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-25-17
DATE

Alonzo Herran

EXHIBIT A

12-00645

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five working days less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or certified or registered mail.

FROM:	Employing Agency Name Newark Police Department – Prisoner Processing	Address/Phone Number 22 Franklin St Newark, 973-733-5618	Date 10/02/12
	Attorney representing your agency should this matter be appealed Corporation Counsel – Law Department	Address/Phone number/Email address 920 Broad Street/973-733-3880/pereiraa@ci.newark.nj.us	
TO:	Employee Name Alonzo Herran	Permanent Civil Service Title Police Officer	Social Security Number 148 68 7444
	Address/Phone Number 23 Kenmore Avenue, Newark, NJ 07106 201-463-9780		

On 04/24/12 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ You requested a hearing which was held on October 02, 2012 CAP 2012-059 IOP 2011-033

☐ You did not request a hearing.

☐ You requested a hearing and did not appear at the designated time and place.

Sustained Charges:	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
Conduct Plea: Not Guilty Disposition: Guilty	
☑ If checked, charges are continued on attached page	☐ If checked, specifications are continued on attached page

The following disciplinary action has been taken against you:

☑ Suspension for 45 days, beginning October 22, 2012 and ending December 21, 2012

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____

☐ Fine $ _____ (Amount) which is equal to _____ (Number) days pay ☐ other disciplinary action:

Appointing authority or authorized agent's signature and title.

SIGNATURE _____ TITLE POLICE DIRECTOR

This form must be personally served on the employee or sent by certified or registered mail.

☑ Certified or Registered Mail ☑ Receipt Number 7010 1870 0002 1414 3191

☑ Signature of Server Lea Golden Agt. AD ☑ Date of Personal Service 10/11/12

APPEAL PROCEDURE TO THE EMPLOYEE: You have a right to appeal Within 20 Days From Receipt of this form. All appeals must include a copy of this form and must be sent to the Civil Service Commission, 44 S. Clinton Avenue, PO Box 312, Trenton, NJ 08625-0312. Your appeal cannot be processed until a copy of this form is received. DO NOT GIVE YOUR APPEAL TO YOUR PERSONNEL OFFICE FOR FORWARDING TO THE CIVIL SERVICE COMMISSION. ANY APPEAL POSTMARKED AFTER THE 20 DAY STATUTORY TIME LIMIT WILL BE DENIED. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at WWW.state.nj.us/csc.

POLICE DEPARTMENT

Newark, N. J., March 22, 2012

To the Honorable, the Police Director,

Sir:

I Hereby Charge POLICE OFFICER ALONZO HERRAN, PRISONER PROCESSING DIVISION, OPERATIONS BUREAU

CAP 2012-059 IOP 2011-033

CHARGES MAYBE ADDED OR AMENDED AT A LATER DATE

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 5:1.1 – CONDUCT – Police Officers must bear in mind that they symbolize the Dignity and authority of the City and State and shall conduct themselves in a manner that will not bring discredit, ridicule, or criticism to the Department.

CHARGE IB: Violation of Civil Service Rule 4A:2-2.3(a) 6.
An employee maybe subject to discipline for:
6. Conduct unbecoming a public employee;

SPECIFICATION: On January 10, 2011, at 399-443 Springfield Avenue, Newark, Home Depot, Police Officer Alonzo Herran, off duty, did conduct himself in such a manner, which brought discredit, ridicule and criticism to the Department when he engaged in a verbal dispute with Mr. Edwin Quainno, which led a physical altercation. After Mr. Quainno was subdued, several witnesses state that Officer Herran initiated a second altercation.

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 18:14 – DISOBEDIENCE OF ORDERS – Department members shall not willfully disobey lawful orders.

SPECIFICATION: Police Officer Alonzo Herran, did disobey a lawful written order from the Police Director to wit: General Order 63-2, SUBJECT: USE OF FORCE POLICY, in that Officer Herran removed his service weapon and did not instruct or say anything to the suspect. He then struck the suspect in the head because his gun was already in his hand. Police Officer Herran did not resort to any other methods written in the General Order under Constructive or Physical Force.

CHARGE III: Violation of Newark Police Department Rules and Regulations, Chapter 18:29.1 – OFFICIAL INEFFICIENCY OR INCOMPETENCY – Department members whose performance is demonstrably inadequate or inequitable and fails to meet, obtain or produce the effects or results mandated by Department orders, shall be deemed in violation of Department Rules and Regulations. Officers found guilty of official inefficiency or in competency shall be subject to departmental charges.

CHARGE IIIB: Violation of Civil Service Rule 4A:2-2.3(a) 1.
An employee may be subject to discipline for:
1. In competency or Inefficiency

POLICE DEPARTMENT

Newark, N. J., March 22, 2012

To the Honorable, the Police Director,

Sir:

I Hereby Charge POLICE OFFICER ALONZO HERRAN, PRISONER PROCESSING DIVISION, OPERATIONS BUREAU

CAP 2012-059 IOP 2011-033

SPECIFICATION: On March 19, 2012, during a video statement Sergeant Kennedy Almeida asked Police Officer Alonzo Herran to explain a key word he wrote in his incident report. Specifically, Police Officer Herran wrote that a suspect was "drawing" and if he did not stop he would be arrested. Police Officer Herran could not articulate in his statement what the word "drawing" entailed which ultimately led to the arrest of the suspect.

CHARGE IV: Violation of Newark Police Department Rules and Regulations, Chapter 18:22 – FALSE STATEMENT – Police officers shall not falsify any official report or record.

SPECIFICATION: On March 19, 2012, Police Officer Alonzo Herran, did falsify an Official Record, to wit: during a video statement he stated that "the suspect never reached for his gun while in his holster nor his hand", although knowing in truth that said information listed in his incident report was false and contrary to fact.

INEZ M. GONZALEZ
CAPTAIN OF POLICE
COMMANDING OFFICE OF PROFESSIONAL STANDARDS

CHAPTER 6

5	STANDARDS OF CONDUCT
5:1	DEMEANOR
5:1.1	CONDUCT. Police officers must bear in mind that they symbolize the dignity and authority of the City and State and shall conduct themselves in a manner that will not bring discredit, ridicule, or criticism to the Department.
5:1.2	LANGUAGE. Police officers shall not use indecent, profane, uncivil or threatening language, regardless of provocation.
5:1.3	LENIENCY. Police officers shall not permit fear, favoritism or sympathy to sway them to illegal leniency or to neglect of duty.
5:1.4	PERFORMANCE. Police officers shall never place themselves under special obligation to any person who might affect the proper discharge of their duties. They shall remain free to perform their duties without hesitation at all times.
5:1.5	POLICE IMAGE. Police officers shall bear in mind that they symbolize the dignity and the authority of the City of Newark and the State of New Jersey, and that they are the representatives of the law to whose lawful demands all must submit, unless otherwise provided by law, and that such submission can be compelled when necessary.
5:2	APPEARANCE
5:2.1	CLEANLINESS. Police officers while on duty or in uniform shall maintain a neat, well-groomed appearance and shall adhere to the grooming standards.
5:2.2	UNIFORM. Police officers shall conform to all regulations set forth for the wearing of the uniform.
5:2.3	CIVILIAN CLOTHING. Unless otherwise directed, police officers assigned to work in civilian clothing shall be neat and clean. Their clothing shall be of a conservative nature.
5:2.4	PACKAGES AND BUNDLES. Police officers in uniform shall not carry packages or bundles except when necessary to accomplish a police purpose on the actual performance of duty.

18:14 DISOBEDIENCE OF ORDERS

Department members shall not disobey lawful orders

18:15 PROPER PATROL OF POSTS

Department members shall properly patrol their posts.

18:16 PAYMENT OF DEBTS

Department members shall neither neglect nor refuse to pay their just debts.

18:17 ASSISTING ESCAPE

Department members shall not communicate any information nor shall they aid a person to escape arrest nor shall they delay in taking action to apprehend an offender.

18:18 MALTREATMENT OF PRISONERS OR OTHER PERSONS

Police officers shall not willfully maltreat prisoners or other persons, nor allow any other officer to maltreat prisoners or others.

18:19 USE OF FORCE

Police officers shall treat all persons and prisoners in a fair and humane manner at all times as provided by law. Police officers shall exercise force only to the degree required by the circumstances necessary:

(1) To prevent escape
(2) To secure detention
(3) To subdue violence
(4) To prevent violence to another prisoner
(5) To defend their own lives and the lives of others.

18:20 SAFEKEEPING OF PRISONERS

Police officers shall be responsible for maintaining the safekeeping of any prisoner and preventing their escape. Police officers shall be responsible for maintaining the safe custody of any prisoner during such time as the prisoner is in their personal charge, whether such prisoner is confined to a cell, hospital room, detention room, court room, or building, or whether such person is in transit. The escape of a prisoner from a police officer shall be considered prima facie evidence of gross neglect of duty.

18:21 CONFIDENTIAL INFORMATION

Police officers shall not reveal to any persons not members of the Police Department any proposed police action or movements, or the provisions of any official order, without first obtaining permission from the Police Director or Chief of Police.

18:22 FALSE STATEMENT

Police officers shall not falsify any official report or record

18:22.1 **False Statements Defined.** Police officers who deliberately depart from the truth by omitting, misrepresenting, or distorting any fact on any form, questionnaire, or report shall be charged with having made a false statement.

18:22.2 **Pre-employment Statements.** Police officers shall be held to have violated this Rule, retroactively, who had made false statements during their investigation for candidacy to the Police Department.

18:22.3 **False Statements-Criminal Investigations.** Police officers who submit false or misleading statements as the target or witness in an internal investigation involving criminal allegations against a police officer shall be subject to disciplinary action.

18:23 BRIBES

Police officers shall not solicit or accept bribes in money, or other valuable articles.

18:24 CRIMINAL LAW

Department members shall not violate any criminal law, any provision of the Disorderly Persons Act or of the City Ordinances. They shall commit no illegal act.

18:25 ACTS OF IMMORALITY

Department members shall not commit acts of immorality, indecency or lewdness

18:26 PERSONAL APPEARANCE

Department members shall be clean in both person and dress.

18:27 INDECENT LANGUAGE

Department members shall not use indecent, profane, or uncivil language

18:28 MISCONDUCT GENERALLY

Any violation or offense not properly chargeable against a Department member under any other Rules of Discipline shall be charged under Rule No. 18.

18:29 PERFORMANCE OF DUTY

18:29.1 Official Inefficiency or Incompetence. Department members whose performance is demonstrably inadequate or fails to meet, obtain or produce the effects or results mandated by Department orders and procedures, shall be deemed in violation of this Rule and Regulation and shall be charged accordingly.

18:29.2 Chronic Inefficiency or Incompetence. Department members charged with repeated violations of Rules and Regulations, which by their nature and frequency demonstrate an unwillingness or inability to meet, obtain or produce the desired effects or results necessary for adequate performance shall be charged with Chronic Inefficiency or Incompetence. Officers found guilty of chronic inefficiency or incompetence, shall be subject to dismissal from the Department.

18:29.3 Inefficiency or Incompetence of Superior Officers. Superior officers within the Newark Police Department shall be held accountable for their performance and the performance and actions of subordinate personnel. A superior officer shall be accountable for individual behavior and actions as defined with the Rules and Regulations as well as ensuring that subordinates comply with the duties, obligations and actions prescribed and/or prohibited by the Rules and Regulations, General Orders, Special Orders and all Departmental memoranda.

Superior officers shall be accountable for the performance, productivity, effectiveness, efficiency and specific functions assigned to subordinates as manifested in individual squad, section and command records including but not limited to: response time, conditions within assigned areas, arrests, interrogations, overtime, sick leave and all other indications of individual and command performance.

A superior officer shall be deemed derelict in his duty and in violation of this section whenever it is demonstrated that the cited superior officer has failed to identify deficiencies and/or failed to take corrective action when subordinate personnel exhibit an unwillingness or inability to meet Department standards, obtain or produce the results necessary for adequate performance and/or result in violations of established Department policy, order, rules, regulations or procedures.

11-13-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 7, 2018

Samuel Wenocur, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Kimberly K. Holmes, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Hakiem Batemon v. City of Newark* (CSC Docket No. 2017-1987 and OAL Docket No. CSV 00162-17) - **SETTLEMENT**

Dear Mr. Wenocur and Ms. Holmes:

The appeal of Hakiem Batemon, a Laborer 1 with the City of Newark, Department of Public Works, of his removal, effective October 13, 2016, was before Administrative Law Judge Thomas R. Betancourt (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 15, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on December 30, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than February 13, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to vote. Based on this information, the parties were asked, as required, to consent to a second extension. However, neither party provided consent. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective February 14, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Thomas R. Betancourt, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 00162-17
AGENCY DKT. NO. 2017-1987

IN THE MATTER OF HAKIEM BATEMON, CITY OF NEWARK DEPARTMENT OF PUBLIC WORKS,
Respondent.

Samuel Wenocur, Esq., for Appellant Hakiem Batemon (Oxfeld Cohen, P.C., attorneys)

Kimberly K. Holmes, Esq., for Respondent, City of Newark Department of Public Works

Record Closed: November 8, 2017 Record Decided: November 13, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Hakiem Batemon appeals a Final Notice of Disciplinary Action, dated December 13, 2016, removing him from his position as Laborer 1 effective October 13, 2016 for conduct unbecoming a public employee, and other sufficient cause.

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL), where it was filed on January 4, 2017, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

I have reviewed the terms of the settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that petitioner's appeal is withdrawn with prejudice.

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.

November 13, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: 11-15-17

Date Mailed to Parties: NOV 15 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

CL No. 17-00011

HAKIEM BATEMON, Appellant, -v- CITY OF NEWARK Respondent.	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DOCKET NO.: CSV 00162-2017N** **LAST CHANCE SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Last Chance Settlement Agreement and General Release ("Agreement",) is made and entered into between CDL Truck Driver, Hakiem Batemon ("Batemon" or "Appellant"), The LOCAL 617 SEIU ("Union") and the City of Newark ("City" or "Respondent") (Batemon, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against him by the City's Preliminary Notice of Disciplinary Action dated September 19, 2016 (PNDA) and Final Notice of Disciplinary Action dated December 13, 20167 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about September 14, 2016, and September 16, 2016, Laborer 1 (Laborer Sanitation Truck), Hakiem Batemon, sent an unbecoming and unprofessional text messages to the management staff in response to a meeting held earlier that day regarding Batemon's time deletions (*see PNDA dated 9/19/16 and FNDA dated 12/13/16).*

2. From April 26 – September 2, 2016, Batemon has amassed over 50 unanticipated absences from work (*see PNDA dated 9/19/16; and FNDA dated 12/13/15).*

KS/MR

3. As a result of the conduct outlined in paragraphs one (1) through three (3) herein, a PNDA was issued and Batemon was brought up on disciplinary charges for removal at the close of business on 9/16/16 prior to a hearing (*See attached PNDA*).

4. On November 10, 2016, a departmental hearing was held and a finding was made that there was sufficient cause for removal based upon the two (2) text messages Batemon sent to the City employees and his chronic absenteeism from work.

5. Batemon was removed from City employment on October 13, 2016. The FNDA was issued on December 13, 2016(*See attached FNDA*).

6. Batemon appealed the decision on the FNDA to the Office of Administrative Law.

7. **The parties have agreed to resolve all issues herein and referenced as follows:**

   a. The Parties acknowledge and agree that Batemon is given a 'last chance' opportunity to return to employment with Newark as a Laborer 1 (Laborer Sanitation Truck) effective October 30, 2017.

   b. The Parties acknowledge and agree that Batemon has served a six (6) month suspension effective September 19, 2016 and that the balance of time after the suspension period will be deemed as an unpaid leave of absence through the execution of this Agreement.

   c. The Parties acknowledge and agree that Batemon is not entitled to any seniority, salary increase, bumping rights, and that he has waived and all back pay, counsel fees, and/or compensation of time

and/or benefits of any sort from September 19, 2016 through the execution of this Agreement.

d. Batemon agrees that immediately upon his return to work, he may be subject to drug/alcohol testing.

e. Batemon agrees to submit to random drug/alcohol testing per Department of Transportation guideline and that the failure to submit to testing or a positive test will result in immediate termination.

f. Batemon further waives any and all rights and/or claims which he has and/or may have to: (1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; (2) To challenge the PNDA, FNDA and/or this Agreement; (3) Initiate and/or partake in Grievance procedures; and/or (4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts.

g. Batemon and the Union each further agree that there is no consideration due Batemon other than what is explicitly outlined herein, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement.

h. Batemon and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.

i. Batemon and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

j. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Batemon's estate, and purchasers and/or assignees of Batemon's, the City's and/or the Unions interests shall also be bound.

k. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

l. Batemon and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

m. Batemon and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

n. This Agreement contains the sole and entire agreement between Batemon, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject

matter hereof. Batemon specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

o. Batemon agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

p. Batemon agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

q. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

r. **By signing this Settlement Agreement, Batemon states that:**

1. He has read it;
2. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as

amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;

3. He agrees with everything contained in this Agreement;
4. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;
5. He consulted with his Attorney prior to executing this Agreement;
6. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

11/8/17
Date

BY: Khaly Thomas/mbr
Khalif Thomas, Director
Department of Public Works

10-30-17
Date

BY:
Hakiem Batemon

11/6/17
Date

Samuel Wenocur, Esq.
Attorney for Hakiem Batemon

Approved as to Form and Legality:

11/8/17
Date

Kimberly L. Holmes, Esq.
Kimberly K. Holmes, Esq.
Law Department, City of Newark

CERTIFICTION

I, Hakiem Batemon, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10.30.17
DATE

Hakiem Batemon

11/8/17

11-13-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 7, 2018

Arnold S. Cohen, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Joyce Clayborne, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Kelly Diggs v. City of Newark* (CSC Docket No. 2017-3762 and OAL Docket No. CSV 09615-17) - **SETTLEMENT**

Dear Mr. Cohen and Ms. Clayborne:

The appeal of Kelly Diggs, a Laborer 1 with the City of Newark, Department of Public Works, of his resignation not in good standing, effective April 3, 2017, was before Administrative Law Judge Barry E. Moscowitz (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 15, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on December 31, 2017. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than February 14, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to vote. Based on this information, the parties were asked, as required, to consent to a second extension. However, neither party provided consent. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective February 15, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Barry E. Moscowitz, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 09615-17

IN THE MATTER OF KELLY DIGGS, CITY OF NEWARK, DEPARTMENT OF PUBLIC WORKS.

Arnold S. Cohen, Esq., for appellant (Oxfeld Cohen, P.C., attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel)

Record Closed: November 1, 2017 Decided: November 13, 2017

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On July 10, 2017, the Civil Service Commission transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

Before the hearing, the parties settled the case. A copy of their agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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 is authorized by law to make a final decision in this case. 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 under N.J.S.A. 52:14B-10.

11/13/17

DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

11-15-17

Date Mailed to Parties: NOV 15 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

Attachment

OAL DOCKET NO. CSV 09615-2017N

KELLY DIGGS,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
v.	:	**OAL DOCKET NO. CSV 09615-2017N**
CITY OF NEWARK,	:	**SETTLEMENT AGREEMENT AND GENERAL RELEASE**
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Sanitation Laborer, Kelly Diggs ("Diggs" or "Appellant"), Service Employees International Union, Local 617 ("SEIU" or "Union") and the City of Newark ("City" or "Respondent") (collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Diggs by the City. This Agreement is made and entered into by the Parties in full settlement of Diggs's appeal regarding the above matter.

On March 6, 2017, the Newark Department of Public Works ("Department of Public Works") brought disciplinary charges against Diggs in the form of a Preliminary Notice of Disciplinary Action ("PNDA") stemming from his actions on February 28, 2017, involving whereby he was out from work for five (5) consecutive days without approval in violations of the City of Newark policies and procedures. On March 23, 2017, a Departmental Hearing was held against Diggs; sustaining his resignation not in Good Standing. On, May 1, 2017, Final Notice of Disciplinary Action and Specifications (hereinafter referred to as ("FNDA") were issued with the following charges: Removal, in violation of New Jersey Civil Service Rule N.J.A.C. 4A:2-2 (a)1.

After further negotiations, the Parties agree to resolve this matter as follows:

OAL DOCKET NO. CSV 09615-2017N

1. The charges listed in the FNDA are amended to Chronic or Excessive Absenteeism or Lateness, in violation N.J.A.C. 4A:2-2.3(a) 4 and Other Sufficient Cause N.J.A.C. 4A2-2.3 (a) 12.
2. Diggs' will serve an unpaid suspension based on the charges reflected in the FNDA. His suspension period will be deemed as "Time Served" covering the period of February 28, 2017 to June 28, 2017, a maximum of six (6) months.
3. The Parties agree from June 29, 2017 to October 29, 2017 will be deemed an unpaid disciplinary leave of absence.
4. The Parties agree Diggs will refrain from the use of all illegal substances and abuse of alcohol pursuant to the attached Letter of Conditional Employment, which is attached hereto and is incorporated and made a part of this agreement.
5. Diggs must submit to random drug screenings pursuant to the Letter of Conditional Employment.
6. Diggs must comply with reporting requirements for calling out from work.
7. Diggs's return to work on Oct. 30, 2017 is subject to his performance of all obligations and conditions that are set forth in this Agreement.
8. Diggs shall waive and will not be entitled to any back pay from the date of his initial removal until the date of his return to work.
9. The Parties acknowledge pursuant N.J.A.C. 17:1-2.18 (b) and (c), no pension or seniority time maybe credited for periods for which the employee is not paid by the employer.
10. Diggs waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
11. Diggs and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
12. Diggs and the Union each further agree that there is no consideration due to him, his counsel and/or Union, including, but not limited to, any claim for additional back pay

and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.

13. Except for the assessment of Diggs' disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Party.
14. Diggs and the Union acknowledge that this Agreement precludes them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.
15. Diggs is bound by this Agreement. Anyone who succeeds to Diggs' rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
16. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees or the Union.
17. Diggs and the Union each agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
18. This Agreement contains the sole and entire agreement between Diggs, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Diggs specifically represents and acknowledges that in executing this Agreement, he has not relied upon any representations, with regard to the subject matter in this Agreement, which are not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
19. Diggs agrees and acknowledges that he has been fully and fairly represented by his Union and counsel in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

OAL DOCKET NO. CSV 09615-2017N

20. Diggs agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representative and he enters into this Agreement knowingly and voluntarily.
21. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
22. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the Civil Service Commission shall not interfere with the rights of either Party to pursue the matter further.
23. By signing this Settlement Agreement, Diggs states that:

a) He has read it;

b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;

c) He agrees with everything in it;

d) His representative negotiated this Agreement with his knowledge and consent;

e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;

f) He has been given at least twenty-one (21) days within which to review and consider this Agreement, although he may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;

g) He understands that for a period of seven (7) days following the execution of this Agreement, he may revoke this Agreement; the Agreement shall not become effective or enforceable until the revocation period has expired; and

h) He has signed this Settlement Agreement knowingly and voluntarily.

OAL DOCKET NO. CSV 09615-2017N

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

10/24/2017
Date

BY: Khalif Thomas/MA
Khalif Thomas, Interim Director,
City of Newark
Department of Public Works

10/30/17
Date

BY:
~~Arnold S. Cohen, Esq.~~ MARTHA RODRIGUEZ
Union Attorney/Representative

10/30/17
Date

Kelly Diggs

Approved as to Form and Legality:

10/27/17
Date

Joyce Clayborne, Esq.
City of Newark Law Department

OAL DOCKET NO. CSV 09615-2017N

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

10/24/2017
Date

BY: Khalif Thomas/DW
Khalif Thomas, Interim Director,
City of Newark
Department of Public Works

10-30-17
Date

BY: Arnold Cohen
Arnold S. Cohen, Esq.
Union Attorney/Representative

Date

Kelly Diggs

Approved as to Form and Legality:

10/27/17
Date

Joyce Clayborne, Esq.
City of Newark Law Department

OAL DOCKET NO. CSV 09615-2017N

CERTIFICATION

I, Kelly Diggs, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement and General Release by signing below. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement and General Release voluntarily.

I also understand that if this Settlement Agreement and General Release are approved by the **CIVIL SERVICE COMMISSION**, then my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10/30/17
DATE

Kelly Diggs
Kelly Diggs

OAL DOCKET NO CSV: 09615-2017N

ADDENDUM

CITY OF NEWARK

v.

LETTER OF CONDITIONAL EMPLOYMENT

KELLY DIGGS

On March 6, 2017, **KELLY DIGGS,** hereinafter identified as "you," was served with a Preliminary Notice of Disciplinary Action, which provided for your Resignation not in Good Standing from duties of employment as a "Sanitation Laborer" with the City of Newark ("City"). The matter was appealed and sent before the Office of Administrative Law ("OAL"). The Parties have since reached a settlement of Docket No. CSV: 09615-2017N. As a result **of SETTLEMENT AND GENERAL RELEASE,** it is the decision of the City's Department of Public Works ("DPW") to adjust Major Disciplinary Action. Subsequently, you will be subjected to the following conditions as terms for your continued employment with the City of Newark:

1. Should your initial drug/alcohol testing yield a positive result, you must participate in and successfully complete a substance abuse rehabilitation program ("Program") and present confirmation of completion of same in writing to the Department and to the City's Personnel Department within seven (7) calendar days of completion. You will comply with all conditions set forth by the Program for your continued rehabilitation.

A. Failure to provide proof of enrollment **and** successful completion of substance abuse rehabilitation program, as stated above, shall be deemed sufficient reason for terminating the employment of Diggs with the City.

B. You must attend any/all aftercare sessions and/or outpatient treatment sessions of continued rehabilitation pursuant to the Program. If you fail to attend any of the continued rehabilitation sessions or treatments, you must substantiate your reason for not attending. On each occasion you are unable to attend said appointment (s) for
continued rehabilitation, you will make arrangements within twenty-four (24) hours of missing said appointment(s) to reschedule said appointment(s) and you shall provide to the Department written confirmation of new appointment(s).

INITIALS KD

OAL DOCKET NO CSV: 09615-2017N

C. For all aftercare sessions and/or outpatient treatment sessions of continued rehabilitation, you must submit written proof of your attendance at each to the Department with seven (7) calendar days of the completion of your last continued rehabilitation aftercare and/or treatment appointment.

2. You will refrain from the use of illegal drugs, any mood altering substance and the abuse of alcohol for the duration of your career with the City. Further, you will refrain from the abuse of any prescription pharmaceuticals for the duration of your career with the City.

3. In the event you take internally, at the direction of a physician, any medicine or drugs, you will advise the Department of Child and Family Well-Being Medical Director's Office that you are taking such medication prior to its use or immediately thereafter. As described in paragraph three (3) hereinabove, you will refrain from the abuse of any medicine or drugs prescribed to you by a physician.

4. When absent for reasons stated or identified as personal illness, you will continue to advise your supervisor personally, via telephone, of the circumstances surrounding your absence and submit the appropriate documentation of same, when required.

5. You will continue to perform your job to satisfactory levels expected of all City employees. Any irregular work behaviors; failure to notify your supervisor of an absence (**no call/no show**); abuse of sick time (chronic/excessive absenteeism) without medical excusal will result in termination.

6. From this point forward, you will submit to unannounced mandatory drug testing when ordered to do so. Failure to submit to testing or testing that results in a positive reading will result in termination.

7. The terms of this Letter of Conditional Employment shall supersede any prior Letter of Conditional Employment.

8. The conditions outlined above are designed to assist you in your rehabilitation effort. If there is any evidence that you have returned to the cause of your problem or you violate the conditions stated above, you will be subject to immediate discharge.

INITIALS KD

11/1/17

OAL DOCKET NO CSV: 09615-2017N

Signature: Khalif Thomas/MR 10/30/2017

Khalif Thomas, Interim Director
Department of Public Works

Date

INITIALS: KD,

I have read and understand the forgoing conditions for continued employment. I understand that failure to adhere to these conditions will result in my immediate discharge.

Kelly Diggs 10-30-17

Date

~~Arnold S. Cohen, Esq.~~ MARTHA RODRIGUEZ (MR) 10/30/17

Date

Witness/Union Representative or Counsel

ORIGINAL TO BE RETAINED BY DEPARTMENT, COPIES TO EMPLOYEE AND EAP COUNSELOR

KD/MR

In the Matter of Ameerah Askew,
Passaic County Sheriff's Office

CSC DKT. NO. 2017-3257
OAL DKT. NO. CSR 05352-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSR 05352-17

AGENCY DKT. NO. N/A

IN THE MATTER OF AMEERAH ASKEW,
PASSAIC COUNTY (SHERIFF'S OFFICE)

Anthony J. Iacullo, Esq., for appellant Ameerah Askew (Iacullo Martino, LLC, attorneys)

Jose Santiago, Assistant Corporation Counsel for respondent Passaic County Sheriff's Office (William J. Pascrell, III, County Counsel)

Record Closed: October 6, 2017 Decided: October 19, 2017

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter concerns the appeal of Ameerah Askew from the action of the respondent, Passaic County Sheriff's Office. The appeal was filed with the Office of Administrative Law (OAL) on April 17, 2017 pursuant to N.J.S.A. 40A:14-202(d).

The matter was scheduled for a hearing on September 26, 2017, but the date was adjourned because the parties reached a settlement of all issues in dispute. The signed Settlement Agreement indicating the terms of settlement was forwarded to the undersigned on October 6, 2017 and is attached and fully incorporated herein.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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 Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

October 19, 2017

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: October 19, 2017

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

10-24-17

Date Mailed to Parties: OCT 24 2017

sej

WILLIAM J. PASCRELL, III,
PASSAIC COUNTY COUNSEL
401 GRAND STREET
PATERSON, NJ 07505
(973) 881-4466
Attorneys for Respondent Passaic County Sheriff's Office

Ameerah Askew,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	AOL DOCKET NO: CSR 05352-2017N
	:	
vs.	:	
	:	**SETTLEMENT AGREEMENT**
PASSAIC COUNTY SHERIFF'S OFFICE,	:	**AND GENERAL RELEASE**
	:	
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made by and between the Respondent, PASSAIC COUNTY SHERIFF'S OFFICE("Sheriff's Office") and its employee, Petitioner, County Corrections Officer, Ameerah Askew, (Hereinafter Petitioner, or Ameerah Askew or Officer Askew)

WHEREAS On January 24, 2017, a 31A PNDA was served upon Petitioner Ameerah Askew, setting forth the following charges and seeking her removal from employment at the Passaic County Sheriff's Office,

> *4A:2-2.3(a)11.48 Failure to submit properly written required report within a reasonable or prescribed period of time as per regulations
>
> *4A:2-2.3(a)11.29 Failure to comply with Sheriff's orders directive, regulations etc. oral and wr4itn and also those of superiors or supervisions

*4A:2-2.3(a)11.36 failure to properly care for assigned equipment

*4A:2-2.3(a)11.47 Improper use handling or display of firearms

*4A:2-2.3(a)2 Insubordination Failure to cooperate in a I/A administrative investigation as per attorney general guidelines

*4A:2-2.3(a 6 Conduct unbecoming a public employee; and

WHEREAS, a civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3; and

WHEREAS on April 10, 2017, a 31-B FNDA was issued, terminating Petitioner's employment with the Passaic County Sheriff's Office as a result of the charges listed above; and

WHEREAS, The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq.; and

WHEREAS petitioner promptly appealed her removal to the Civil Service Commission, who transferred the matter to the OAL as a Contested case and

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with a hearing; and

WHEREAS, the proposed settlement is in the best interest of the Parties; and

NOW THEREFORE, intending to be legally bound hereby, The Passaic County Sheriff's Office, and Petitioner, have voluntarily resolved all disputed matters between them and enter into this Settlement and General Release, which fully disposes of all issues in controversy between them, and agree as follows:

A. Petitioner's termination shall be converted to a 90 day suspension, with 30 days being actively served and 60 days held in abeyance until the execution of this Agreement

B. Petitioner waives any and all claims to back pay, to the date of reinstatement. Any period of no pay shall be treated as a leave of absence without pay.

C. Petitioner shall be returned to work, immediately after acceptance of and issuance by Judge Testa of this Agreement as an Initial Decision and recommendation to the Civil Service Commission for acceptance as a Final Decision

D. Petitioner agrees to immediately contact the Office of Internal Affairs, in order to complete any and all required background and drug testing prior to beginning immediate employment.

E. The Passaic County Sheriff's Office shall amend its records and to conform to this agreement and Petitioner's disciplinary history shall be amended to reflect the 30 day suspension and a 60 day probationary period.

F. Petitioner waives all other claims against the Passaic County Sheriff's Office and all others as set forth above with regard to the instant charges, including any award of back pay, counsel fees or other monetary relief.

G. This Agreement shall not constitute a precedent in matters involving other employees.

H. Petitioner waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against Passaic County, Passaic County Board of Chosen Freeholders, The Passaic County Sheriff's Office, all employees, agents or assigns, including but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits law, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract, express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The Parties agree that if any portion of this Settlement Agreement and Release is deemed illegal, unenforceable, or ineffective, in a legal forum, such portions shall be deemed severable, such that all other portions of this Agreement shall remain valid and binding upon all Parties and shall be fully enforceable. No Party, shall act or seek to have this Settlement Agreement and Release declared illegal or unenforceable in any legal forum, specifically as to its terms and conditions, including the waiver of rights as set forth herein.

J. In the event that any party to this Settlement and Release, brings an action to enforce the terms of this Agreement or as a result of a breach of the Agreement by the opposite

party, in addition to any remedies available at law or in equity, the non-breaching party shall be entitled to an award of reasonable attorneys' fees and costs incurred in connection with that enforcement or breach action in the event that any such breach is found by a court of competent jurisdiction.

K. This Agreement is executed voluntarily and without any duress or undue influence on the part or behalf of any and all Parties signing hereto, with the full intent of releasing all claims. They acknowledge that:

1. They have carefully read this Agreement and it has been explained to them in full;
2. They have been represented in the preparation, negotiation and execution of this Agreement by legal counsel of their own choice or that they have voluntarily declined to seek such counsel;
3. They fully understand the terms and consequences of this Agreement and of the releases it contains;
4. They are fully aware of the legal and final binding effect of this Agreement;
5. They freely and voluntarily enter into this Agreement without duress or coercion;
6. They are completely satisfied that this Agreement is fair, reasonable, and acceptable; and

7. They are satisfied with their respective counsel, if any, and believe their counsel has effectively represented their independent interests.

L. The Parties each represent that they have the authority to act on their own behalf and all who may claim through them, under the terms and conditions of this Agreement. Each Party warrants and represents that there are no actions filed or pending in state or federal court, liens or claims of lien or assignments in law or equity or otherwise of, or against, any of the claims or causes of action released herein.

M. Each executing Party represents that it has had the opportunity to consult with an attorney, and has carefully read and understands the scope and effect of the provisions of this Agreement. Neither Party has relied upon any representation or statement made by the other Party hereto, which are not specifically set forth in this Agreement.

N. This Agreement cannot be discharged, abandoned, supplemented, changed or modified in any manner, orally or otherwise except by an instrument in writing, of concurrent or subsequent date, signed by a duly authorized officer or representative of each of the Parties hereto. The Parties agree that they waive the rule of construction against the drafter of this Agreement.

O. The laws of the State of New Jersey shall govern this Agreement.

P. This Agreement is effective after it has been signed by all of the Parties set forth below and approved by Administrative Law Judge Testa.

Q. This Agreement may not be executed in counterparts.

R. This Agreement represents the complete and full understanding between the Parties, and is signed as their own free act and will.

S. The recitations set forth above in the Whereas clauses, are incorporated herein as substantive provisions and are not mere recitals.

BY SIGNING BELOW, THE UNDERSIGNED FURTHER INDICATE AND ACKNOWLEDGE THAT THIS IS A LEGALLY BINDING DOCUMENT AND THAT THEY ARE FREELY AND VOLUNTARILY GIVING UP CERTAIN RIGHTS TO FILE LEGAL CLAIMS AND TO RELEASE PRIVATE AND CONFIDENTIAL INFORMATION AND INTEND TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT WITHOUT EXCEPTION.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the respective dates set forth below.

9-20-17
Date

Petitioner

9/20/17
Date

Attorney for Appellant

9-27-17
Date

Representative of Office of Passaic County Sheriff

10-3-17
Date

Attorney for Respondent

CERTIFICATION

I, Ameerah Askew, being the moving party in this matter, hereby certify that I have reviewed this Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Agreement voluntarily.

I also understanding that if this Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

9-20-17
DATE

Ameerah Askew,

In the Matter of Christopher Calhoun, Department of Human Services, Woodbine Developmental Center

CSC DKT. NO. 2018-672
OAL DKT. NO. CSV 13337-17

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13337-17

AGENCY DKT. NO. 2018-672

IN THE MATTER OF CHRISTOPHER CALHOUN,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: October 26, 2017 Decided: October 27, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Christopher Calhoun, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as contested cases on September 12, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that this proceeding be concluded.

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.

October 27, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 10/30/17

Date Mailed to Parties: 10/30/17

/nd

OAL DKT. NO. CSV 13337-2017

AGENCY DKT. NO. 20 – 2018 – 672

SETTLEMENT AGREEMENT

IN THE MATTER OF

Christopher Calhoun

AND

WOODBINE DEVELOPMENTAL CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 8/9/2017 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.2.3	20 DAYS SUSPENSION	NOT YET SERVED
2.			
3.			
4.			
5.			

B. The Appellant Christopher Calhoun withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.2.3	Withdrawn	
2.			
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.
3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.
2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.
4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Christophe Calhoun 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Payroll records shall be modified reflecting Approved absence without pay on:
1/21/2017
1/30/2017
2/6/2017

J. Appellant shall be removed from medical verification requirement effective today, 10/26/17.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10-26-17
DATE

Appellant

10-26-17
DATE

Respondent

10-26-17
DATE

ON BEHALF OF Appellant

10/26/17
DATE

ON ~~BEHALF~~ OF Woodbine Developmental Center

OAL DKT. NO. CSV 13337-2017.

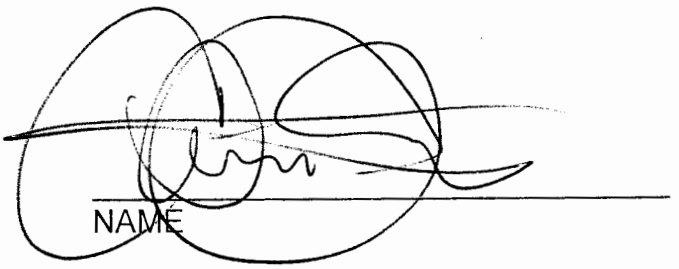
CERTIFICATION

I, Christopher Calhoun, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-26-17
DATE



NAME

In the Matter of Ebony Gibbons,
Department of Human Services,
Vineland Developmental Center

CSC DKT. NO. 2016-3848
OAL DKT. NO. CSV 07030-16

STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 07030-16

AGENCY DKT. NO. 2016-3848

IN THE MATTER OF EBONY GIBBONS,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

William A. Nash, Esq., for appellant, Ebony Gibbons (Nash Law Firm, LLC, attorneys)

Peter Jenkins, Deputy Attorney General, for respondent, Department of Human Services, Vineland Developmental Center (Christopher Porrino, Attorney General of New Jersey, attorney)

Record Closed: October 17, 2017 Decided: October 24, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

This matter was filed with the Office of Administrative Law (OAL) on May 10, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement (J-1), which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on October 17, 2017.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 24, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 10/24/17

Date Mailed to Parties: 10/24/17

JSK/jdw/lam

APPENDIX

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement, received by the Office of Administrative Law on October 17, 2017

J-1

OAL DKT. NO. CSV 07030-16

AGENCY DKT. NO. 2016- 3848

SETTLEMENT AGREEMENT

IN THE MATTER OF

Ebony Gibbons

AND

Vineland Developmental Center

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 4/11/16 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. NJAC 4A:2-2.3(a)4	removal effective 4/11/16	
2. AO 4:08 A-2.7		
3. A-4.2		
4. A-9.4		
5. E-1.1		

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: 6 mos.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: no back pay
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: approved leave of absence w/o pay

C. The Appellant Ebony Gibbons withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services agrees that the following result will occur with regard to each charge:

Charge	Disposition
1.	all charges in "A" sustained. Penalty modified to a
2.	6 month suspension. This agreement constitutes a
3.	Last Chance Agreement. Respondent will seek removal
4.	for any subsequent absenteeism/lateness violations.
5.	

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority Department of Human Services will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Ebony Gibbons 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

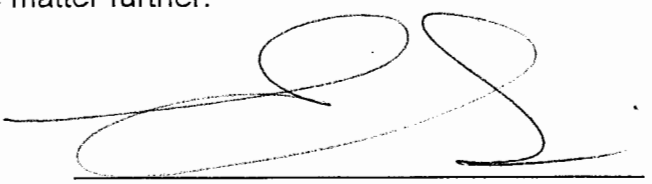
H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties agree not to file exceptions or cross exceptions.

OAL DKT. NO. CSV 07030-16

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10/17/17
DATE


Appellant

10/17/17
DATE

Bernadette M. Hudson, ERC
Respondent

10/17/17
DATE

ON BEHALF OF Appellant
William Nash

10/17/17
DATE

Peter H. Jenkins, DAG
ON BEHALF OF DHS

OAL DKT. NO. CSV 07030-16

CERTIFICATION

I, Ebony Gibbons, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10/17/17

DATE

NAME

11-15-17

STATE OF NEW JERSEY

In the Matter of John Hammock, Ewing Township, Department of Administration, Finance and Public Work

CSC DKT. NO. 2017-3379
OAL DKT. NO. CSV 5919-17

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 5919-17

AGENCY DKT. NO. 2017-3379

IN THE MATTER OF JOHN HAMMOCK, EWING TOWNSHIP DEPARTMENT OF ADMIN., FINANCE AND PUBLIC WORKS.

Debbie Parks, Union Representative, AFSCME Council 73, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Rocky L. Peterson, Esq., for respondent (Hill Wallack, LLP, attorneys)

Record Closed: October 30, 2017 Decided: November 2, 2017

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 28, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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**, who 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.

November 2, 2017
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 11/3/17

Date Mailed to Parties:

/cb

Settlement Agreement

On December 22, 2016 the Township of Ewing (hereinafter the "Township") served a Preliminary Notice of Disciplinary Action (31-A) on its employee, John Hammock (hereinafter "Hammock"), a laborer employed with the Township since September 9, 2005, who was later rehired from a Special Re-Employment List (SRL) on September 4, 2012, for violations of the Township's Policy & Procedure Manual and the AFSCME Collective Bargaining Agreement ("CBA").

A hearing was scheduled for January 12, 2017 at which time the Township would seek termination as disciplinary action. Specifically, Hammock was charged with violation of Procedural Manual Section 1.22, Chronic or Excessive Absenteeism or Lateness, and Section 2.2, Violation of the Attendance Policy. On the date of the hearing, the Township and representative of AFSCME met and agreed to settle the pending disciplinary charges against Hammock as follows:

1. Hammock and his Association representatives have asked that this matter be settled and that all disciplinary actions be resolved amicably without the necessity of formal hearings.

2. Hammock agrees that he will serve a total of forty (40) consecutive unpaid suspension working days for the violations referenced in the December 22, 2016 preliminary notice. Hammock will not be paid for any holidays that fall within the 40-day suspension period.

3. Hammock will serve the total of forty (40) unpaid consecutive working suspension days from Wednesday, January 18, 2017 through Wednesday, March 15, 2017.

4. Hammock further agrees that after completion of the forty (40) working days of unpaid suspension time, he will enter a one (1) calendar year period of probation commencing March 16, 2017 in which any violation of a Township policy or rule will result in a recommendation of immediate termination by the Township.

5. Hammock further agrees that he will attend five (5) separate counseling sessions pursuant to the requirements of the Employee Assistance Program (EAP). Hammock will be responsible for contacting EAP to schedule the sessions. The EAP sessions must be completed within Hammock's 40-day suspension period and he must provide proof of attendance to the Personnel Director when he returns to work on March 16, 2017.

6. Hammock further agrees that during his period of suspension referenced herein, he will not accrue any paid time off days (i.e., vacation, personal or sick).

7. Hammock further agrees that the Township will deduct from his paycheck issued prior to implementation of the suspension, the monies required to continue Hammock's union dues, life insurance, health and/or medical insurance during the period of his unpaid forty (40) working days suspension. Hammock is to confirm the total amount of this deduction from his paycheck with the Chief Financial Officer.

8. On December March 15, 2017, Hammock was served with a Preliminary Notice of Disciplinary Action (31-A) for violating the above settlement terms. A hearing was held on March 21, 2017 and he was terminated on March 28, 2017. Hammock appealed the termination to the Office of Administrative Law and a hearing was scheduled for October 31 and November 1, 2017.

9. Hammock has agreed to withdraw his appeal of the termination and resign from Ewing Township effective March 28, 2017.

10. Hammock agrees that he will not seek future employment with the Township.

11. The Township agrees to the above terms of the Settlement Agreement for the following reasons:

a. This matter is being resolved in the best interests of all parties involved and is an efficient use of the resources required to litigate this to conclusion.

b. This is a matter of progressive discipline in which there have been numerous verbal warnings, including an eleven (11) day suspension imposed on September 29, 2016 and a forty (40) day suspension imposed on December 22, 2016, involving the exact same violations referenced herein.

12. Hammock acknowledges that he voluntarily and knowingly waives any and all appeals of the discipline imposed herein and waives any and all claims against the Township, known or unknown, as a result of this Agreement or the violations referenced herein. Hammock also acknowledges that he voluntarily and knowingly enters into this Agreement and has had the representation of a Union member throughout this proceeding. Hammock is aware of his right to Union representation and was accompanied and discussed the within settlement agreement with a member of his Association who similarly agreed to the within terms.

13. The settlement is not an admission of any liability of the Township and should not be deemed a precedent in any subsequent proceeding, including any administrative, judicial or

disciplinary matter. The Township agrees this settlement agreement resolves the disciplinary action brought against Hammock on March 15, 2017.

John Hammock
Dated: 10/27/17

Witness:
Debbie Parks, AFSCME Representative
Dated: 10/27/17

Township of Ewing
By:
James P. McMackinon, Business Administrator
Dated: 10-30-17

11-15-17

STATE OF NEW JERSEY

In the Matter of Larry Jones,
Department of Human Services,
Woodbine Developmental Center

CSC DKT. NO. 2018-677
OAL DKT. NO. CSV 13338-17

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 13338-17

AGENCY DKT. NO. 2018-677

IN THE MATTER OF LARRY JONES,
DEPARTMENT OF HUMAN SERVICES,
WOODBINE DEVELOPMENTAL CENTER.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: October 26, 2017 Decided: October 27, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Christopher Calhoun, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as contested cases on September 12, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that this proceeding be concluded.

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.

October 27, 2017
DATE

Lisa James-Beavers
LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 10/30/17

Date Mailed to Parties: 10/30/17

/nd

OAL DKT. NO. CSV 13338-2017
AGENCY DKT. NO. 20 – 2018-607

SETTLEMENT AGREEMENT

IN THE MATTER OF

Larry Jones

AND

WOODBINE DEV. CENTER
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 8/9/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.6.4.	} 20 DAYS SUSP	Not Yet Served
2.	A.5.1.		
3.			
4.			
5.			

B. The Appellant Larry Jones withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	A.6.4	SUSTAINED	2 DAYS SUSP. - will
2.	A.5.1	Withdrawn	be scheduled
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 0 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Larry Jones 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

10-26-17
DATE

Appellant

10-26-17
DATE

Respondent

10-26-17
DATE

ON BEHALF OF APPELLANT

10/26/17
DATE

ON BEHALF OF Woodbine Developmental Center

OAL DKT. NO. CSV 13338-2017

CERTIFICATION

I, Larry Jones Jr., being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

10-26-17
DATE

Larry Jones Jr.
NAME

11-73-17

STATE OF NEW JERSEY

In the Matter of Louis McKnight,
Union County, Department of Parks
and Recreation

CSC DKT. NO. 2017-2750
OAL DKT. NO. CSV 03574-2017

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03574-2017

AGENCY REF. NO. 2017-2750

IN THE MATTER OF LOUIS McKNIGHT, COUNTY, DEPARTMENT OF PARKS AND RECREATION,

---

Eric D. Brophy, Esq., for appellant (Diegnan & Brophy, LLC)

Eric M. Bernstein, Esq., for respondent (Eric Bernstein & Associates, LLC)

Record Closed: October 31, 2017 Decided: October 31, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter was received at the Office of Administrative Law (OAL) on March 13, 2017, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing conference was conducted on April 3, 2017 wherein the parties agree on a hearing dates. The initial hearing dates were adjourned and the matter was rescheduled to September 20 and November 22, 2017. During the pendency of the September hearing date the parties reached a tentative settlement agreement. On October 31, 2017, the parties submitted a fully executed settlement agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD,** which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

10-31-17

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties:
ljb

ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.

ATTORNEYS AT LAW

34 MOUNTAIN BLVD., BUILDING A
P.O. BOX 4922
WARREN, NEW JERSEY 07059

(732) 805-3360
FACSIMILE (732) 805-3346
www.embalaw.com

October 30, 2017

Honorable Kimberly A. Moss, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Via Overnight Mail Only

Re: Louis McKnight v. County of Union
OAL Docket No. CSV 03574-2017-N
Agency Ref. No. CSC DKT# 2017-2750
Our File No. 3138-1032

Dear Judge Moss:

Pursuant to the agreement between the parties forged with the assistance of Your Honor, please find enclosed a fully executed Settlement Agreement and General Release as to the above-captioned matter. A copy of this Settlement Agreement and General Release has been forwarded to Eric D. Brophy, Esq., attorney for Louis McKnight, at his law office of Diegnan & Brophy, LLC, 2329 Route 34, Suite 106, Wall Township, New Jersey 08736. We ask the Court to take the appropriate actions to approve this Agreement. If you have any questions, or desire any further information, please do not hesitate to contact me. Your prompt attention and response in this matter is greatly appreciated.

Very truly yours,
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.

By: _____
Eric M. Bernstein, Esq.

EMB/ml

cc: *(Letter Only) (Via Email Only)*
Eric D. Brophy, Esq.
(Letter Only) (Via Email Only) (Personal & Confidential)
Ron Zuber, Director, Parks & Recreation
Dawn Packan, Assistant to the Director of Parks & Recreation
Claudia Martins, Director, Division of Personnel Management & Labor Relations
Robert Barry, Esq., County Counsel

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Agreement"), made this 17th day of October, 2017 by and between the County of Union, Park Environmental Services ("County"), a governmental entity created under the laws of the State of New Jersey, whose principal offices are located at 10 Elizabethtown Plaza, Elizabeth, New Jersey 07207; and, Louis McKnight, with a mailing address of 458 W. 3rd Avenue, Roselle, New Jersey 07203 ("McKnight") sets forth the terms and conditions of this Settlement Agreement and General Release between all of the aforementioned parties of an outstanding disciplinary action brought against McKnight by the County as follows:

1. A. On or about September 6, 2016, the County brought disciplinary charges against McKnight related to issues involving his position as a Building Maintenance Worker with the County, most notably regarding excessive and chronic absenteeism. McKnight was charged by the County based on those issues with violations of N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency or failure to perform duties); N.J.A.C. 4A:2-2.3(a)(3) (Inability to perform duties); N.J.A.C. 4A:2-2.3(a)(4) (Chronic or excessive lateness); N.J.A.C. 4A:2-2.3(a)(6) (Conduct unbecoming a public employee); N.J.A.C. 4A:2-2.3(a)(7) (Neglect of Duty); N.J.A.C. 4A:2-2.3(a)(12) (Other sufficient cause); and, violations of Union County Employee Handbook.

   B. On February 21, 2017, the County found McKnight liable as to all of the charges set forth in §1A above and terminated McKnight, effective February 28, 2017; said decision was amended on September 4, 2017 as per a decision of the Honorable Kimberly Moss, ALJ. McKnight appealed said termination to the Office of Administrative Law which was to be heard by Judge Moss on September 20, 2017.

2. Prior to the September 20, 2017 appeal hearing before Judge Moss, McKnight and the County agreed to the following:

   (a) McKnight's employment status is converted to a resignation in good standing, retroactive to February 28, 2017. An irrevocable letter of resignation is attached and executed by McKnight and shall be made part of this Agreement.

   (b) McKnight shall withdraw, with prejudice, his appeal before the Office of Administrative Law, OAL Docket No. 03574-2017-N and Agency Reference No. CSC Docket No. 2017-2750 as to the aforementioned charges.

   (c) McKnight acknowledges that he has been paid in full by the County and is owed no additional benefits, compensation and/or emoluments by the County in any way, shape or form whatsoever as to the past, present or future. The County agrees to waive any monetary claims it may have against McKnight.

   (d) McKnight acknowledges that he is not entitled to any back pay, leave, benefits and/or prerequisites and/or emoluments related to his employment with the County from his first (1st) day of employment through February 28, 2017 and beyond.

   (e) McKnight shall be entitled to have prospective employers contact the County, through Dawn Packan and only Ms. Packan. Upon inquiring, a prospective employer will be advised of the following information: (1) date of hire with the County; (2) date of resignation from the County; (3) job title at the time of resignation; (4) McKnight resigned to pursue other opportunities; and, (5) it is the County's policy not to provide any other employee information to any prospective employer.

(f) McKnight and the County agree not to contest in any judicial, quasi-judicial or administrative forum any of the terms and conditions of this Agreement, except to enforce any of the provisions of this Agreement, if necessary.

3. A. McKnight hereby releases, acquits, gives up and forever discharges the County and any and all of its officials (elected and/or appointed), officers, employees, associates, attorneys, directors, partners, agents, servants, executors, administrators, heirs, personal representatives, assigns and designees (past, present and/or future), from any and all claims and rights that he may have arising from his employment with the County, through full execution by all parties to this Agreement. This releases any and all claims, including those for which McKnight, his family, heirs, designees, representatives and assigns are not aware of and/or those not mentioned in this Agreement. This Agreement applies to any and all claims and/or potential claims resulting from anything that has happened from McKnight's first (1st) date of employment with the County through the final execution date of this Agreement by all parties. McKnight specifically releases any and all claims and/or potential claims, including but not limited to, those arising under the following:

   A. Any collective bargaining agreement with the County covering McKnight and/or any other resolution, ordinance, policy, practice and/or procedure addressing, specifically or general, McKnight's employment with the County;

   B. The National Labor Relations Act;

   C. Title VII of the Civil Rights Act of 1964;

   D. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

E. Civil Rights Act of 1991;

F. The Americans with Disabilities Act;

G. The Rehabilitation Act of 1973;

H. The Age Discrimination in Employment Act;

I. The Fair Labor Standards Act;

J. The Occupational Safety and Health Act (OSHA) and the New Jersey Public Employee Occupational Safety and Health Act (NJPEOSHA);

K. The Equal Pay Act;

L. The Employee Retirement Income Security Act;

M. The New Jersey Law Against Discrimination;

N. The New Jersey Conscientious Employee Protection Act;

O. The Family Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

P. The Federal and New Jersey State Wage and Hour Acts;

Q. The Federal and New Jersey State Equal Pay Law;

R. The New Jersey Civil Rights Act;

S. The New Jersey Employer-Employee Relations Act;

T. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

U. Any public policy, contract (express, written, implied or oral), tort and/or common law;

V. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the County;

W. Any allegation for costs, fees or other expenses, including but not limited to attorneys' fees; and/or,

X. ANY AND ALL DAMAGES, WHICH ARE KNOWN AT THIS DATE ARISING FROM OR RELATING TO ANY AND/OR ALL PORTIONS OF HIS EMPLOYMENT WITH THE COUNTY. This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations.

3. B. The County hereby releases, acquits, gives up and forever discharges McKnight and any and all of his family (by blood relation and/or marriage), executors, heirs, administrators, assigns and designees from any and all claims and rights that the County may have as to McKnight's employment through full execution by all parties to this Agreement. This releases any and all claims including those for which the County and any of any and all of its officials (elected and/or appointed) are not aware of and/or those not mentioned in this Agreement. This Agreement applies to any and all claims and/or potential claims resulting from anything that has happened from McKnight's first (1st) date of employment with the County through the final execution date of this Agreement by all parties.

4. McKnight agrees that the within waiver and release in favor of the County shall also include his waiver and release from joining or being included in any class in any case in which any claim is asserted against the County, involving any event that has occurred

on or before his execution of this Agreement, unless McKnight is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the County for its records and response.

5. The waiver by McKnight and the County of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.
6. This Agreement shall not set a precedent standard or practice between any party hereto and shall not be enforceable by any party hereto except to enforce the terms contained herein.
7. If any term, provision or condition of this Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity, enforceability or any other clause, sentence, paragraph, section, provision, term and/or condition of this Agreement, provided that the essential consideration received by each party is not eliminated or materially reduced as a result of such declaration of invalidity.
8. This Agreement shall be construed, interpreted and applied in accordance with the laws of the State of New Jersey.
9. McKnight agrees that he has been fully and fairly represented by counsel.
10. McKnight and the County shall each bear all of their own costs and expenses arising from the actions of their own self or counsel in connection with this Agreement.
11. This Agreement contains the entire agreement between the parties hereto with regard to the matters set forth herein and shall be binding upon and inure to the benefit of their officials (elected and/or appointed), officers, employees, associates, attorneys,

directors, partners, agents, servants, executors, administrators, heirs, personal representatives, assigns and designees (past, present and/or future), except as may be set forth herein or as may be agreed to in a further writing between the parties hereto.

12. In entering into this Agreement, McKnight has had an opportunity to rely upon the legal advice of an attorney, if he so chooses, who is the attorney of his own choice. McKnight acknowledges that he is not under the influence of any drugs (illicit or prescription or non-prescription) or alcohol or both or is mentally incapacitated to the extent that he is unable to form rational thoughts and make rational decisions. McKnight also acknowledges that he was satisfied by the representation of his attorney in this matter.

13. McKnight acknowledges and agrees that: (a) he has carefully read this Agreement and fully understands its meaning, intent and terms; (b) he has full knowledge of its legal consequences; (c) he agrees to all of the terms of this Agreement and is voluntarily signing below; and, (d) other than as stated herein, McKnight attests that no other promises or inducements have been offered for him approval/execution of this Agreement.

14. McKnight understands that he has twenty-one (21) calendar days from his receipt of this Settlement Agreement and General Release to decide whether to sign this Settlement Agreement and General Release, although he need not wait the full twenty-one (21) calendar days to sign and deliver the Settlement Agreement and General Release to the County. By his signature below, McKnight represents and acknowledges that he had or could have had twenty-one (21) calendar days to consider the terms of this Settlement Agreement and General Release with any attorney/ representative of

his choice prior to its execution and that he has voluntarily waived any unexpired portion of the twenty-one (21) calendar day review period. If McKnight signs this Settlement Agreement and General Release, he will have seven (7) calendar days from the date he signs the Settlement Agreement to withdraw his consent to the terms of this Settlement Agreement and General Release by submitting a signed written statement to Labor Counsel to the County by 5:00 p.m. on the seventh (7^{th}) calendar day stating: "I revoke my consent to the Settlement Agreement and General Release I signed with the County of Union, dated _____, 2017." If McKnight signs this Settlement Agreement and General Release and does not notify the Labor Counsel to the County in the manner set forth herein that he wishes to rescind such Settlement Agreement and General Release within seven (7) calendar days of him signing, then this Settlement Agreement and General Release will be deemed a binding and enforceable contract according to its terms. McKnight's rejection of this Agreement will result in a reinstatement of the termination of employment by the County of McKnight.

15. This Agreement is subject to County approval and execution by same and execution by McKnight.

16. Any notices as to any issues regarding this Agreement shall be sent to the following, by regular mail and certified mail, return receipt requested:

FOR THE COUNTY OF UNION:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

COPY TO:

Dawn Packan, Assistant to the Director
Department of Parks & Recreation
COUNTY OF UNION
County of Union Administration Building
10 Elizabethtown Plaza, 6th Floor
Elizabeth, New Jersey 07207

AND

Claudia Martins, Director, Division of Personnel
Management and Labor Relations
COUNTY OF UNION
Administration Building
10 Elizabethtown Plaza, 6th Floor
Elizabeth, New Jersey 07207

AND

Robert Barry, Esq.
UNION COUNTY COUNSEL
10 Elizabethtown Plaza, 5th Floor
Elizabeth, New Jersey 07207

FOR LOUIS MCKNIGHT:

Louis McKnight
458 W. 3rd Avenue
Roselle, New Jersey 07203

COPY TO:

Eric D. Brophy, Esq.
DIEGNAN & BROPHY, LLC
2329 Route 34, Suite 106
Wall Township, New Jersey 08736

IN WITNESS WHEREOF, MCKNIGHT and UNION COUNTY, have hereunto set their hands this 12th day of October, 2017.

Witness:

Dated: 10/12/17

LOUIS MCKNIGHT

Louis D McKnight 10/12/17

Louis McKnight

Dated:

Attest:

Dated: 10|19|17

COUNTY OF UNION

Dated: 10|19|17

By my signature below, I, Louis McKnight, do hereby submit an irrevocable resignation from my employ with the County of Union as Building Maintenance Worker in the County's Park Environmental Department, retroactive to the close of business, February 28, 2017. As of March 1, 2017, I shall no longer serve as a paid employee/member of the County of Union or in any other paid employment capacity with the County of Union.

By my signature below, I further acknowledge that I am of sound mind and able to make the determination to submit this irrevocable letter of resignation and that I have had the opportunity to consult with an attorney of my choosing prior to making this decision and chosen not to do so.

I further agree that I will execute any and all additional documents necessary to effectuate this letter and all related matters thereto.

Dated: 10/12/17, 2017 Louis D. McKnight

Louis McKnight

Sworn and subscribed before me
this 12th day of October 2017

Eric D. Brophy, Esq.
Attorney at Law,
State of N.J.

11-15-17

STATE OF NEW JERSEY

In the Matter of Trina Perry,
Bergen County, Department of
Human Services

CSC DKT. NO. 2017-269
OAL DKT. NO. CSV 14363-16

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 14363-16
AGENCY DKT. No. 2017-269

TRINA R. PERRY,
Appellant,

v.

COUNTY OF BERGEN, DEPARTMENT OF HUMAN SERVICES,
Respondent.

Matthew P. Rocco, Esq., for Appellant (Rothman, Rocco, La Ruffa, LLP, attorneys)

Eric M. Bernstein, Esq., for Respondent (Eric M. Bernstein & Associates, LLC, attorneys)

Record Closed: October 20, 2017 Decided: October 30, 2017

BEFORE **JOHN P. SCOLLO**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) and filed on September 21, 2016, for determination as a contested case. A telephone prehearing conference was held on October 21, 2016 and a hearing date was scheduled for May 22, 2017, but later rescheduled to June 12, 2017.

The parties mutually negotiated and agreed to the terms of a Settlement Agreement ("the Settlement Agreement"), which was signed by Trina Perry on July 25, 2017 and by Bergen County's authorized representative, Julian X. Neals, County Counsel and Acting County Administrator on August 10, 2017. Attached to the Settlement Agreement is a letter dated July 13, 2017 from Trina Perry to the New Jersey Department of Law and Public Safety, Division on Civil Rights with a copy also sent to the United States Equal Employment Opportunity Commission. In this July 13, 2017 letter, Trina Perry withdrew all charges of discrimination. The Settlement Agreement and the July 13, 2017 letter were presented to the Tribunal on September 26, 2017 by John Kaplan, Esq. of Eric Bernstein and Associates on behalf of Bergen County. On September 27, 2017, the Tribunal asked both counsel for proofs of mailing of the July 13, 2017 letter to both Civil Rights entities- the New Jersey Department of Law and Public Safety, Division of Civil Rights and the United States Equal Employment Opportunity Commission. On October 20, 2017, both counsel appeared at the OAL and assured the Tribunal that the July 13, 2017 letter was sent to both of the aforementioned Civil Rights entities. With the parties' consent, the tribunal marked the July 13, 2017 letter as Exhibit 'A' and as Exhibit 'B' to the Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

October 30, 2017

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: October 30, 2017

Date Mailed to Parties:

db

PLEASE CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THIS DOCUMENT, YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS THAT YOU MAY HAVE.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE (hereinafter referred to as the "AGREEMENT"), is made this ___ day of _____, 2017 by and among the County of Bergen, a governmental entity created under the laws and Constitution of the State of New Jersey, whose principal offices are located at One Bergen County Plaza, Hackensack, New Jersey 07601 (hereinafter referred to as the "COUNTY") and Trina Perry, a former employee of the COUNTY with a mailing address of 56 Laurel Street, City of Paterson, State of New Jersey 07522 (hereinafter referred to as "PERRY").

1. The COUNTY, as defined and used throughout this Agreement, shall at all times mean the COUNTY OF BERGEN, its divisions, subdivisions, departments, agencies, affiliates, designees, predecessors, successors and assigns of any and all of them, their past, present and future directors, officers, officials (elected and/or appointed), representatives, employees, agents, attorneys and/or representatives, heirs, executors and administrators, whether in their individual or official capacities, in the past, present and future.

2. PERRY, as defined and used throughout this Agreement, shall mean TRINA PERRY, her family (by marriage and/or blood relation), relatives, heirs, representatives, designees, privies, executors, administrators, representatives, assigns, successors-in-interest and predecessors-in-interest.

3. The parties agree that this AGREEMENT is contingent upon and subject to execution by PERRY and approval and execution by the COUNTY.

Exhibit "B"

4. In consideration of the mutual promises of this AGREEMENT and for other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree to resolve all disciplinary actions between them under the terms of this AGREEMENT.

a. PERRY was formerly employed by the COUNTY in the title of Juvenile Detention Officer.

b. On or about June 7, 2016, the COUNTY served PERRY with a Preliminary Notice of Disciplinary Action (hereinafter referred to as the "PNDA") in which the COUNTY charged PERRY with violations of N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency or failure to perform duties); (a)(3) (Inability to perform duties); (a)(6) (Conduct unbecoming a public employee); (a)(7) (Neglect of duty); (a)(9); (a)(12) (Other sufficient cause); and, N.J.A.C. 4A:2-2.5 and N.J.A.C. 4A:2-2.7, immediately suspending PERRY from duty without pay based upon a determination that: (1) PERRY's suspension was necessary to maintain safety, health, order and/or effective direction of public services; (2) PERRY was formally charged with a crime of the second (2nd) degree; and, (3) based on the ongoing investigation of PERRY's situation, there existed a pending criminal complaint/indictment against PERRY.

c. On or about June 15, 2016, a hearing was held based upon PERRY's immediate suspension without pay only.

d. On or about June 29, 2016, a disciplinary hearing was held based upon the allegations set forth within PERRY's PNDA.

e. On or about July 17, 2016, PERRY's occupational status was changed to an administrative leave with pay.

f. On or about July 22, 2016, while still on unpaid administrative leave, and prior to the issuance of a Final Notice of Disciplinary Action (hereinafter referred to as an

"FNDA") PERRY filed a Major Disciplinary Appeal with the New Jersey Civil Service Commission, Division of Merit System Practices and Labor Relations.

g. On or about July 29, 2016, PERRY filed a verified complaint with the New Jersey Department of Law & Public Safety, Division on Civil Rights, Docket Number: EB62WK-66059, Federal Charge Number: 17E-2016-00378, claiming discrimination against her by the COUNTY.

5. On or about August 10, 2016, PERRY was served with an FNDA suspending her without pay for forty (40) working days to be served pending the resolution of her appeal and maternity leave and the completion of mandatory Juvenile Detention Officer Training.

6. On or about November 6, 2016, PERRY submitted formal paperwork changing her occupational status to an unpaid family medical leave pursuant to the Federal Family Medical Leave Act and the New Jersey Family Leave Act.

7. On or about March 17, 2017, PERRY submitted a written formal resignation to the COUNTY resigning her position as a Juvenile Detention Officer effective immediately.

8. PERRY's appeal of her disciplinary suspension was scheduled for a hearing in the Office of Administrative Law before the Honorable John Scollo, A.L.J., on June 12, 2017.

9. In order to avoid the time and expense of proceeding with the hearing, PERRY and the COUNTY, through their respective attorneys and/or representatives, agreed to enter into the within AGREEMENT upon the following terms and conditions, which are as follows:

a. PERRY's March 17, 2017 resignation from the County would remain and would be considered to be a resignation in good standing, dismissing the charges against her as set forth in her PNDA and FNDA.

b. The COUNTY shall pay to PERRY Ten Thousand Dollars ($10,000.00) as back wages subject to a W-2 and all applicable income taxes and other applicable deductions.

c. PERRY shall not be paid for any accrued leave time (sick leave, personal leave, vacation leave, holiday leave, etc.) and only compensated for any back wages referenced in paragraph 9.b.

d. In consideration of the COUNTY's payment of Ten Thousand Dollars ($10,000.00) to PERRY, PERRY shall send a letter to the United States Equal Employment Opportunity Commission, a copy of which is attached hereto as Exhibit A, and the State of New Jersey Department of Law & Public Safety, Division on Civil Rights, a copy of which is attached hereto as Exhibit B, formally withdrawing any and all claims of discrimination alleged by her against the COUNTY. The COUNTY shall receive a copy of Exhibit A and Exhibit B executed by PERRY with evidence it was sent to the respective governmental entities at the time PERRY executes this Agreement.

e. PERRY agrees that the within waiver and release in favor of the COUNTY shall also include her waiver and release from joining or being included in any class in any case in which any claim is asserted against the COUNTY, involving any event that has occurred on or before his execution of this Agreement, including, among other actions, any action involving the New Jersey Division on Civil Right and the United States Equal Employment Opportunity Commission, unless PERRY is found to be an indispensable party and ordered by a court to become a party to any such action. A copy of any such Order will be provided to the COUNTY for its records and response.

f. PERRY agrees not to contest, in any judicial, quasi-judicial or administrative forum, any of the terms and conditions of this AGREEMENT.

g. PERRY shall withdraw with prejudice her appeal before the Office of Administrative Law, CSC Docket No.14363-2016 N, Agency Reference No. 2017-269 and provide the COUNTY with a copy of same with evidence it has been transmitted to the Office of Administrative Law within ten (10) calendar days of PERRY's execution of this AGREEMENT.

10. PERRY releases, acquits, gives up and forever discharges any and all claims and rights that she may have against the COUNTY and any and all of its officials (past, present and future) (elected and/or appointed), officers, employees, representatives, assigns, successors and designees (past, present and future as to all categories listed), up to the time of complete execution of this AGREEMENT by all parties. This releases any and all claims, including those that PERRY, her family, designees, representatives and assigns are not aware and those not mentioned in this Agreement. This AGREEMENT applies to claims resulting from anything that has happened from PERRY's first (1st) date of application for employment with the COUNTY through the date of complete execution of this AGREEMENT by all parties. PERRY specifically releases the following claims:

a. Any collective bargaining agreement with the COUNTY covering PERRY and/or any other resolution, ordinance, policy, practice and/or procedure addressing, specifically or generally, PERRY's employment with the COUNTY;

b. The National Labor Relations Act;

c. Title VII of the Civil Rights Act of 1964;

d. Sections 1981 through 1988 of Title 42 of the United States Code (Civil Rights Act of 1871);

e. Civil Rights Act of 1991;

f. The Americans with Disabilities Act ("ADA");

g. The Rehabilitation Act of 1973;

h. The Age Discrimination in Employment Act ("ADEA");

i. The Fair Labor Standards Act ("FLSA");

j. The Occupational Safety and Health Act ("OSHA") and the New Jersey Public Employee Occupational Safety and Health Act ("NJPEOSHA");

k. The Equal Pay Act;

l. The Employee Retirement Income Security Act ("ERISA");

m. The New Jersey Law Against Discrimination ("LAD");

n. The New Jersey Conscientious Employee Protection Act ("CEPA");

o. The Family and Medical Leave Act (Federal) and the Family Leave Act (New Jersey);

p. The Federal and New Jersey State Wage and Hour Acts;

q. The Federal and New Jersey State Equal Pay Law;

r. The New Jersey Civil Rights Act;

s. The New Jersey Employer-Employee Relations Act;

t. Any other Federal, State and/or local civil rights law or any other local, State or Federal laws, regulations, statutes or ordinances involving labor/employment or other applicable matters;

u. Any claims under public policy, contract (express, written, implied or oral), tort and/or common law;

v. Any claims for terminal, vacation, sick and/or personal leave with or without pay or payment pursuant to any practice, policy, handbook or manual of the COUNTY;

w. Any allegation for costs, fees or other expenses, including but not limited to attorneys and/or representatives' fees; and/or,

x. ANY AND ALL CAUSES OF ACTION, CLAIMS OR DAMAGES, WHETHER KNOWN OR UNKNOWN AS OF THE DATE OF EXECUTION OF THIS AGREEMENT, ARISING FROM OR RELATING IN ANY WAY TO ANY AND/OR ALL PORTIONS OF PERRY'S EMPLOYMENT WITH THE COUNTY, FROM THE FIRST (1st) DATE OF HER EMPLOYMENT WITH THE COUNTY

THROUGH AND INCLUDING THE DATE OF COMPLETE EXECUTION OF THIS AGREEMENT BY ALL PARTIES.

This covers any and all amendments and supplements to any and/or all such laws, statutes, rules and/or regulations.

11. The waiver by PERRY and the COUNTY of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other or as a waiver of any subsequent breach by the other.

12. This AGREEMENT contains the full agreement of PERRY and the COUNTY and may not be modified, altered, changed or terminated, except upon the express prior written consent of PERRY and the COUNTY, which consent must be in writing and signed by PERRY and the COUNTY and/or their duly authorized agents.

13. If any term, provision or condition of this AGREEMENT is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this AGREEMENT.

14. This AGREEMENT shall be construed and interpreted in accordance with the laws of the State of New Jersey.

15. This AGREEMENT shall become effective immediately as to PERRY following execution by PERRY and shall become effective upon the COUNTY after approval and execution by all applicable COUNTY officials.

16. PERRY and the COUNTY shall bear all costs and expenses arising from the actions of their own counsel and/or representatives in connection with this AGREEMENT.

17. This AGREEMENT contains the entire agreement between PERRY and the COUNTY with regard to all matters and shall be binding upon and inure to the benefit of their officials (elected and/or appointed), officers (elected and/or appointed), directors, attorneys and/or representatives, representatives, employees, associates, partners, agents, servants, executors,

administrators, personal representatives, heirs, successors and assigns of each and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

18. All notices, demands and requests that are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

FOR THE COUNTY OF BERGEN:

Eric M. Bernstein, Esquire
ERIC M. BERNSTEIN & ASSOCIATES, L.L.C.
34 Mountain Boulevard, Building A
P.O. Box 4922
Warren, New Jersey 07059-4922

WITH A COPY TO:
Julien X. Neals, Esq., County Counsel and Acting County Administrator
One Bergen County Plaza, 5th Floor
Hackensack, New Jersey 07601

FOR TRINA PERRY:
TRINA PERRY
56 Laurel Street
City of Paterson, New Jersey 07522

WITH A COPY TO:
Matthew Rocco, Esq.
Rothman Rocco LaRuffa, LLP
3 West Main Street, Suite 3
Elmsford, New York 10523

19. PERRY understands and agrees that the COUNTY could have given her twenty-one (21) calendar days from the date of her receipt of this AGREEMENT to consider and review this AGREEMENT with her attorney and/or representative. By her signature below, PERRY agrees to waive the twenty-one (21) calendar day provision. Following her execution of this AGREEMENT, PERRY has a period of seven (7) calendar days to revoke this AGREEMENT. Revocation of the AGREEMENT must be undertaken by advising the COUNTY's attorney in

writing at his address set forth in Paragraph 15 above by 5:00 P.M. of said seventh (7th) calendar day that she rescinds her agreement to same. Failure to revoke such AGREEMENT shall be considered an acceptance of the AGREEMENT. If the AGREEMENT is revoked, the COUNTY will pursue the disciplinary charges against PERRY at the Office of Administrative Law.

20. In entering into this AGREEMENT, PERRY has relied upon the legal advice of her attorney and/or representative, who is the attorney and/or representative of her own choosing, as to the terms of this AGREEMENT, which have been completely read and explained by her attorney and/or representative and those terms are fully understood and voluntarily accepted by PERRY. By executing this AGREEMENT, PERRY also warrants and affirms that, at the time of said execution, she was not suffering from any mental or psychological disorder, nor was she under the influence of alcohol or any drug and/or medication, prescribed by a physician or otherwise, which would prevent her from understanding the terms of this AGREEMENT. Furthermore, PERRY, by executing this AGREEMENT, warrants and affirms that she was not under any mental duress and was not coerced by any individual or other party to enter into this AGREEMENT. PERRY expressly acknowledges, represents and warrants that: (a) she has carefully read this AGREEMENT; (b) she fully understands the terms, conditions, and significance of this AGREEMENT; (c) she has had ample time to consider and negotiate this AGREEMENT; (d) she has had a full opportunity to review this AGREEMENT; (e) she is able to make an informed decision and is not physically, medically or mentally incapacitated so that she is able to make an informed decision to accept the AGREEMENT; (f) she has executed this AGREEMENT voluntarily and knowingly, and with the advice of her own counsel and/or representative, if applicable; (g) she agrees that she has been fully, fairly and adequately represented by her union, Local 655 USWU IUJAT, its officers, employees, agents, attorneys and parent unions in all matters relating to her employment and separation therefrom, including the negotiations and execution of

this agreement; and, (h) she releases the aforementioned entities from any claims and remedies assertable in connection with her employment with Bergen County and separation therefrom.

IN WITNESS WHEREOF, TRINA PERRY and THE COUNTY OF BERGEN have hereunto set their hands this _____ day of _____ 2017.

Witness:

_____

Dated: _____

TRINA PERRY

T. Perry

TRINA PERRY

Dated: 7/25/17

Attest:

Aurelia Gonzalez Munn

Dated: 8/10/17

COUNTY OF BERGEN

By: **Julien X. Neals,**
County Counsel/Acting County Administrator

Dated: 8-10-17

STATE OF NEW JERSEY :
: SS.:
COUNTY OF :

I, _____, a Notary Public, do hereby certify that TRINA PERRY, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledges that she signed and delivered the said instrument as her free and voluntary act, for the uses and purposes set forth therein.

Given under my hand and official seal this 25th day of July 2017, 2017.

Pauline D. Daniels

Notary Public

PAULINE D. DANIELS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 12/30/19

July 13, 2017

Via Regular Mail
Mr. Craig Sashihara
New Jersey Department of Law & Public Safety
Division on Civil Rights
140 E. Front Street
Trenton, NJ 08608

Re: Trina Perry v. Bergen County Department of Human Services
Docket No.: EB62WK-66059

Dear Mr. Sashihara:

I wish to withdraw my charge of discrimination in this matter. With the help of my labor union, and in connection with another quasi-judicial proceeding I had initiated against Bergen County, I have globally resolved all the issues relating to my employment separation therefrom.

I also wish to withdraw the Charge of discrimination which was administratively, and simultaneously, filed with the U.S. EEOC.

I thank you very much for your Agency's attention to my case.

Sincerely,

Trina Perry

NOTARY PUBLIC:

PAULINE D. DANIELS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 8/30/19

7/25/17
Date:

cc: United States Equal Employment Opportunity Commission
Two Gateway Center, Suite 1703
283-299 Market Street
Newark, NJ 07102

11-3-17

STATE OF NEW JERSEY

In the Matter of George Urban, Gloucester County, Sheriff's Department

CSC DKT. NO. 2016-3114
OAL DKT. NO. CSV 5607-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOVEMBER 15, 2017 JM

The Civil Service Commission, at its meeting of November 15, 2017, acknowledged the attached settlement in the above matter.

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

DECISION RENDERED BY THE CIVIL SERVICE COMMISSION ON NOVEMBER 15, 2017

Robert M. Czech, Chairperson
Civil Service Commission

Inquiries and Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 5607-16

AGENCY DKT. NO. 2016-3114

IN THE MATTER OF GEORGE URBAN, GLOUCESTER TOWNSHIP SHERIFF'S DEPARTMENT.

John P. Rowland, Esquire, for appellant, George Urban

Eric Milavsky, Esquire, for respondent, Gloucester Township Sheriff's Department (Brown and Connery, LLP, attorneys)

Record Closed: October 12, 2017 Decided: October 26, 2017

BEFORE **DEAN J. BUONO,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law (OAL) on April 12, 2016, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Appellant, a sherrif's officer with the Gloucester County Sheriff's Department, appeals a fifteen-working-day suspension effective March 8, 2016. On October 12, 2017, the parties filed a fully executed Settlement Agreement in this matter. The Agreement is attached and fully incorporated herein. (J-1).

FINDINGS OF FACT

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures to J-1.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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..

October 26, 2017
DATE

DEAN J. BUONO, ALJ

Date Received at Agency: 10/27/17

Date Mailed to Parties: 10/27/17

EXHIBITS:

J-1 Settlement Agreement

J-1

SETTLEMENT AGREEMENT

BETWEEN

THE GLOUCESTER COUNTY SHERIFF'S DEPARTMENT

AND

GEORGE URBAN

This Settlement Agreement is made by and between the Gloucester County Sheriff's Department ("GCSD") and Sergeant George Urban ("Urban") (collectively, the "parties") as follows:

WHEREAS, the GCSD charged Sergeant Urban with insubordination pursuant to GCSD Rules of Conduct Rule 1.4 and N.J.A.C. 4A:2-2.3(a)(2) regarding an email sent by Sergeant Urban to his superior, Lieutenant Barry Fell, on April 6, 2014;

WHEREAS, Urban waived a departmental hearing and appealed the discipline to the Office of Administrative Law ("OAL"), Case No. CSV 056072016S, Agency No. 2016-3114; and

WHEREAS, the parties appeared for trial on May 3, 2017 at the OAL before the Honorable Dean Buono, A.L.J.; and

WHEREAS, the parties desired to amicably resolve the above controversy without the need for further legal proceedings; and

WHEREAS, as a result of further negotiations prior to trial, the parties reached the terms of a settlement, with such terms being placed on the record prior to the start of trial on May 3, 2017;

NOW THEREFORE, in consideration of the covenants, conditions, and promises herein, the parties agree as follows:

1. **Terms of Settlement**

    1. The charges in the Final Notice of Disciplinary Action dated February 23, 2015, and attached hereto as Exhibit A shall be sustained.

    2. The penalty for the foregoing charges shall be reduced from a 15-day suspension without pay to a 6-day suspension without pay.

3. As Sgt. Urban previously served ten (10) days of suspension, the GCSD agrees to pay four (4) days of back pay to Sgt. Urban within thirty (30) days of this Agreement.

4. Sgt. Urban releases all procedural and substantive challenges with regard to all disciplinary matters referenced herein. This release includes the right to appeal or otherwise challenge the disciplinary charges and penalty therein. This release further includes any claims, suits, grievances, unfair practice charges, arbitration demands, or other legal action arising from the events underlying these disciplinary charges. This release is intended to be a full general release with regard to these disciplinary charges, and Urban therefore waives all claims, causes of action, or demands against the Sheriff and/or the County of Gloucester and/or any of its agents, officers, or employees arising under any contract (express or implied), common law, federal or State constitutional provision, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A- the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, the New Jersey Civil Rights Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, and disability benefits laws.

5. The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

6. GCSD shall amend Sgt. Urban's personnel records to conform to the terms of the settlement. All internal records of the GCSD will be kept intact. Nothing herein shall preclude GCSD from releasing information on this matter to anyone who has a release executed by Sgt. Urban or as consistent with law.

2. Dismissal and Covenant Not to Demand, Arbitrate or Sue

Sergeant Urban agrees to the dismissal with prejudice of the matter of George Urban v. Gloucester County Sheriff's Department, CSV 05607-2016 S. Agency Ref. No. 2016-3114. Sgt. Urban further agrees that no other demands, arbitration, or lawsuits shall be filed in connection with the events which underlie this matter.

3. Entire Agreement

This agreement contains the sole and entire agreement between the parties hereto and fully supersedes any and all prior agreements and understanding pertaining to the subject matter hereof. The parties represent and acknowledge that, prior to executing this agreement, they

consulted their attorneys, that they had ample time to do so, that they obtained the advice of counsel prior to making the decision to execute the agreement, and that they have not relied upon any representation or statement not set forth in this agreement made by counsel or representatives with regard to the subject matter of this agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this agreement.

4. Severability

The parties agree that if any court declares any portion of this agreement unenforceable, the remaining portion shall be fully enforceable.

5. Effective Date

This Agreement will become effective on the date on which all parties have signed the agreement.

6. Not Admissible/No Past Practice or Precedent

This agreement is not intended to be used and shall not be used as evidence or for any other purpose in any other action or proceeding, other than evidence of the parties' compromise as set forth herein or to enforce the terms of this agreement. Nothing in this agreement shall be used, considered, construed, or interpreted to constitute a past practice or precedent of any kind.

7. Counterparts

This agreement may be executed in one or more counterparts, each of which shall be fully effective without the others, and all of which shall collectively constitute an original of this agreement. Facsimile or .pdf signatures shall be treated as originals for all purposes applicable hereto but the parties agree to exchange fully executed (non-facsimile) originals as soon as they are reasonably able to do so.

8. Sufficient Review

By signing this agreement, Sgt. Urban acknowledges:

A. HE HAS READ IT;

B. HE UNDERSTANDS IT AND KNOWS HE IS GIVING UP IMPORTANT RIGHTS, INCLUDING THE RIGHT TO PURSUE THE MATTER AT A TRIAL BEFORE THE OFFICE OF ADMINISTRATIVE LAW OR TO PURSUE THE MATTER AT ANY LEVEL OR THROUGH ANY OTHER FORUM CONCERNING THIS MATTER;

C. HE AGREES WITH EVERYTHING IN IT;

D. THE SGT. URBAN'S ATTORNEY NEGOTIATED THIS AGREEMENT WITH HIS KNOWLEDGE AND CONSENT;

E. HE HAS BEEN ADVISED TO CONSULT WITH HIS ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT; AND

F. HE HAS SIGNED THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE KNOWINGLY AND VOLUNTARILY AND WITHOUT ANY UNDUE INFLUENCE OR PHYSICAL OR MENTAL IMPAIRMENT.

IN WITNESS WHEREOF, GCSD and Sgt. Urban hereto knowingly and voluntarily execute this Agreement:

FOR THE SHERIFF:

Carmel Morina
Sheriff, County of Gloucester

Dated: 8/23/2017

FOR SGT. URBAN:

George Urban

Dated: 6-27-17

7/24/17

John P. Rowland, Esq.
Counsel for PBA Local 122

Dated:

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 13, 2018

Anthony J. Fusco, Jr., Esq.
Fusco & Macaluso Partners, LLC
150 Passaic Avenue, P.O. Box 838
Passaic, New Jersey 07055

Kimberly K. Holmes, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Gabriel Rivera v. City of Newark* (CSC Docket No. 2016-2774 and OAL Docket No. CSV 3286-16) - **SETTLEMENT**

Dear Mr. Fusco and Ms. Holmes:

The appeal of Gabriel Rivera, a Police Officer with the City of Newark Police Department, of his six working day suspension, was before Administrative Law Judge Joann LaSala Candido (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 21, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 12, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than February 26, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to hold a meeting. Based on this information, and since we have no information as to when a quorum will be convened and the settlement complies with Civil Service law and rules, the Commission has determined that there is no reason to delay the final disposition of this matter any further by requesting any additional extensions of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective February 27, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Joann LaSala Candido, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03286-16

AGENCY DKT. NO. 2016-2774

IN THE MATTER OF GABRIEL RIVERA, CITY OF NEWARK POLICE DEPARTMENT,

---

Anthony J. Fusco, Esq. for appellant (Fusco & Macaluso, LLC)

Kimberly K. Holmes, Esq., for respondent (Assistant Corporation Counsel, attorney)

Record Closed: November 13, 2017 Decided: November 21, 2017

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

This matter was received at the Office of Administrative Law (OAL) on February 29 2016, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13 and assigned initially to ALJ Joan Bedrin-Murray. When reassigned to me, a telephone prehearing was conducted wherein the parties agreed on dates for hearing. During the pendency of the November 2017 hearing, the parties resolved all issues in dispute. The parties prepared and submitted a Settlement Agreement, which is attached hereto for reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

November 21, 2017
DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: November 24, 2017

Date Mailed to Parties: November 24, 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LOCAL

OAL DKT. NO. CSV 03286-2016N

AGENCY DKT. NO. 2016-2744

SETTLEMENT AGREEMENT

IN THE MATTER OF

Gabriel Rivera

AND

City of Newark Police Dept.

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 1/19/16 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	1814	Disobedience of Orders	
2.	Civil Service	4A:2-2.3 a)(6)	
3.			
4.			
5.			

B. The Appellant ~~Gabriel Rivera~~ N/A withdraws his/her appeal and request for a hearing, and the Respondent appointing authority _____ agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.			
2.			
3.			
4.			
5.			

OAL DKT. NO. CSV 03286-2016 N

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 6 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authortiy to the Appellant is as follows: 6 days back pay.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: N/A

This matter is dismissed with retraining for Gabriel Rivera in places Pacederes.

For Removals, Complete the Following

1. To date, appellant has served a total of N/A days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. City of Newark (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Appointing Authority NPD will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, [redacted] or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Edward Rivera's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.
6 Days Suspension to come off Rivera's disciplinary record.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the Appointing Authority, NPD, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and

Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The City Agrees to ~~withdraw~~ dismiss (A) this Appeal with Retraining by Gabriel Rivera. 6 days suspension to be given back pay to Appellant.

OAL DKT. NO. CSV 2016 N 03284

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

11/13/17
DATE

IDK 9278
Appellant Gabriel Rivera

DATE

Respondent

11/13/17
DATE

ON BEHALF OF City of Newark
As to Form and Legality

11/13/17
DATE

ON BEHALF OF Gabriel Rivera
Anthony J. Fusco, Jr.

OAL DKT. NO. CSV _____

CERTIFICATION

I, Gabriel Rivera, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11/13/17
DATE

IDA 9278
NAME

11-27-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
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Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 14, 2018

Samuel B. Wenocur, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

John P. Harrington, Esq.
Trimboli & Prusinowski, LLC
268 South Street
Morristown, New Jersey 07960

Re: *Ermath Albery v. Morris County, Department of Human Service* (CSC Docket No. 2017-2546 and OAL Docket No. CSV 2611-17)

Dear Mr. Wenocur and Mr. Harrington:

The appeal of Ermath Albery, an Institutional Attendant with Morris County, Department of Human Services, of her removal on charges, was before Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on November 27, 2017, recommending upholding the removal. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The time frame for the Commission to make its final decision was to initially expire on January 11, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time the Commission secured a 45-day extension of time until February 25, 2018, and since if does not currently have a quorum, requested consent of the parties, as required, for an additional 45-day extension to render its final decision no later than April 11, 2018. *See N.J.A.C.* 1:1-18.8. However, the appointing authority did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective February 26, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Thomas R. Betancourt, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 02611-17
CSC DKT. NO. 2017-2546

IN THE MATTER OF ERMATH ALBERY, MORRIS COUNTY DEPARTMENT OF HUMAN SERVICES.

Samuel B. Wenocur, Esq., for Appellant Ermath Albery (Oxfeld Cohen, attorneys)

John P Harrington, Esq., for Respondent Morris County Department of Human Services (Trimboli & Prusinowski, attorneys)

Record Closed: November 2, 2017 Decided: November 27, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Ermath Albery, appeals a Final Notice of Disciplinary Action (FNDA), dated January 18, 2017, providing a penalty of removal effective the same date.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14f-1 to -13, to the Office of Administrative Law (OAL), where it was filed on February 22, 2017.

A hearing was held on September 1, 2017. The record remained open to November 2, 2017, to afford the parties the opportunity to submit written summations.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Sharon Crooks, testified as follows:

She is employed as a Clerk III at Morris View Healthcare Center (Morris View). She is responsible for scheduling of Certified Nurse's Aides (CNA), does their time cards and payroll, among other things. She also maintains a spreadsheet to track expiration dates for the CNAs' certifications. The expiration dates are obtained from the CNA's certification card when they are first hired.

She periodically checks the PSI website to check on certification status. PSI is a service contracted by the New Jersey Department of Health (NJDOH or State) to do CNA recertification.

A valid and current CNA certification is required to work as a CNA at Morris View.

A CNA would usually receive a renewal form in the mail from the State of New Jersey within two to three months prior the certificate expiration. The forms would be brought to Ms. Crooks, who would then complete the employee information, give the

form to the Administrator for signature, and return to the CNA to take to the PSI office to complete the renewal process. No examination is required to renew a CNA certification.

There was one previous instance where a CNA had an expired certification. The CNA had moved and did not receive the renewal notice. She was notified by Morris View, taken off the schedule, and given time to complete the renewal process.

Ms. Crooks had discussions with Appellant in October 2016 regarding the renewal of her CNA certification prior to its expiration. Ms. Crooks advised Appellant that her certification was about to expire. Appellant acknowledged she was aware of the matter and that she would attend to it. Appellant's certification was due to expire on November 12, 2016.

Appellant had requested time off to attend to the recertification. She did not hear from Appellant after she requested time off. Appellant was called to Ms. Crooks office on Monday, November 14. 2016, and was told by Appellant that the recertification was not done. Appellant advised she would complete it by November 16, 2016. Elizabeth Wheelan, assistant director of nursing, was also present at this time.

Ms. Crooks did not hear from Appellant by November 17, 2016. Ms. Crooks checked the NJDOH website and discovered that Appellant's certification was revoked. Ms. Crooks then informed Ms. Wheelan and the Director of Nursing by email.

On November 21, 2016, Appellant telephoned Ms. Crooks to advise her that there was something on her certification from her other employment. Appellant advised she had an appointment with NJDOH on November 29, 2016. Appellant did not advise Ms. Crooks that her certification was revoked.

Appellant again telephoned Ms. Crooks on December 8, 2016, and advised she needed to retake the CNA course to become recertified. She further advised she was enrolled in the class for recertification and should be recertified on December 29, 2016,

when the class is finished. Appellant did not advise Ms. Crooks her certification was revoked during the telephone conversation.

Appellant was not reinstated on December 29, 2016. Ms. Crooks had no further communication with Appellant thereafter.

Appellant was given the option to resign, or be terminated, and to reapply for employment after she became recertified. Appellant chose to request a hearing.

Elizabeth Wheelan, Assistant Director of Nursing, testified as follows:

Her responsibilities include hiring and staffing.

There is a difference between revocation of a certification and expiration of a certification. Revocation is the removal of a certification in good standing. Abuse or neglect are the biggest causes of revocation. It is important to know the reason for a revocation.

Ms. Wheelan met with Appellant on November 14, 2016, to discuss Appellant's failure to renew her certification. She was advised that it would be done by November 16, 2016. There was no discussion about her certification being revoked.

Ms. Wheelan again met with Appellant on December 14, 2016. Appellant requested being placed in another department as she could not work as a CNA. Appellant was asked about the revocation of her certification at this meeting. Appellant only said it was related to another job. Appellant was advised that her request to work in another department could not be accommodated as they did not know the reason for the revocation.

At this time the County advised that incentive checks were being issued to employees. Appellant was due for an incentive check but had not been working. Therefore, Jennifer Carpentiery, the Director of Human Resources at the County of

Morris, became involved. This then caused Ms. Wheelan to contact the State Department of Health and Senior Services.

Ms. Wheelan contacted the State on December 15, 2016, and spoke to one Jodi Nocks, who was the person handling Appellant's matter regarding the revocation. Ms. Nocks informed Ms. Wheelan that Appellant's certification had been revoked on April 14, 2016. Ms. Nocks advised she was not able to provide details regarding the revocation.

Ms. Wheelan had a second conversation with Jodi Nocks on December 16, 2016, to request written confirmation regarding Appellant's revocation. Ms. Nocks advised in an email that no such letter could be issued.

No one at Morris View received any notification regarding Appellant's certification revocation.

Ms. Wheelan had no further communication with Appellant after the two conversations with Ms. Knox.

Ms. Wheelan was aware of a letter from the State advising Appellant that abuse charges against her were dismissed and the revocation was removed. Ms. Wheelan first became aware of this letter at the departmental hearing on removing Appellant from employment on disciplinary charges.

Appellant would not be able to work as a CNA whether her certification was revoked or expired.

Ms. Wheelan was not involved in the decision to issue the Preliminary Notice of Disciplinary Action (PNDA).

Appellant's Case

Ermath Albery, Appellant, testified as follows:

She was hired on August 17, 2015, by Morris View to work as a CNA. Her CNA certification is current and expires on March 6, 2019. CNA certifications must be renewed every two years. Ms. Albery recounted the certification renewal process. The State send out the renewal package about two months prior to expiration. The employer is required to complete the form. The completed form, together with a fee of $30, is submitted to PSI. This is the only item received every two years for recertification.

Ms. Albery stated her mail was sent to her parent's home address. She does not live with her parents, but this was the address on file with the State. She further stated that her parents usually leave for Haiti every year from March to October and therefore, did not receive her mail. She stated she did not receive mail from the State prior to 2016 as her parents were away.

Ms. Albery stated she established her own residence in May 2016 and notified the State of her new address in August 2016.

She was aware of the certification revocation allegation. They stemmed from a patient-abuse incident at a facility in Oakland, New Jersey, where she was also employed. That facility in Oakland never advised her of the allegation. She was never interviewed by the State regarding the allegation. She was not aware of an investigation. She never received a letter from the State regarding the same.

Ms. Albery did receive the recertification form from the State in August 2016 and provided it to Ms. Crooks for the employer section to be completed. The recertification documentation did not contain a reference to her certificate being revoked. The only other mail she received from the State was in December 2016.

Ms. Albery spoke to Ms. Crooks on October 27, 2016, to arrange to take off on Monday, October 31, 2016, to renew her certification. However, she did not take that day off and worked sixteen hours. She then asked for November 7, 2016, off for the same purpose. She was still unaware her certification was revoked. She did not renew her certification on November 7, 2016, as her mother was ill. On November 8, 2016, she was in the office to speak with Ms. Crooks regarding her recertification. Ms. Albery stated she was still unaware of the revocation at this time. On November 11, 2016, she spoke with Ms. Paula Howard from the State and was informed for the first time her certification was revoked.

Ms. Albery again spoke with Ms. Crooks on November 14, 2016, who advised that her certification was expired and she was still working. Ms. Albery advised Ms. Crooks that there was something on her license. She did not work thereafter.

On November 29, 2016, she met with Ms. Howard, Jody Nocks, and another person from the State. She showed them all the certified mail that was not delivered. She was not told she was revoked at this meeting. She spoke with Ms. Crooks the day after and advised Ms. Crooks she had to retake the CNA course to regain certification.

She reviewed an undated letter she sent to Paula Howard acknowledging receipt of Ms. Howard's letter to her dated November 3, 2016. Ms. Albery stated she did not receive Ms. Howard's letter of November 3, 2016. Ms. Albery also stated she did not know where Ms. Howard's letter of November 3, 2016, is as it was misplaced. The November 3, 2016, letter from Ms. Howard informed Ms. Albery of the allegation of patient abuse. Ms. Albery did not inform anyone at Morris View as to the content of the letter.

Ms. Albery stated she was terminated at the Oakland facility in June 2015 and knew the reason for the termination was an allegation of patient abuse. She did not inform anyone at Morris View of her termination, or the reason for it, at the Oakland facility. She started working at Morris View in August 2015.

Ms. Albery completed her recertification class and took the exam on March 6, 2017.

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 In re Polk, 90 N.J. 550 (1982). 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).

Both Ms. Crooks and Ms. Wheelan were credible. They both testified in a direct and straightforward manner. They were professional and composed. They did not hesitate when answering. Nothing about their testimony would lead anyone to believe they were not credible.

Ms. Albery's testimony was less forthcoming. She at times hesitated in her answers. Most compelling was her denial of having received a letter from Ms. Howard at the State dated November 3, 2016. This denial was maintained even though she

acknowledges receipt of said letter in her undated letter in response thereto. She knew of the allegation of patient abuse at the Oakland facility had been lodged with the State at the very least by the time she received this letter.

Further, she stated the first time she was aware of the allegation of patient abuse was when she met with Ms. Howard, Ms. Nocks, and another person from the State on November 29, 2016. This is simply not true based upon her later testimony when she stated she knew when she was discharged by the Oakland facility in May 2015; it was due to an allegation of patient abuse.

I deem Ms. Albery not credible.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant was employed by Morris View as a CNA.
2. A CNA receives certification from the State which must be renewed every two years.
3. At the time of Appellant's employment with Morris View her CNA certification was due to expire on November 12, 2016. (R-12.)
4. Prior to the date set for the expiration of her CNA certification Appellant received a renewal form from the State.
5. Appellant provided the renewal form to Morris View who are required to complete the same. Morris View completed the employer portion of the form.
6. Appellant did not renew her certification in a timely manner and her CNA certification expired on November 12, 2016.
7. Prior to the expiration of her certification it was revoked by the State based upon an allegation of patient abuse at Appellant's prior employment in Oakland, New Jersey. The revocation date was April 14, 2016. (R-4, R-7, and R-8.)

8. Appellant knew at the time of her discharge from the Oakland facility that the discharge was based upon an allegation of patient abuse.

9. Appellant failed to inform Morris View that her certification was revoked.

10. Appellant failed to timely renew her certification.

11. The charges of patient abuse were ultimately removed from Appellant's record and her status was changed from revoked to expired. This was effective December 6, 2016. (R-11.)

12. Appellant knew at some time prior to her termination from Morris View that her certification was revoked and did not inform Morris View of the same.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, supra, 90 N.J. 550. The evidence must be such as to lead a reasonably cautious mind to a given conclusion.

Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, supra, 26 N.J. at 275. The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, supra, 218 N.J. Super. at 341. The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. at 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The sustained charges in the Final Notice of Disciplinary Action (R-2) are set forth as: incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; neglect of duty; and, other sufficient cause. These charges are set forth in N.J.A.C. 4A:2.3(1), (3), (6), (7) and (12) respectively.

Nothing in the factual record supports a finding of incompetency, inefficiency or failure to perform her duties. No testimony or documentary evidence was presented to support the allegations contained in this charge. Accordingly, Respondent has not carried its burden as to the first charge set forth in the FNDA.

Respondent has more than carried its burden by a preponderance of the credible evidence that Appellant was unable to perform her duties. Appellant was legally barred from performing her duties as her certification had expired on November 12, 2016. Appellant was not recertified until March 6, 2017. From the time of expiration to the time of her discharge from Morris View Appellant was legally unable to perform the duties of a CNA.

I cannot conclude that Respondent has demonstrated by a preponderance of the credible evidence that Appellant is guilty of conduct unbecoming a public employee. Merely not renewing a certification does not amount to conduct unbecoming.

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

I can conclude that Respondent has met its burden on the charge of neglect of duty. It was certainly the duty of Appellant to maintain her certification. Without it she could work. Appellant did not maintain that certification and permitted her certification to expire.

There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961).

The penalty of removal was the only option available to Respondent as Appellant was not legally permitted to perform her job.

I **CONCLUDE** that the respondent has carried its burden to prove by a preponderance of the credible evidence that that appellant was guilty of the charges of inability to perform duties and neglect of duty set forth the Final Notice of Disciplinary Action.

ORDER

It is hereby **ORDERED** that appellant's appeal is **DENIED**;

It is further **ORDERED** that charges contained in the Final Notice of Disciplinary Action dated May 5, 2015, of inability to perform duties in violation of N.J.A.C. 4A:2.3(3), and neglect of duty in violation of N.J.A.C. 4A:2.3(7) are **SUSTAINED**, and penalty of removal, effective January 18, 2017, is **AFFIRMED**.

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, P.O. 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.

11/27/17
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: November 27, 2017

Date Mailed to Parties: November 27, 2017

db

APPENDIX

List of Witnesses

For Appellant:

Ermath Albery, Appellant

For Respondent:

Sharon Crooks, Clerk III

Elizabeth Wheelan, Asst. Dir. of Nursing

List of Exhibits

For Appellant:

None

For Respondent:

R-1 PNDA dated December 20, 2016

R-2 FDNA dated January 18, 2017

R-3 Emails from Sharon Crooks dated November 17, 2016, November 21, 2016, and December 8, 2016

R-4 December 17, 2016, printout from NJ Dept. Health and Senior Services showing revoked status of Appellant's CAN certification

R-5 Marked – not in evidence

R-6 December 16, 2016, email from Elizabeth Wheelan to Frank Infante

R-7 December 16, 2016, email from Elizabeth Wheelan to Jody Nocks

R-8 December 19, 2016, email from Jody Nocks to Elizabeth Wheelan

R-9 Terminated Employee Log re: January 18, 2017 termination of Appellant

R-10 Undated letter from Appellant to Paula Howard of NJDOH

R-11 December 6, 2016, letter from NJDOH to Appellant

R-12 Appellant's CNA certification cards with expiration dates of November 12, 2016, and March 6, 2019, provided to Respondent by Appellant's counsel on March 27, 2017

11-27-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 14, 2018

Samuel B. Wenocur, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Teresa Moore, Esq.
Riker, Danzig, Sherer, Hyland & Perretti
One Speedwell Avenue
Morristown, New Jersey 07962-1981

Re: *Yvonne Ellis v. Jersey City Public Schools* (CSC Docket Nos. 2016-2483 and 2017-2373; OAL Docket Nos. CSV 1656-17 and 4261-16) (Consolidated)

Dear Mr. Wenocur and Ms. Moore:

The appeals of Yvonne Ellis, a Community Aide Schools with the Jersey City Public Schools, of her nine working day suspension and removal on charges, were before Administrative Law Judge Michael Antoniewicz (ALJ), who rendered his consolidated initial decision on November 27, 2017, recommending upholding the suspension and removal. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The time frame for the Commission to make its final decision was to initially expire on January 12, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time the Commission secured a 45-day extension of time until February 26, 2018, and since if does not currently have a quorum, requested consent of the parties, as required, for an additional 45-day extension to render its final decision no later than April 12, 2018. *See N.J.A.C.* 1:1-18.8. However, the appointing authority did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective February 27, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Michael Antoniewicz, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)
OAL DKT. NOS. CSV 01656-17
and CSV 04261-16
AGENCY DKT. NOS. 2016-2483
and 2017-2373

IN THE MATTER OF YVONNE ELLIS,
JERSEY CITY PUBLIC SCHOOLS.

Samuel B. Wenocur, Esq., for appellant Yvonne Ellis (Oxfeld Cohen, attorneys)

Teresa L. Moore, Esq., for respondent Jersey City (Riker, Danzig, Scherer, Hyland, Perretti, attorneys)

Record Closed: October 13, 2017 Decided: November 27, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE

On August 6, 2007, appellant Yvonne Ellis, was hired by the City of Jersey City, Public Schools (respondent) as a Community Aide. Her disciplinary history indicates disciplinary actions were taken on July 19, 2010, and March 5, 2012. On December 10, 2015, respondent issued to appellant a Final Notice of Disciplinary Action (FNDA) for the following charges: Violation of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; violation of

N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause; N.J.A.C. 4A:2-2.3(a)(6), insubordination; and N.J.A.C. 4A:2-2.3(a)(5), failure to perform duties. On September 18, 2013, respondent reported specifications for the PNDA in the form of a letter, in pertinent part, as follows:

> Between June 17, 2013 and September 18, 2013, you have been absent a total of twenty-one and a half day (21½) from work. You have exhausted all of your sick time and presently have been placed on salary deletion. You were given a Memorandum on June 21, 2013 regarding Departmental Time and Attendance Policy.
>
> Despite repeated warnings you have shown a frequent nature of absenteeism and lateness, which demonstrates an unwillingness to meet, obtain or produce the effects necessary for adequate or satisfactory performance.
>
> As of September 11, 2013, you have been absent without official leave for five (5) consecutive days and you have failed to follow the Leave of Absence Procedure.

Appellant was notified that the disciplinary action against her for the charges in the PNDA may be removal or resignation not in good standing effective September 11, 2013. Appellant requested an internal hearing on the PNDA charges, which was held on October 2, 2013.

On January 20, 2017, respondent issued a Final Notice of Disciplinary Action (FNDA) that sustained all charges set forth in the PNDA the charges include chronic and excessive absenteeism, neglect of duty, conduct unbecoming, and other just cause. The disciplinary action against appellant is removal effective January 29, 2017. On January 23, 2017, appellant requested an appeal of the FNDA disciplinary action.

PROCEDURAL HISTORY

The New Jersey Civil Services Commission Division of Appeals and Regulatory Affairs transmitted the matters to the Office of Administrative Law (OAL), where they were filed on March 18, 2016 (as to CSV 04261-16) and February 3, 2017 (as to CSV 01656-17), for a hearing pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1

to F-13. The undersigned was assigned and an Order of Consolidation was issued on March 2, 2017, consolidating the matters. The matters were scheduled for hearing dates on May 30, 2017, June 7, 2017, June 13, 2017, June 23, 2017, and June 28, 2017.

TESTIMONY

Maribell Rivera

Maribell Rivera (Rivera) is employed by the Jersey City Public School District as an attendance counselor for four years, but worked for the Jersey City School District for seventeen years, overall. Prior to being an attendance counselor, Rivera was an attendance clerk in the attendance department, in the central office. Rivera's duties in her current job is to oversee the community aides (CA) from all the schools which were assigned to her and PS 38 is one of her schools. Rivera does home visits and gives out legal notices. Rivera works with parents regarding truancy. Rivera also trains all the CAs in the school district. Rivera trains the CAs to use Infinite Campus, which is a system that the school district uses in order to track students' attendance and tardiness. Through this system a CA has access to print out a daily attendance record and has access to students' records, parents' names, telephone numbers, and other information. Rivera believes that it was first used in the 2013-2014 school year. Prior to this program, the school used the AS 400. The training for the CAs on Infinite Campus was held once a year, when the employees came back to their school. In a conference room, there is a training session teaching the CAs to handle this program. The CAs have hands-on training with this program.

Rivera stated that at the beginning, in 2013-2014, Ellis attended the Infinite Campus training sessions twice. In addition, training is offered to all CAs who request additional training. Rivera would be notified and go to the appropriate school to train them or the CA could go to the central office and train there. There came a time when Rivera gave Ellis personal training in Infinite Campus. Rivera provided this training twice at the central office and a couple of times at the school level. The training in the central office was done with other CAs. The other two times, Rivera gave Ellis two one-

on-one trainings. When Rivera went to the school to train with Ellis, it was at PS 38. Rivera went to PS 38 because Ellis requested additional training. This training took place in October 2015.

There was one time when Rivera went to train Ellis at PS 38 and Ellis rejected her training. When Rivera appeared to assist Ellis with training, Ellis responded by saying: "You don't have an appointment." Rivera replied: "I don't need an appointment to come to the schools that I'm assigned to." Ellis then refused her training, so Rivera left the building. Rivera told her supervisor what had happened in PS 38. Rivera went to PS 38 because Ellis had requested training. Rivera sent Ellis an e-mail alerting her that she was coming to PS 38 for training. Apparently, Ellis did not read the e-mail before Rivera appeared at the school. A copy of a notice, dated October 8, 2015, to Ellis from Rivera was admitted into evidence. (R-1.)

Ellis started working at PS 38 as a CA in the 2011-2012 school year and thus was trained on AS 400 as the computer program. CAs must send out the following reports: weekly reports for tracking truancy; homeless reports; home visits reports; and parent notification letters. Rivera helped create these forms with her supervisor. These forms were given to the CAs as part of the training packet each year and were used at least since the 2011-2012 school year. These reports are on paper and in the computer. The CAs submit these reports in paper and electronically.

On cross-examination, Rivera confirmed that she started as an attendance counselor in 2014. Rivera stated that she dealt with Ellis prior to 2013 as a clerk for attendance. Rivera stated that Ellis was a parent liaison before she came into the system. Rivera had no interaction with Ellis when Ellis was a parent liaison. Rivera said that there were about forty to fifty people at the training in the beginning of the 2013-2014 school year.

Rivera said that she had managed up to forty CAs at one point and at the present time only twelve CAs. At one point, there was about forty CAs, one for each school. The difference between the AS 400 and the Infinite Campus was that in the AS 400, a

person can only look up the information, which cannot be altered, but with Infinite Campus, the CAs could work independently.

Rivera described the Infinite Campus training sessions as lasting from morning until afternoon and sometimes all day (i.e., seven hours). If a person was out on the day of the training, there was an automatic make-up session. (R-1 was based on a make-up session for an original training session.) Ellis made a request for additional training to Rivera's supervisor, who then told Rivera to go to the school. Regarding the one-to-one training appointment with Ellis, Rivera's supervisor received an e-mail from Ellis and the supervisor told Rivera to adjust her schedule and go to PS 38, which was before her normal daily tasks. Rivera stated that Ellis was not conducting assignments when she got to the school. Rivera described the interaction as Ellis verbally pushing her away. Rivera stated that Ellis responded to her by saying: "You cannot train me unless my union rep is here." Rivera stated that she was appalled by appellant's statement. Rivera confirmed that she was not appellant's supervisor. Rivera said that she asked Ellis, "why?" and Ellis responded by saying "It's complicated."

On re-direct, Rivera stated that she wrote an e-mail after leaving Ellis, when she would not meet with Rivera, because she characterized appellant's behavior as insubordination. Rivera explained that she went over to PS 38 to train Ellis and Ellis disrespected her.

On re-cross-examination, Rivera confirmed that Ellis did not use any obscenities or curses. Rivera just stated that Ellis was rude. Ellis also told Rivera that she would have allowed the training if a union representative was there.

John Ross

John Ross (Ross) was the student attendance supervisor for the Jersey City Public Schools and the educational stability liaison for the district and the homeless liaison for the district. His duties include supervising CAs at each building and the attendance counselors in the district. Ross also supervises the police officer who are

part of the truancy task force. As the educational stability liaison, Ross maintains students who are displaced through DYFS.

Ross holds an elementary education certification, a psychology certification, and a supervisor certification. Ross also has a principal certification. Ross holds a Masters of Education in administration and supervision.

Ross stated that there are about 38,000 students in the Jersey City Public Schools. Ross stated that regular student attendance is important because students need to be in school to learn and achieve. Jersey City Schools have an issue with attendance. In a report, it was determined that they had over 3,000 students. The district has an initiative in use in the district to improve student attendance. They have a goal to reach a ninety-seven percent rate of attendance in the district.

Ross stated that they have a computer program called Infinite Campus that tracks attendance in the school. The teachers take attendance and the information is inputted into the computer program. The CAs then take the record of attendance and make phone calls to the home. They seek to find out why they are absent if a parent has not called the school to begin with. If there is a trend of consecutive absences, then letters are sent home and home visits are made. In the event the trend continues, and they can't resolve same, the CA then refers the case to an attendance counselor for further investigation. For the most part, there is one CA per school. The CA will issue a Did Not Report (DNR) form to be issued.

Ross stated that a work day for a CA is 8:00 a.m. to 2:55 p.m. Ross stated that his office does provide training to the CA. In terms of training, at the beginning of the school year, usually the second day back, Ross has attorneys come from Legal One and train the CAs, attendance counselors, and service brokers. After a break for lunch, they gather and Ross works with the CAs and the attendance counsellors with reference to goals in the school year. If training is needed, they do that thereafter. It is a full day of training, from 8 until 2:55.

Ross stated that he started in this current position in 2012. Ross stated that computer training is part of the training for the CAs. People like Rivera would do one-on-one training, when requested. Ross recalled that he and Rivera worked with Ellis with her use of Infinite Campus. Ross identified a packet of documents, which are given to the CAs in their training. (R-2.) The packet contains the duties of a CA, which was created by Ross with HR. There is also a DNR report. This report is done at the beginning of the school year. After ten consecutive absences, we need to know the information about the student so an investigation can be done. There is also included other different forms used by a CA. There is also include truancy tracking forms.

There is also a form used to be a snapshot of what a CA has done at school. This tracking form is due once a week. It tells Ross the phone calls that are made, home visits completed, letters sent home, and court referrals regarding truancy. This form is a snapshot of what's going on since Ross is not there day to day. They are called weekly activity log report which must be submitted by every CA each week. Ross testified that a CA should fill out the weekly summary form and the back-up on a weekly basis. Ross's office tracks whether it receives weekly reports from each CA. Ross reviews each form to see if there are any issues and then gives it to his clerk. The clerk maintains a file for each CA with their reports. In addition, there are monthly reports which need to be submitted by the CAs. These reports include the homeless reports.

Ross also created a comprehensive list of duties for the CAs with the input of HR. (R-3.) These duties explained the day to day duties of the CAs. They include civil service job specifications. Ross described the principal duties of a CA as: to figure out how many students are absent at school; seek medical information and conferencing and home visits. CA must report to their administrator (building principal and assistant principal) and the central office (Ross).

Ross first met Ellis at a workshop in September 2013. Ross stated that the building principal and HR track appellant's attendance. Ross testified that at no time while he was the director of attendance did Ellis submit her weekly reports. He stated that Ellis did not hand in her weekly reports. These reports come to Ross and he opens them up and reviews them. His clerk makes a spreadsheet once a month to confirm the

submission of reports. Ross also testified that Ellis never submitted the homeless reports and the home visit reports. After refreshing his recollection with reference to a spreadsheet regarding submitted reports by the CAs, Ross recalled that Ellis did submit reports on two dates, i.e., October 9 and October 18, 2015. In addition, Ellis failed to submit reports in the 2016/2017 school year. Ross testified at the departmental hearing for a five-day suspension for neglect of duty and chronic absenteeism and at the hearing for a nine-day suspension for neglect of duty and chronic absenteeism. His office did not receive a DNR report from Ellis from September to November 2015.

In the Fall of 2015, Ross attempted to meet with Ellis. Ross described it as an informal meeting to discuss DNRs and the goals and objectives regarding attendance at PS 38. Ross went to the school and was in the main office. Ellis asked to have a union representative at the meeting. Ross sent an e-mail to Ellis to say that he would be appearing at the school on a future day. His plan was to meet with all personnel. Ross wanted to meet with Ellis, Ms. Jones (principal), or one of the assistant principals in order to discuss attendance goals at the school. Ms. Jones was not available on this date, so Ross met with Mr. Ileya, the assistant principal. When Ross got to the school Ellis asked for a union representative, which Ross approved even though it was not a disciplinary meeting. The meeting had nothing to do with discipline. They were on their way to Mr. Ileya's office on the second floor. Ross advised Ellis that they were just going to discuss attendance goals. When they got to the office, Ellis did not appear at the meeting. Ileya then made a call through the intercom asking for Ellis to report to his office. Thereafter, a phone call came to Ileya that Ellis left the building. Everyone was waiting at the meeting and they did not hear from Ellis. The meeting went on without Ellis and they discussed attendance issues and goals with the assistant principal.

Ross saw Ellis later that day at the union office. Ross had some other issues that he needed to discuss with some union representatives at the union office and he was standing at the entrance and he saw Ellis come into the building. This occurred in the afternoon, around 3:00/3:30 p.m. Ross stated that Ellis did not return to PS 38 that day. "The following day I wrote an e-mail to Ellis and copied the division director and the assistant principal, expressing his shock at appellant's behavior." (R-4.) The e-mail recounts the fact that Ellis stated to Ross that she needed to get her notebook and then

never returned to the meeting. Ellis stated to Ileya that she left the building because she was not feeling well. On October 8, Rivera went to see Ellis in order to give Ellis some one-on-one training. Ross was the individual sending Rivera to train Ellis.

There was a disciplinary hearing in the Fall of 2015 which lead to a nine-day suspension of Ellis. Ellis did not submit any reports except for two in the Fall of 2015. In the 2016/2017 school year Ellis came to work the first day of school and on the second day, when there were workshops and training, she did not come to work. In the Fall of 2016, Ellis did not submit a DNR. In addition, the respondent did not receive any weekly reports, DNR, home visit reports, or homeless reports from Ellis in the Fall of 2016.

Ross supported the discipline of Ellis for neglect of duty and chronic absenteeism because it was his position that he doesn't ask a lot from his employees and the weekly reports aren't hard to complete. Ross gave Ellis many, many opportunities but Ellis gave him no other choice but to bring charges against her. Ellis asked for and received an extension to submit her reports and they were still not submitted.

On cross-examination Ross stated that an attendance counselor is a supervisor or a superior to a CA; however, they do not have the ability to issue discipline over a CA. Accordingly, Rivera was not a superior or a supervisor to Ellis. Ross confirmed that Infinite Campus was first used in the 2011/2012 school year.

Ross recalled that Ellis appeared for work on the first day of the 2016/2017 school year and thus was not on a leave of absence. Ross stated that if an employee is on an approved leave of absence, there is no expectation for that employee to perform her tasks. Ross explained that he does not ask for daily reports and only weekly reports must be submitted to his office. Ross explained that there is one DNR report to be submitted each year. It is due about the third week of September. If someone is on a leave of absence, there was no expectation for that employee to submit a DNR.

The meeting with Ileya, Ross, and Ellis was not being held at a set time. Ross said that Ellis appeared apprehensive because she wanted a union representative at

the meeting. Ross said that Ellis was not loud or aggressive in asking for a union representative, but Ellis was adamant, even though was wasn't needed. The union stated that they didn't need to be there, but they wanted to accommodate her. Ross confirmed that he was of the belief that some of appellant's leaves of absence were not legitimate.

On redirect, Ross stated that the reason for questioning appellant's leaves of absence, was that he knows sick people. Ross knows people who are dying of cancer and still go to work every day. Ross is also aware of people who take leaves of absence when they are not truly ill. Ross also believes that people with depression or anxiety should still go to work, because he suffers from such conditions and still goes to work.

On re-cross, Ross stated that if someone needs to go for inpatient treatment for depression and they have to miss work, it is appropriate to receive inpatient treatment. In addition, Ross went to the union in order to ask about an employee asking for union representation for almost any meeting with management. It was a general question and had nothing to do with Ellis herself.

Sandra Jones

Sandra Jones (Jones) is the principal of PS 38 since September 2004. Prior to that, Jones was an elementary teacher in all departments. Jones worked for Jersey City Public Schools for thirty-three years. Jones holds a degree in elementary education and a Master's Degree in educational Leadership. Jones has a certificate in elementary education grades K through 8 and one in supervision. Jones also holds a certificate in principalship and as a reading teacher. Jones also holds a certificate in business administration, school leadership, and superintendency and below.

PS 38 is a pre-K-8 school with 1,000 students. The school has eighty instructional staff members. The school also has non-instructional staff members from teacher's aide to CA to custodians and security and food service employees. There are

about twenty non-instructional staff, including clerical staff. There are two assistant principals and one principal (Jones).

Jones stated that student attendance is important in order to provide the children with a quality education. The students must be in the classroom in order to learn. This is the foundation of being productive citizens and go on to college and career opportunities. However, the number one priority is safety. If the child is not in the school building, the school district has no ability to track the child and he could be in a situation which is not safe. In the event that a child is exceeding eighteen days away from school, he is in jeopardy of being retained. On any given day, Jones stated that there was a range of thirty to fifty students not attending school. In addition, there are between twenty to thirty students late on a general day. Jones stated that the number of students late or absent has reduced because of the employees calling the students' homes. Jones noticed that the new CA in the 2016/2017 school year has made a difference in getting the numbers down.

Jones was the principal at PS 38 since 2004. Ellis joined the school around 2012. Ellis was assigned by the Board of Education. Appellant's hours were 8:00 to 2:55. p.m. Appellant's tasks were: to identify the students who were absent; put the information regarding students' notes into the system or given to the nurse; facilitate that schools coming in late have signed the book and obtained a late pass. At 8:00 a.m. Ellis was assigned to duties such as hall duty, door duty, or cafeteria duty. Those duties were until 8:45 a.m. when the late bell rang. Ellis would then head upstairs to the lobby where students would appear after the late bell in order to make sure the students would sign the late book. Ellis would remain in the lobby until about 9:10 a.m. After that Ellis would go downstairs to her office where she would document and call parents on the late list. There are multiple rooms on the basement level including a second-grade class, a third-grade class, a computer lab, library, two guidance counsellor offices, and a literary room. In addition, there is a ESL replacement room, cafeteria, and a custodial office. The main office is on the first floor.

When Ellis first entered the PS 38, there was a discussion between Jones and Ellis regarding her job duties and expectations. Jones advised Ellis that she expected

Ellis to keep a log book of information pertaining to attendance. Jones expected her to keep her paperwork in order. Jones testified that she was unable to find a log book from Ellis when she wanted it. At no time was such a log book ever available. Appellant's first year was a learning curve since she was not a CA prior to that year. They provided assistance to Ellis through the use of DG who was an employee in the computer area. Jones sent Ellis to be trained by DG. Jones stated that Ellis was always approved for additional training every time she requested it.

Jones was presented with an e-mail (R-6) dated December 11, 2013, which was sent by Jones. The basis behind the email is that Jones met with Ellis with an inquiry about her reports. Jones told Ellis that she needed information. Ellis responded that she was not really sure how to work the program and that she needed more help. Jones stated "No problem. I'll get in contact with DG and I'll let you know when you can visit his office . . . ." This reflected one of the times Jones set Ellis up for additional training.

Jones testified regarding the issue of Ellis's attendance becoming an issue, for example during the 2014/2015 school year. (Exhibit R-7 was the records of Ellis's attendance while working as a CA in PS 38.) Attendance records for employees are kept based on those employees signing in an attendance book on each work day. This book is located on the counter in the main office. A secretary will also input the information in the event when an employee calls out. The secretary will then input this information. The secretary will then input this information into the computer.

At one point in time, a letter was sent to Ellis from Jones regarding her chronic absence. (R-8.) The letter was dated March 4, 2016. The letter was typed on February 29. Ellis never reported to Jones regarding the contents of this letter. It was confirmed that there was a previous disciplinary matter where Ellis was charged with chronic absenteeism, neglect of duty, and insubordination, which resulted in a five-day suspension.

Jones reviewed appellant's attendance records for the 2014/2015 school year. The records show a PB, which is a personal business day (allotted three days), and

does not count against the employee and PI which is personal illness. There were numerous days showing PI/NP, which stands for personal illness/no pay. That means she ran out of sick days. There was one day with the designation PI/SUS/NP which means personal illness/suspended/no pay. It also shows that Ellis was out in 2014 on September 3, 4, 5, 8, 9, 10, 11, and 12 for personal illness. Based on these records, Ellis rarely showed up for work in September 2014.

In December 2014 Ileya wrote a reprimand to Ellis. (R-9.) Jones received a copy of this memorandum. The basis of this memo was the allegation that Ellis went to the wrong house regarding a student's attendance at school and the person was very upset. This event occurred in December 2014 where Ellis was looking for a child who was in fact in school. There was a parent at school who was very upset by saying that she sent her child to school and she got a phone call saying she was not in school when in fact she was in school. Jones was able to calm the woman down by confirming that the child was in fact in school. The CA (Ellis) came to the office and advised that it was a mix up. Jones advised Ellis that this was a serious matter and this part of her job had to be handled correctly.

In the 2015/2016 school year, Jones was on a leave of absence in the beginning of the year, i.e., from September 2015 through part of January 2016. Jones recalled that when she returned in January 2016, Ellis was in work for a week or two and then out for pretty much the rest of the school year. Jones was shown a letter, dated March 4, 2016, (R-8) which was written because Ellis had not done certain reports which needed to be submitted. Jones wrote the letter to HR and a copy to her immediate supervisor and assistant principals. The letter addressed chronic absences in 2015/2016. Jones reviewed the attendance records for Ellis for the school year 2015/2016. The March 4 letter was written to Jones' supervisor requesting a meeting about appellant's attendance. Jones' school was without a CA and she needed help. To address this problem, Jones asked if she could keep the sub (Ms. Frasier) they assigned to her school. Certain photos of appellant's office were attached to Jones' memo of March 4. Jones wanted HR to see the state of Ellis's office. Jones described this office as disorderly and unsanitary. Jones did not feel that a narrative would completely describe the state of the office.

In September 2016, Ellis failed to appear on the first day of work. Ellis also failed to contact Jones that she was not returning to work. In fact, at no time in September 2016 did Ellis contact Jones to advise her that she was not coming into work and she was out the entire month of September 2016. In October 2016, Ellis reported for work on the 3rd and then did not return for the balance of the week. This was described by Jones as being a very critical time because DNRs are to be submitted.

At around this point, Jones spoke with Celeste Williams (Williams) who is the director of HR for the district. The letter from Williams to Ellis advised her to return to work by September 30. Ellis returned on October 3. Jones described appellant's attendance between October 3 and her termination in January 2017 as "in and out." In appellant's absence, Jones patch-worked a group of employees to handle appellant's job.

There were charges against Ellis for chronic absenteeism and neglect of duty. A hearing on these charges was held on November 16, 2016. Jones stated that she supported that Ellis be disciplined for chronic absenteeism and neglect of duty. Jones also supported her termination for these offenses. Jones stated that this was because Ellis was not doing her job and this could result in harm to the students. The district's main concern is the student's safety.

Jones testified that she would ask Ellis to do things and Ellis would respond by saying: "No, I'm not doing it." Jones would give her verbal reprimands and Ellis would not do the requested tasks. Jones stated that she never asked Ellis to do something that was not within her duty duties. Jones gave her an annual performance evaluation and Ellis would not sign it. The evaluation states on it that even if you don't agree with the evaluation, you still must sign it.

On cross-examination, Jones stated that PS 38 received an award for attendance called the "Full House Attendance Award." Jones reviewed the written duties of a CA. (R-2.) Appellant's first daily assignment was cafeteria and door duty. This duty is to ensure that the students enter the building in a safe manner. Thereafter

Ellis was assigned to the lobby to handle students coming to the school late. During her lobby duty or hall or cafeteria duty, Ellis would not have access to Infinite Campus. In order to identify which assigned duties if covered by these tasks, Jones pointed to "other duties as deemed appropriate by the principal or supervisor."

Jones confirmed that daily absences at PS 38 was between thirty and fifty. Jones confirmed that when she spoke with Ellis, Ellis did not curse at her. Jones said she spoke firmly but did not yell at Ellis. Jones confirmed that she helped with an appointment between Ellis and DG to get her further training on the computer. Jones confirmed that Ellis was on leave of absence on March 4, 2016. Jones stated that there ia a requirement for an employee to sign their evaluation form even if they don't agree with it. Jones stated that at some point in time Ellis stopped submitting the homeless reports.

On redirect, Jones confirmed that all staff members at PS 38 get assigned early morning duty. Ellis got assigned cafeteria duty in the early morning. Afterwards, Ellis was assigned to lobby duty. Being in the lobby is considered part of attendance tracking. It was part of the process of getting students to arrive at school on time. Prior to Ellis taking a leave of absence Ellis never advised Jones that she was going to request a leave of absence. Jones stated that notifying her was not required, but was only a courtesy.

Jones was shown a memo dated March 15, 2016, from Donna Carrappa at central office to Ellis. The memo addressed a leave of absence requested by Ellis. The leave of absence was from February 22 through May 22, 2016. Jones also testified about appellant's evaluation for the 2014/2015 school year. (R-11.) Jones rated appellant's appearance as satisfactory and that was the only area rated satisfactory. Everything else was below satisfactory or needs improvement.

On re-cross, Jones confirmed that a union representative was there at the meeting. Employees are permitted to have a union representative there during an evaluation if requested.

As a follow-up on redirect, Jones stated that Ellis would not meet with her even when it had nothing to do with discipline. There were times when Jones had to meet with Ellis to discuss her work duties and nothing to do with discipline. Despite this scenario, Ellis would insist on the involvement of a union representative.

Hani Ileya

Hani Ileya (Ileya) was the assistant principal at PS 38 for the previous six years. Ileya's duties are: oversee curriculum, make sure the teachers and students are safe, evaluate staff members, ordering, budget, and overseeing facets of the building running smoothly. Ileya has a Master's Degree in special education and administration and supervision. He holds certificates in teacher of the handicapped, supervisor, and principal license. Ileya has a role in student attendance in reviewing those students who are chronically absent (more than ten percent of the school days). When a student is chronically absent, a CA contacts the parents. Both Ileya and Jones supervised the CA at the school. Ileya confirmed the importance of student attendance in the educational process.

When Ellis did not come to work, Jones or Ileya would have to fill in and meet with the parents of those students who were absent. In addition, Rivera (Ross's assistant) would also assist the school when Ellis was out. Ileya reviewed appellant's attendance records. (R-7.) When there is a notation of PI/TA, it means Personal Illness and Teacher Assistant. TA means, non-instructural staff. It the designation says PI/NP, it means non-paid day. Ileya also testified that YE did not inform him when she was taking a leave of absence. The information would come from HR to Jones.

When Ellis was out for extended periods of time, the Board would send a clerk to assist the school in the 2014/15 and 2015/16 school years. Ileya stated that Ellis did show up for work on September 2, 2014, but left on a half-day. Thereafter, Ellis did not show up for work on September 3, 4, and 5, 2014.

Ileya also had a recollection of Ellis visiting the wrong house in the 2015/16 school year. Jones was on leave at that time and Ileya was the acting principal. Ellis

went to the wrong house due to the fact that a student was not at school. The parent then came to school in order to make sure that their child was in school. This parent was very irate. Ileya then escorted the parent to the classroom to make sure that their child was in fact in the building. Based on this event, Ileya wrote-up Ellis in order to ensure that Ellis checked her work and goes to the correct house. Ileya wrote a memo, dated December 12, 2014, referring to this incident. (R-12.) Ileya spoke with Ellis when the parent complained about this incident. Ileya recalled that Ellis came into his office very irate the day after she received the write-up. Ellis stated that the facts in the memo were not true and that she didn't need to be written up. After Ellis came to Ileya's office, she went to the nurse to have her blood pressure checked and she left early that day. Ellis left for one-half day as PI/NP, personal illness, non-pay.

There was a disciplinary hearing for YE in December of 2014, which resulted in a five-day suspension. Ileya was presented with an email he received from Ellis. (R-14.) Ileya received this email on or about September 17, 2015. In the e-mail, Ellis is requesting a number of things including: 1) training in Infinite Campus; 2) ink for a printer; 3) telephone; 4) bulletin board, etc. Ileya stated that he took action to address these items. Ileya gave her a telephone number and training from Rivera. They could not provide Ellis with air conditioning. Ileya verified that appellant's computer was working fine. Ileya advised Ellis that her computer was working fine.

Ileya also received an email from Ellis on or about October 7, 2015. (R-15). The email was sent to Ross and Ileya received a copy. Ileya stated that there were not any school-wide problems logging onto Infinite Campus.

Ileya also testified regarding the attempted meeting between Ellis, Ross and himself. Ileya said that Ross was making his rounds at the schools to meet with CAs. Ellis was called into the office and she stated that she needed a union representative and she was informed that the meeting was not disciplinary in nature. They called a union rep named Gaines into the meeting. They pulled Gaines from her duties to attend the meeting. Ellis stated that she needed a notebook. They waited for Ellis to return to the meeting. Ileya paged Ellis over the PA system. Ellis called Ileya on the office phone and said that she was not feeling well and that she was going home. Ellis then

left the school. Ellis did not participate in the meeting with Ileya and/or Ross at this time. This meeting never occurred.

Ileya was presented with a letter of reprimand. (R-16.) Ileya never asked for training which was denied. Ileya stated that in every case when Ellis asked for training it was provided to her. In October 2015, the school district requested discipline against Ellis. There charges against Ellis were: failure to perform duties, neglect of duties, insubordination, chronic and excessive absenteeism. This was based on the 2014/2015 and the 2015/2016 school years. This resulted in a nine-day suspension being issued.

Ileya testified regarding appellant's office. Ileya described it as an office with a chair, desk, computer, filing cabinets, phone, and a fax machine. Ileya stated that the office was very sloppy. He stated that it was always disorganized and very messy. Ileya spoke with Ellis regarding the condition of her office. Ileya told her that it should be neater. Ileya took photos of the office. There was created a memo (R-8) with those photos attached. Ileya said that he took those photos. His testimony stated that these photos accurately depicted the state of appellant's desk for the 2014/15 and 2015/16 school years.

Ileya stated that Ellis did not return on the first day of the school year on September 6, 2016. In fact, Ellis did not return the whole month of September 2016. Ileya recalled that the district sought to discipline Ellis to have her removed from employment. Ileya agreed with the position of having her removed from employment because Ellis was incompetent in doing her job, was hardly ever there, and made mistakes when doing her job. The charges were: chronic and excessive absenteeism, neglect of duty, conduct unbecoming, and other just cause. The hearing was held on November 16, 2016. Discipline was imposed effective January 20, 2017.

Evaluations were conducted regarding Ellis while she worked at PS 38. The last evaluation was conducted in June 2016 in which Ileya rated her job performance as unsatisfactory. (R-20.) Upon presenting the evaluation to Ellis, she refused to sign same because she disagreed with the evaluation. A union representative was present

at that time. Ileya stated that Ellis never made Ileya aware of any medical conditions which she had and affected her ability to do her job.

On cross-examination, Ileya confirmed that Ellis was responsible to call parents when a child was absent and was responsible to file paperwork with Ross's office and appear in court when needed. When taking a leave of absence, an employee has to submit paperwork to the central office. Ileya confirmed that there was no requirement for Ellis to contact Ileya regarding taking a leave.

Ileya reviewed R-12, which was an email from the parent regarding Ellis going to the wrong house. It stated that Ellis rang the doorbell of the neighbor's house. Ileya did not interview the neighbor. Ellis denied the basis for the complaint but did not give specifics.

Ileya also stated that he had no medical expertise. He was unable to determine what is high or average blood pressure. Ileya was given R-14, which is an email dated September 17, 2016, and he stated that he did not respond in writing to that email. Ileya admitted that Ellis had only one training session with DG. Ileya did not believe that requesting a union representative was a hostile act but he did believe that appellant's tone of voice was hostile. Ellis did not curse or yell. Rivera did go to PS 38 to train Ellis on Infinite Campus.

Ileya looked at R-16 which was Ileya's September 30 memo. Ellis first went to the main office when Ross set up a meeting to go over the attendance policy. Ellis stated that she needed a notebook and she left. Thereafter, she did not return and Ileya paged her to come to the office. Ellis called him and stated that she was not feeling feel and she was leaving.

Ileya stated that he had zero discretion or authority to grant or deny a request for training. Ileya stated that Ellis would get training whenever she requested it. Such a request was granted by either himself or Jones.

Ileya reviewed the PNDA (R-17) which set forth five charges and in the FDNA three charges were sustained. The two charges which were removed were chronic and excessive absenteeism and other sufficient cause. Appellant's suspension was then scheduled about two to three months after the FNDA.

Ileya testified that there were no locks on appellant's office. In picture R-18D, Ileya identified cards in the picture in the far left as cards when a student comes in late, for the student to fill out. It was like a late pass. Ellis was supposed to contact the parent to advise them that their child came to school late. Ileya reviewed R-19, with the first page dated January 20, which set forth charges of chronic and excessive absenteeism, neglect of duty, conduct unbecoming, and other just cause.

Ileya admitted that Ellis was given an evaluation on the first day after about a five-month absence. Ileya stated that the evaluation was based on the first five months when she was in work. Ileya said that it was appropriate to do such an evaluation. It was his position that Ellis was evaluated on the first five months of her work until the time she took leave.

On re-direct, Ileya stated that Ellis returned to school on June 21 after her leave. Ileya confirmed that he did not have any role in drafting the discipline charges against Ellis. However, Ileya, along with Ross, did provide information that supported those charges. This information was submitted to Williams, the director of talent. Ileya also confirmed that employees are entitled to one emergency personal business day per year.

Ileya also testified regarding the meeting in September 2015 where Ellis did not show up and left the building. Ileya did a write-up after that meeting. (R-16.) Ileya stated that Ellis returned to school after the school day at about 4:30 p.m. on the same day as the meeting. Ileya stated that he saw Ellis on that date at the school (PS 38).

Lakesha Oliver

Lakesha Oliver (Oliver) works for the Jersey City Public Schools as a teacher's assistant. Oliver is assigned to PS 38 and has been working for about ten years. Oliver and Ellis discuss attendance and students who are excessively late or absent. They would speak once every couple of weeks and sometimes every month. Oliver stated that the teacher's assistants or teachers keep track of the attendance on a card and then input the information on Infinite Campus. In the event the system is down, we would make a note of the students' absence and forward information over to Ellis.

Oliver starts her shift at 8:00 a.m. and the students begin to come in at 8:30 a.m. Between 8 and 8:30 a.m., Oliver would attend morning meetings or professional development. From 8:30 a.m., Oliver would be assigned door duty and greet the students coming in. She would be on door duty for about ten to fifteen minutes. After that time frame, they lock the doors and the students must come in through the front door to sign and obtain a late pass. Afterwards Oliver would then be in her classroom assisting the teacher. They serve breakfast in the classrooms. Oliver stated that it was her belief that Ellis would be at door duty at 8:30 a.m. and at 8:40 a.m. Ellis was at the security desk assisting with students filling out late passes. There was then a stipulation between the parties that an employee was not required to sign an evaluation form.

On cross-examination, Oliver admitted that she had an issue with absenteeism. Oliver also admitted that she was bought up on disciplinary charges for not attending work on a regular basis. The charges were bought up about five years ago. These charges resulted in a suspension for two days. There was a second disciplinary hearing which she did not attend.

On re-direct Oliver described her relationship with Jones as close to non-existent. Oliver described her relationship with Jones as not very welcoming. Oliver testified that when she would say good morning to Jones, Jones would not say good morning back.

Corinne Decker Gingles

Corinne Decker Gingles (Gingles) is a teacher assistant for the Jersey City Board of Education for about eleven years. Gingles works at PS 38 and is a member of the union and is a union representative. As a union rep, she will interact if there is an issue or answer questions when presented with same. Gingles stated that she was called into a meeting with Ellis in June of 2016 in order to discuss here evaluation. Present at the meeting were: Jones, Ileya, Ellis, and Gingles. The evaluation was for the 2015/2016 school year. (R-20.) Gingles remembers that Ellis refused to sign the form because of the low evaluation she received.

Gingles stated that in the morning she has meetings or could be assigned to cafeteria and/or pick up bus students. Gingles said that she was not assigned to cafeteria often. She got students off the bus five days a week. At 8:30 a.m. Gingles would go to the classroom and assist with giving the students breakfast. Instructional learning began at 8:45 a.m. Gingles is currently in sixth, seventh and eighth grades. It is a transitional class for special ed.

On cross-examination, Gingles stated that she did not know why she didn't receive a performance evaluation for the 2015/2016 school year. Gingles was on a leave of absence that school year from October 1 until February of 2016. Gingles did admit that she filed a grievance against Ileya while at PS 38. The grievance involved a field trip and a student leaving the building and Gingles was unaware that she was going on the field trip. Ileya told her that she was going on the field trip and Gingles said she wasn't going on the trip. Gingles said she was not dressed properly for a field trip as she was wearing dress clothes and uncomfortable shoes. Gingles stated that this event made her upset. Gingles then spoke to Buzby, the assistant principal, who gave her permission to leave. Ileya's demeanor made Gingles file her grievance.

On re-direct Gingles stated that she was upset regarding the field trip incident that because she was unaware about going on this trip and she was not properly dressed for such a trip. Gingles stated that she was never suspended from her employment.

Maggie Leahy

Maggie Leahy (Leahy) is a clerk in the main office at PS 38. Her original date of hire was November 2011 and then laid off and rehired on July 1, 2015. Leahy said that there were three clerks and one CA (YE) in PS 38. Leahy stated that Ellis would come into the main office two to five times a day. The clerks would make copies for Ellis. The policy was that Ellis was not allowed around the front counter. Leahy was aware that there were copy machines on each floor. There was a teacher assigned to each copier with a code. In order to have a copy made, Ellis had to fill out a copy request form. There was a two-day turn around on copies. All teachers are also required to fill out a form for copies.

Leahy observed interaction between Jones and Ellis during the 2016/2017 school year. These occurred about three times a week. Jones demonstrated frustration that Ellis was in the office. Leahy recalled one incident where Ellis said good morning to Jones and Jones turned around and looked up and down at her and Ellis said how are you today and Jones responded, "how do I like with." Leahy called the response very passive aggressive. Otherwise, Leahy stated that Jones would otherwise ignore Ellis.

Leahy testified that she never witnessed any disrespectful or inappropriate behavior by Ellis toward Jones. Leahy recalled that Jones sent out an e-mail to her and other clerks and the nurse telling them to stop communication with Ellis. Jones stated that Ellis was no longer employed in the district. Leahy had no role in the student drop off or students going to their classroom.

On cross-examination, Leahy stated that Ellis called her one day outside of work in order to let her know what was going on. The email from Jones regarding not communicating with Ellis was dated January 20, 2017. Leahy acknowledged that the principal of the school is the school leader and oversees the school. Jones has the right to direct employees' actions at school, including making copies.

Leahy confirmed that she had write-ups in the 2016/2017 school year by more than one administrator. Buzby wrote her up because of Leahy's tone. The basis of the write up was conduct unbecoming. In addition, Leahy was supposed to arrange a field trip but there was a problem with that trip. Jones wrote a memo to Leahy in connection with the field trip, which indicated that Leahy did not follow through with an administrative directive. In addition, there was another eighth-grade field trip on May 25 and there was a problem with the bus arrangements. The problem was that Leahy arranged for a school bus rather than a private bus. Leahy was written up to ordering the wrong type of bus.

Furthermore, in June there was an interaction between Jones and Leahy which resulted in Ellis being written up. Jones instructed Leahy to put away her cell phone and Leahy put the phone in her open drawer. Leahy was written up for conduct unbecoming and insubordination. Leahy admitted that she had her own share of negative interactions with administrators.

There was a review of the email form Jones to the clerks. (P-1.) The email wen tot McCoy (nurse) with copies to Ileya, Buzby, and the clerks (Camillo, B. Ellis, and Leahy). The email stated: "FYI, Ms. Yvonne Ellis is no longer employed here. Please avoid corresponding with her. Any questions see me."

Leahy described the layout of the main office as follows: there is a wide counter and behind it is Leahy's desk with another clerk's desk. There are two desks back there with two offices off to the side. With regard to the copiers, Leahy had the code for same in the main office and a specific teacher has the code for a copier on each floor. Accordingly, only certain people have the codes for the copiers.

On redirect, Leahy confirmed that she was never suspended for any past disciplinary action. Leahy filed a grievance after receiving a disciplinary letter in May. Leahy filed an affirmative action complaint for a hostile work environment against Jones. The basis for the complaint was the way Jones spoke to Leahy. Leahy stated that Jones would yell at her like she was a child in front of everyone. Leahy stated that on May 11, she had an anxiety attack because of Jones. Jones yelled at Leahy in an office

filled with children and staff members. Leahy missed work on May 11 and 12 because of this incident. After filing this complaint Jones treated her differently, said Leahy. Leahy stated that Jones would then nitpick at every little thig. Leahy said that Jones now ignores her, the way she ignored Ellis. Thereafter, Leahy filed another complaint for retaliation after she filed the first complaint. When Leahy saw that Ellis was fired, Leahy felt that Ellis was targeted by the administration. Leahy wanted to reach out to help Ellis. What prompted Leahy to testify at this hearing was the way she was treated in the past month.

On re-cross-examination, Leahy confirmed that the email from Jones (P-1) regarding communication with Ellis, was directed to her even though it was sent to the nurse with copies to Leahy and other clerks. It was Leahy's belief that there was a hostile work environment at PS 38 because she did not like the way she was treated by Jones. It was her opinion that Ileya was great. Leahy stated that she liked Jones as a person but not as an administrator. Leahy admitted that she knew very little about appellant's job duties, yet she had an opinion as to whether Ellis did her job. Leahy is not appellant's supervisor.

Adrienne Lois Palmer

Adrienne Lois Palmer (Palmer) is currently in private practice in Clifton and will be starting as the clinical supervisor at Bethany Christian Services shortly. Palmer supervisors the clinical staff at the agency and she also will be the head of the adoption and foster care department. Palmer works with individuals from children to adults providing therapeutic services. She provides therapy in a relationship process to enable clients to learn about themselves and alleviate symptoms. Palmer deals with people with depression, bipolar depression, unipolar depression, anxiety, obsessive compulsive disorder, and post-traumatic stress disorder. Her practice began in November 2003. Palmer discusses with her client what is bothering them and then determine a treatment plan.

Palmer stated that Ellis made an intake appointment in August 2011. Thereafter Palmer consistently treated Ellis since August 2011. Palmer did assign homework to

Ellis as part of the treatment. Thereafter, Palmer reviewed progress. The client would come in and they would discuss current events as well as underlying causes.

Palmer saw Ellis consistently since 2011. Palmer noticed changes in appellant's condition. These changes occurred about two years into treatment. Palmer described appellant's condition as depressive symptoms. Palmer stated that she was not a doctor but was a licensed clinical social worker. Palmer has a Master's Degree in social work. Palmer found Ellis to have a major depressive disorder recurrent with a hoarding disorder. This was determined in September 2011. Palmer also admitted that she is not qualified to prescribe medication.

Palmer testified that when Ellis experienced an incident at work, she experienced anxiety and became more symptomatic. Palmer stated that Ellis reported incidents at work she found disturbing which made it hard for her to focus on anything else. Ellis advised Palmer that she would have trouble getting to work or functioning at work.

In the first two years of therapy, Ellis was not talking about work at all. They were focused on Ellis, herself. Palmer set up a plan for Ellis to use when she became anxious. Maintaining her ability to work became a main focus for Ellis. There also became a time when Ellis asked about the possibility of seeking accommodations at work. Ellis asked Palmer to fill out some forms for this purpose. Palmer was presented with a form which was filled out for that purpose. (P-2.) The form was entitled: "Request For Reasonable Accommodations and Medical Authorization Form." Palmer signed this document. The form was dated February 15, 2016. The form requested three separate accommodations: 1) extra training and support, especially with computer skills; 2) regular schedule reminders of report due dates and extra time for completion; and 3) permission for early departure when necessary to attend doctor's appointments. The form also requested prior notice and preparation for all administrative meetings and permission to be excluded from any school related task outside of the primary responsibilities of CA unless undertaken voluntarily. No one from the district ever got back to her regarding this request.

Palmer stated that when Ellis returned from her leave of absence, she was very proactive in using self-maintenance tools in an effort to function better and not be as symptomatic. Ellis has contained these self-maintenance tools from her return until the present time.

On cross-examination, Palmer stated that by maintaining appellant's own mental health, she was seeking to function at a better level. Palmer stated that the process of self-maintenance occurred after she returned from treatment in Illinois. Ellis started to develop the ability to self-monitor, which means to become aware of when your anxiety level is rising. This ability started in 2013.

Palmer stated that she was able to draft the request for accommodations through her conversations with Ellis. Palmer admitted that she had no prior experience in developing workplace-related accommodations and never did it before for another client. Palmer was also unaware that Ellis had a regular schedule of reminders of various tasks that she was expected to do but that she was told by Ellis that she had a regular schedule of reports to be done. Palmer still recommended a series of reminders to Ellis, which could be a system generating prompts. Palmer also recommended that Ellis have additional time to do reports, for example, if the report if due on September 13, Ellis could have an extra week if necessary. Palmer also recommended prior notice and preparation for all meetings involving her job performance discipline. Palmer stated that she became aware that Ellis was on the medication, Cymbalta, which is an anti-depressant. This was prescribed as of August 2011.

On re-direct, Palmer stated that Ellis received additional tools in her in-patient care while she was in Illinois. Ellis received a technique called mindfulness which is like self-meditative technique. Palmer also stated that Ellis was diagnosed with post-traumatic stress disorder. The diagnosis was made by a psychiatrist at Timberline Homes in Illinois. This condition was based on multiple traumas.

Yvonne Ellis

Yvonne Ellis (Ellis) was first hired in 1997 as a substitute teacher in the district until about the year 2000. In 2000, Ellis was hired as a full-time teacher assistant. Ellis worked as a teacher assistant for two and half years and she then resigned because she was supposed to move out of town. In 2004, Ellis came back as a substitute teacher for a little over a year. Then Ellis was hired as a parent liaison at PS 34. In that position Ellis would do family field trips after church and got parents involved with the school. In this position, she had little to do with attendance, but would occasionally assist a CA with attendance calls.

Appellant's most recent position with the district was as a CA in about 2011 at PS 38. Ellis reviewed R-2 which set forth the duties of a CA. Ellis confirmed the duties of a CA. As a CA, Ellis worked Monday through Friday from 8 a.m. until 2:55 p.m. and was a ten-month position. For students the school day began at 8:30 a.m., however, classes begin at 8:45 a.m. Appellant's first assignment when she starts her day at 8:00 a.m. is cafeteria duty, where she monitors students in the cafeteria until they leave for class at 8:30 a.m. Ellis acted in cafeteria duty for four to four and a half years. For the first two years in cafeteria duty, Ellis worked alone. At one point appellant sent an e-mail to Ileya and told him that it was impossible for her to monitor fifty students alone and then four teacher aides were sent to assist her. Appellant testified that there was nothing in the job duties for a CA which references cafeteria duty.

At one point in time, Ellis spoke to Jones and Ileya and told them that it would be beneficial for her to be in the office answering the phone calls from parents because that was the time parents called. Jones and Ileya responded to Ellis by telling her to remain in the cafeteria duty. Ellis stated that other schools (for example 34) the CA did not have such an 8:00 a.m. assignment like she had. While Ellis was doing the cafeteria assignment, she did not have access to Infinite Campus. From 8:45 to 9:00 a.m. Ellis was assigned to door duty. From 8:30 until 8:45 a.m., Ellis did hall duty, making sure students make it to class safely. Jones assigned Ellis to hall/door duty. There is nothing written in the duties of a CA which specifically state anything about

hall/door duty. Ellis was assigned to front door/security desk duty from first being assigned to PS 38. Door duty was from 8:45 until 9:15 a.m.

After door duty was completed, appellant would go downstairs and she would start with Infinite Campus. Ellis would get to her office at about 9:30 or so. This was the first opportunity to work in Infinite Campus. After checking Infinite Campus, Ellis would call teachers who did not complete their attendance.

Once attendance was done, Ellis would print the summary report. Ellis would also go up to the security desk and get the names in a logbook of the students who were late. After confirming attendance, Ellis would print out the caller report to make the daily phone calls for students who were absent and late. Late students numbered from twenty to thirty and absent students would number thirty to fifty. If parents call ahead of time, there was no need for Ellis to call. Ellis stated that it would take about ninety minutes to make all of the calls. Ellis would finish around 11 to 12 or even 1:00 p.m.

With regard to chronic absenteeism, Ellis would have to do a home visit. Appellant would have to keep a record of the home visit and who she spoke to, etc. Ellis would then have to send out parent notification letters. Ellis had to do home visits two to three times a week.

In addition, from 2:00 to 3:00 p.m. Ellis had to be at the security desk. Ellis would require parents sign in when they come to the school. At this time Ellis did not have access to Infinite Campus. Ellis was assigned to this job every day. Ellis also had to do other duties which were not explicitly on the duties chart, including community board with letters. This process took around five to seven hours per marking period. Jones would also ask Ellis to deliver stuff to teachers and pick stuff up from teachers. Ellis also assisted with the Thanksgiving drive. Ellis recalled that PS 38 received attendance awards. The school received such awards twice a year.

The phased out the position of parent liaison so when there was an opening for CA, the district placed the liaisons into these positions. When Ellis first got to PS 38,

she spoke Jones of her prior experience and how Ellis was never a CA before. Ellis asked for help on how to handle the position of CA. Ellis testified that she required help on the computer and "after a few years" Ellis got help with Infinite Campus with DG. Ellis sent an email to Jones and Ross was copied on the email requesting training. This resulted in Rivera coming to give Ellis training. This training was in October 2015. Ellis also had training in a workshop at the Board of Education.

Appellant testified regarding Rivera attempting to give Ellis training. Ellis described Rivera as appearing at her door without prior notice. Ellis saw the notice after Rivera arrived. The notice was sent by Ross one hour prior to Rivera's arrival. Ellis asked Rivera why she was there and she responded that she was there to train her. Ellis then asked for a union representative. The reason that Ellis asked for a union rep was because she was being sent to hearing. Ellis was concerned about discipline. Ellis stated that she did not raise her voice or use profanity.

There was also testimony regarding the allegations of Ellis going to the wrong parent's house. Ellis denied trying to enter the parent's house. Ellis stated that she knocked on the neighbor's house, but she never talked about those parent's children. Ellis recalled the meeting with Ileya afterwards, where she told him that she was not looking for that child but rather another child but that she wrote the address wrong. During the meeting with Ileya, Ellis stated that she did not yell, curse or threaten.

Thereafter, Ellis sent an e-mail regarding this meeting with Jones. (R-22.) Ellis asked Jones if they could go into a side office to discuss this. Ellis claimed that union rules and regulations state that you are not supposed to address employees in front of other people when dealing with job duties. Accordingly, Ellis requested a union rep. Ellis was concerned that this could lead to discipline. Ellis also recalled that she asked for a union rep prior to this e-mail from Jones. When Jones approached Ellis, she felt anxious and embarrassed and belittled by talking in front of other staff.

At one point Ellis sent out an e-mail dated September 17. (R-14.) The purpose of this email was so they she could do her job effectively. In this e-mail, Ellis requested more ink; needed a phone for herself (she shared a phone with Ms. Carter); requested a

bulletin board; requested a window shade; requested Infinite Campus training; request to sit down with another CA; requesting a forty-eight-hour notice before a meeting with the supervisor or other people (including Ross, Ileya); and request for air conditioning. It was Ellis's position that none of these items were properly addressed.

Ellis then reviewed the events of September 24, when she was to meet with Ross and Ileya. Ellis stated that she was in the main office collecting messages from the clerks. Ellis said she saw Ross in that office, who she was not expecting to see. Then Ileya told Ellis that they wanted to meet with her. Ellis did not believe that they explained why they wanted to meet; however, Ellis requested a union representative because it was not clear what they wanted to talk about. Based on this meeting request, Ellis felt unsettled and anxious. Thereafter, Ellis told them that she had to go downstairs to get a notebook. Because of how she felt, she went to see the nurse, who was not there. She then saw Ileya and told him she didn't feel well and was going to leave. Ellis signed out for an early dismissal and she called Ileya and left the school for the day.

Ellis then sat in her car and then went to the union office. First, she called her doctor and he was not available. She went to the union office to discuss lack of notice prior a meeting was set up with her. Later in the day, Ellis returned to PS 38. She did so because she had taken a personal business day and she needed her notebook for a legal matter the next day. Ellis went to the school around 4:30 p.m.

Ellis confirmed that she remembered times when Jones refused to talk to her. Ellis thought the interaction with Jones was strange. Jones spoke to her in an odd tone. When Ellis first started at PS 38, she had access to the copiers in the main office. Then at one point, Ellis no longer had the copier code and access in 2014. Jones made the decision to no longer give her access to the copier. Ellis did have access to the copier in Carter's office, but most of the time it was broken. Ellis had to make copies on a regular basis. Ellis recalled other select times when Jones would yell at her.

Ellis identified P-3, which was an application for a leave of absence. The term of this absence was February 11, 2016, to May 22, 2016. This application was approved by the district. (P-4.)

Ellis testified that prior to February 2016, she was seeing a psychiatrist and talking to a therapist in Colorado over the phone. A doctor recommended that she go to High Focus Center (P-5). Ellis went to High Focus from February until April 2016. Thereafter, there was a request and then an approval to extend her leave through June 2016. (P-7.)

Ellis also reviewed P-2 was a document for ADA accommodations in her role as a CA, dated March 2. The decision for accommodations was made by Palmer, Ellis, and High Focus. Ellis reviewed the list of the requested accommodations. It was her belief that these accommodations would ease her stress and anxiety. No one from the district responded to her request for accommodations.

There was also an evaluation meeting in June 2016. No one addressed the accommodation request during the evaluation meeting. Ellis reviewed a letter from Timberline Knolls to the nurse, confirming her enrollment in the program. Ellis entered the program around August 17. Ellis also made a request for a leave of absence from September 6 to September 24. The basis for the leave request was that Ellis was a patient at a residential treatment facility. The leave was approved by the district. (P-10). Ellis then had another extension of leave and returned to work on October 3.

On cross-examination, Ellis confirmed that she has one session of training in Infinite Campus with DG. Ellis also received training in a workshop in September 2013 and September 2015. Ellis also met with Rivera in October 2015 and the fall of 2016. Ellis admitted that she knew how to print out caller reports. Ellis stated that she still had some problems with attendance reports, including how to put in the codes. Each separate reason for a student absence has a different code that Ellis has to input. Each code is listed in the Infinite Campus program. In answering why, the process was difficult, Ellis stated "Because it was." Ellis stated that she was responsible for printing out reports of students who don't show up and there is no contact with the parent and a

report of those students who are late and the comments made by the parents. Ellis stated that she was familiar with the forms. Ellis was aware that she had to submit these forms every week to Ross and his clerk. The weekly report was supposed to be submitted in paper.

In addition, Ellis stated Rivera went over homeless reports with her. Ellis acknowledged that she had an understanding of how to create same. Ellis stated that she had some difficulty in emailing the report so she would either get help or submit it in a paper copy. Ellis stated that homeless reports should be submitted on a monthly basis. The homeless reports were to be submitted to Ross and Jones. There was also a form for a truancy task force matter. This referred to a court referral for a student that has excessive absences. Ellis stated that she sometimes had difficulty with that form. Ellis also received assistance from computer teacher Carter at PS 38.

Ellis reviewed R-14 on cross-examination, which is an email, dated September 17, 2015, written by Ellis. Ellis told Jones that she didn't have an answering machine and a phone number and Ileya that she didn't have ink. Ellis asked for additional training. Ellis confirmed that one time Rivera came to PS 38 to train her and she did not receive the training because she asked for a union rep. Ellis reviewed an email chain (R-25) where Rivera stated to Ellis that she arrived at PS 38 to give her training on November 25, 2014. In the email Rivera characterize the encounter as Ellis being uncooperative and refused her assistance to train her on Infinite Campus. Despite Ellis's inconsistent testimony where she stated that she did not refuse training unless a union rep was present and then that she did not have training because a union rep was not present. Ellis stated that she asked for a union rep because she was surprised at Rivera coming to see her and she didn't know what it was going to lead to.

In addition, Ellis confirmed that she received a schedule for her daily tasks from Jones and Ileya and Ellis requested time to review the schedule with union management and then will respond to same. In additional Ellis received an email addressing business cards and if you run out of cards, contact Rivera and she will stop by to place another order. Ellis refused to meet with Rivera because Ellis wanted a union rep to be present.

Ellis testified that she was entitled to have a union rep present when a person from the district shows up. Ellis learned this from the JEA conference in Atlantic City. Ellis's position is that whenever she is meeting with any type of authoritative person for any type of job-related duty, she is entitled to a union rep to be present.

Ellis testified that she did submit some of the weekly activity reports in the 2016/17 school year. Ellis testified that she submitted these reports in November and December in 2016. With reference to the 2015/16 school year, she stated that she submitted some reports from September 2015 to January 2016. Ellis stated that she did not have any of the reports to prove that she submitted such reports. Ellis also testified that she submitted some reports in the 2014/15 school year. Ellis also testified that despite Ross's testimony to the contrary, Ellis said that she submitted several monthly homeless reports.

Ellis also testified that she did keep a logbook with information in it. The information included home visits, addresses, phone number, absences, and parent excuses. This book was never shown to Jones because she did not ask to see it.

Ellis referred to R-2 which set forth her job duties. Ellis conferred that they were the job duties set forth in that document. Ellis confirmed that she was expected to track student attendance and make home calls when the students were late or absent. In addition, Ellis was expected to make home visits from time to time. Ellis was also expected to make weekly activity reports. Ellis admitted that she received reminders to file reports from Ross's office and also got reminders from Rivera. Ellis was shown exhibit which was an email which told Ellis that activity logs and summary reports are due every Friday but could be handed in by Ellis on Monday due to Ellis's request for more time. This email was received by Ellis on September 22, 2015. (R-5.)

On the day when Ellis was supposed to meet with Ileya and Ross to discuss procedures, Ellis fell ill and left the building without attending the meeting. Ellis then ate in her car, collected herself, and then went to the union office later that day. Ellis stated that she felt overwhelmed and did not have prior notice about the proposed meeting.

Ellis was hoping to clarify having notice given when she was being trained with the union. Ellis admitted that at this point, she did not tell anybody at PS 38 that she had an illness.

Ellis reviewed a memo from Ileya about the meeting of September 24, 2015, received by Ellis on September 30, 2015. (R-16.) Ellis also reviewed an email from Jones to Ellis, dated January 20, 2015. R-21. Ellis stated that she did receive this email. Ellis also confirmed that she had a working telephone shared with Carter who was a teacher next to her. Ellis admitted that she received training from DG and Rivera at least once each on Infinite Campus. Ellis also received ninety-minute training at the central office. In addition, Ellis was never refused training.

Ellis also confirmed that she was brought up on disciplinary charges three times. The last two charges are the subject of this hearing. The first charge lead to a suspension for five days. (R-27).

Ellis reviewed her health and medical department file. (R-28). Ellis stated that she took several leaves of absence over the time of her employment at PS 38. Ellis confirmed that before she took those leaves she did not notify either Jones or Ileya. There was a memo dated September 30, 2016 from Nurse Carrafa, which states that the leave of absence for Ellis was approved from September 6 through 24, 2016. It goes on to say that these absences will count for her overall record of attendance with the district. This reference was contained in all of the approvals for a leave of absence.

Ellis also reviewed a letter from Dr. Aftell which stated that Ellis has no medical history and has a prior psychiatric history of depression since the 1980s. Ellis stated that this doctor was the Board's doctor. Ellis confirmed that she was diagnosed with depression since March 2007.

Ellis's doctor cleared her to come back to work on June 16, but she did not come back to work until June 21 because Ellis maintained that the 21st was the day she was cleared to return to work.

For purposes of therapy, Ellis went to Timberline in Illinois in August 2016. However, Ellis stopped going to High Focus in Cranford in April 2016. Ellis did not directly from High Focus to Timberline because of a lack of income which she needed for transportation to Timberline.

Ellis was presented with an email from Rivera sent on or about October 30. (R-29.) Ellis could not recall if she received this email. Ellis served as a parent liaison at PS 34 and was a teacher assistant in 2000 in Jersey City. Ellis resigned from the teacher assistant position in November 2002. During this time as a teacher assistant Ellis was charged with chronic absenteeism. The result of the discipline was multiple day suspension.

On redirect, Ellis confirmed that Infinite Campus was not in use when she started the position as a CA. Ellis stated that Infinite Campus was related to classroom monitor; daily attendance, and summary and call reports. In addition, the weekly reports go through Infinite Campus. Ellis also wanted help with Blackboard Connect which connects with an answering machine and sends out robo calls to all the parents telling them that the child was absent. Ellis testified that she did not receive any stipend from the District for any outside training on computers or technology.

Ellis sent an email to Jones and Ileya stating that she did not have a telephone to make phone calls or business calls. (R-25.) Ellis stated that her phone was removed when she was on medical leave. Ellis did not get her own telephone line between November 2014 and September 2015. In addition, Ellis requested that she sit down with another CA to go over her schedule. This request was never completed.

Ellis reasserted her belief that an employee is allowed to have a union rep for any meeting with administration for job related duties. This position was never clarified by any in the District. Ellis also stated that if she removed copies of her reports from the building, she would be subject to discipline. Ellis stated that when she told Ross and Ileya that she needed to obtain a notebook prior to the meeting she did not attend, she was getting the notebook simply to take notes. Ellis filled out an early dismissal form in order to leave early on that date. When Ellis put in her ADA form, she stated that her

requests for additional training were not addressed. There were a series of leaves of absence from February 1 to 19; then February 20 to March 1 and then March 5 to 17, which Ellis acknowledged as her leave of absence.

Ellis stated that her understanding about getting a union rep for any job-related duties was from a card she received when she was at a convention from a representative from the union. It was agreed that UE would produce a copy of that card for the record.

On re-cross Ellis confirmed that she got reminders from time to time to submit her weekly reports. Ellis referred to her ADA request form for accommodations which included extra computer training and the district did not provide such training. This request was made toward the beginning of an extensive leave of absence in the spring of 2016. Ellis was not there for the balance of the 2015/2016 school year. Thereafter Ellis was then out on a leave in September 2016 through October 2016. Not long after her return from the leave in October 2016, Ellis then received a notice of disciplinary charges in November 2016. Ellis stated that the District should believe that she would work as a CA thereafter because she would no longer be working in a hostile work environment and she would be in a new school with a new administrator with a new position with a fresh start and a new beginning.

John Ross (recalled to testify)

Ross described the system set up for his department for CA's to submit reports as at the end of the week on Friday every CA is required to submit a weekly report via intra office system so he could receive it by Monday morning. In addition, Ross also was to receive a report with phone calls to home when students were absent; home visits by CAs and information regarding letters which were sent to home. Ross considered this a snapshot of CAs activity. Ross then stated that the homeless report is to be filled out at the end of the month. In addition, a DNR report is due in September. It is the duty of the CA to submit all these reports. Ross reviews all these reports and he then hands them off to his clerk who files them. The clerk then puts them on a spreadsheet. The spreadsheet is a list of all CAs and an accounting of the weeks and

the reports submitted from September to June. It shows who submitted the reports and who has not submitted the reports. The spreadsheets are updated once a week. (R-32). Ross reviewed the spreadsheets submitted as evidence as R-32.

Upon his review, Ross stated that Ellis did not submit any reports for the 2016/2017 school year. In the 15/16 school year, Ellis handed in two reports and in the 14/15 school year Ellis handed in no reports. R-33 is a spreadsheet which is a report for CA which covers weekly activity log reports and home visits. Ross stated that there was an initiative to increase home visits because they were more effective in addressing attendance. This was created in the 15/16 school year. This showed that Ellis made no home visits in that school year. There was also another spreadsheet (R-34) which reflected homeless reports, which are monthly reports. This report showed that Ellis submitted a homeless report in September and October 2016; however, Ross testified that this does not mean that Ellis herself submitted the reports as someone could have submitted them on her behalf. However, for a number of months afterwards there was a designation that the reports were not submitted.

Ross stated that he organized workshops in early September in the 13/14 school year. Ross created workshops every year thereafter. Ross stated that Ellis attended the first workshop in the 13/14 school year. In addition, Ellis received separate training. Ross said that the district offered a workshop the day after Labor Day in 2015. Ross recalled that Ellis did not attend the workshop at that time.

Ross testified that Infinite Campus was started in the beginning of the 10/11 school year. Ross said that there was training for staff by the educational tech department. Ross also spoke about the attempted meeting with Ellis and Ileya to be held on September 24, 2015. Ross advised the principals and CAs that he would stop by the schools in the beginning of the year. The purpose is to meet with staff to speak about attendance and forms associated with that and the district's goals. There was not a set date, but rather it would be just in the month of September. Ross did not rearrange this meeting with Ileya.

On cross-examination, Ross stated that Ellis's last day of employment was January 20, 2016. The district hired a per diem CA after Ellis no longer worked there. If no homeless report is submitted it is the responsibility of the principal, ultimately. Ross had a specific recollection that Ellis did not attend the workshop in September 2015. This workshop was held in the central office. Ross had no idea as to whether Ellis was at some other Board meeting on that date.

Ross also arranged for Rivera to assist Ellis in her computer training on October 8, 2015. The charges written up in the PNDA was not created by Ross but rather by Human Resources.

Sandra Jones (on recall)

Jones testified on rebuttal as a wittiness for the District. Jones stated that she gave Ellis a schedule of her duties. Jones gave her a schedule because Ellis was informing her that she did not have enough time to do all her tasks. She gave Ellis this schedule between 2013 and 14/15 school year. Jones also reviewed an email from Ellis to Ileya and Jones, dated November 25, 2014. (R-25.) This email was in response to the schedule give to Ellis from Jones. Jones also gave Ellis an outline to help her organize her work duties. (R-35). It addressed the following duties: cafeteria (8-8:30); lobby duty (8:45-9:00); daily calls for absences (9:05-9:45); contacting parents of students with excessive lateness and absences (9:45-10:45); then a ten minute break (10:45-10:55); home visits (11:00-11:45);update documentation logs (11:45-12:30); then lunch break; check with nurse for medical documentation (2:00-2:15); at which point the schedule ends even though Ellis's work day ended at 2:55. Jones confirmed that Ellis would be at the security desk from 2:30-2:55.

Jones stated that she was unaware of any medical conditions that Ellis had during her employment. Jones did recall that there was an accommodation hearing on December 20, 2016, at which time some issues were raised. Jones denied that she yelled and/or screamed at Ellis regarding student uniform shirts. When Jones intervened in the "shirt" discussion between Ellis and Jones's clerk Maritza, Ellis responded to Jones by saying that I am not talking to you. Jones also discussed an

incident which took place on Election Day where there was a problem with Ellis having a chair. Jones questioned why Ellis took a chair from another area when there were already chairs in the lobby. Ellis failed to explain why she took the chair.

Jones also addressed the testimony by Leahy, who stated that Jones yelled at her like a child. Jones explained that at some point during testing Leahy leaned over and exposed her breast. Jones told Leahy to please stand up. Jones said that there were children in front of the counter when this occurred. Jones confirmed that Ellis was not permitted behind the counter to use the copier. This also applies to teachers, aides, and teacher assistants.

FINDINGS OF FACT

1. Ellis was first hired by the Jersey City School District in 1997 as a substitute teacher and then became a full-time teacher's assistant in 2000.
2. Ellis had two prior discipline charges for chronic and excessive absenteeism while working as a teacher's assistant.
3. In 2001, Ellis received a warning and in 2002, a twenty-day unpaid suspension based on her excessive absences.
4. Ellis then resigned from the respondent in 2002 in anticipation of an expected move.
5. Thereafter in 2005, Ellis was re-hired by the respondent as a Community Aide/Parent Liaison and worked from 2005-2011 at Public School number 34.
6. As a Parent Liaison, Ellis's involvement with attendance was limited to assisting the school's Community Aides make calls a couple times per month.
7. As of 2011, the School District eliminated the position of Community Aide/Parent Liaison throughout the district. As a result of such action, Ellis was offered and accepted work as a Community Aide at Public School number 38.
8. Public School number 38 is an elementary school with less than 1,000 students in grades pre-kindergarten through eight.
9. The job description for a Community Aide includes making daily calls to all student absentees; documenting student absences in a weekly log activity log to be submitted thereafter to the Central Office Attendance Supervisor; home visits

to chronic absentees; sending "Parental Notification Forms" to certain parents; when a student has fifteen absences, preparing Student Period Attendance Detail and Truancy Tracking Forms for court referral; and completing the Did Not Report report on the tenth day of school.

10. The above duties are consistent with the Civil Service job specifications for "Community Aide Schools." It also included a provision of duties "other duties deemed appropriate by the principal or supervisor." Thus all of the duties performed by Ellis were within the duties set forth in the list of responsibilities.
11. The School District provided annual training for all Community Aides every September generally after Labor Day when the employees returned to work after summer break.
12. The training consisted of a full-day workshop at the central office and addressed computer training and other related training including a demonstration on a "Smart Board" of how to look up student information (Absence and attendance information); use of "Infinite Campus." Community Aides were given their own laptops to use during the training.
13. Maribell Rivera, an Attendance Counselor, provided the training to the other employees of the District.
14. The employees were trained on the reports that the employees were required to submit to the Central Office and they were given a packet that contained blank forms for use in their reports and for daily logs of their activities. Ellis attended at least two of these workshops.

    It is important for the School to track student attendance at the Jersey City Schools because of academic achievement (quality education/to learn and achieve) and most importantly, student safety.
15. John Ross became the Supervisor of Attendance to whom Ellis and other Community Aides reported.
16. Community Aides were required to submit the following reports to Ross's office throughout the school year: a) weekly student absence reports; b) weekly home visits reports (in the weekly absence reports); c) monthly homeless reports and d) DNR (Did Not Report) report by the tenth day of each September.
17. In the 2012-2013 school year, Ross did not change any of the Community Aide reporting procedures that were in place prior to that time.

18. The Weekly Reports were to be submitted on paper to Ross's office and the Monthly Homeless Student Reports can be submitted by hard copy or electronically by the Community Aide or someone else designated to do so at each school.
19. Ross's clerk maintained a file for each Community Aide of every report submitted. The clerk also maintained a spreadsheet that documented the student absence and homeless reports that each Community Aide submitted.
20. Community Aides are expected to keep a daily log of their work tracking student absences.
21. A daily log form is included in their annual training packet. The daily logs were used to create the weekly reports in order to be submitted to the Central Office.
22. Jones gave Ellis a binder in which Jones instructed Ellis to keep her logs for easy reference by others, in the event the information is needed.
23. Ellis conducted her job duties during the first couple of years adequately.
24. Ellis attended the annual training held at the Student Attendance Office in September 2013, which included training in Infinite Campus.
25. Ellis requested additional computer training and in December 2013, Jones authorized one on one training for Ellis with the School District's Information Systems coordinator and also permitted Ellis to have a follow-up appointment approximated one week later.
26. Ellis was never refused training from the time Ross became supervisor in December 2012.
27. Ellis continuously neglected to prepare the daily and weekly student absence logs which were, without dispute, a necessary part of her job.
28. Ellis submitted no reports to Ross's office for the entire 2013-2014 school year.
29. Ellis was absent from her job on 32.66 days for personal illness or personal business, inclusive of the final two weeks of the school year.
30. The respondent's written acknowledgement of Ellis's leave of absence, informed Ellis that her absences would count toward her overall attendance record with the School District.
31. Ellis was previously charges with discipline for failure to perform duties, chronic and excessive absenteeism, neglect of duty, conduct unbecoming a public employee, insubordination and other just cause, which was sustained at a

departmental hearing and ultimately an unpaid suspension of five days was imposed.

32. Ellis failed to report to work during the last two weeks of the school year (2013-2014), Ellis requested a medical leave of absence at the beginning of the 2014-2015 school year from September 3, 2014, through October 6, 2014.

33. Once again Ellis was informed that her absences would count toward her overall attendance record with the respondent.

34. Based on these absences, Ellis failed to prepare and submit the annual DNR report for Public School 38.

35. After Ellis's return to work in October 2014, Ellis failed to prepare or submit any weekly student attendance reports.

36. Jones provided Ellis with a schedule of daily tasks in order to assist her organize her day and complete her work. Ellis provided input into the creation of that schedule.

37. Ellis requested additional training on using Infinite Campus and how to complete weekly reports and in response Rivera was sent to Public School 38 to provide Ellis with re-training.

38. When Rivera arrived at Public School 38 to see Ellis, Ellis refused to permit Rivera to train her without a union representative being present.

39. In addition, Ellis refused to speak to Jones about any job-related topics unless a union representative was present.

40. It was Ellis's belief that she was exercising her "Weingarten Rights," which she believed applied when she was meeting with any authoritative figure for any type of job-related duty.

41. Ellis also had job duties of making visits to the homes of students who were excessively absent in order to determine the reason for their absence.

42. In December 2014, a mother of a student complained that Ellis visited a neighbor's house and advised the neighbor that she was looking for the parent's kindergarten daughter. As a result of this visit, the mother rushed to Public School 39 to find that her daughter was in school and fine.

43. Ellis failed to prepare or submit any weekly student attendance reports or monthly homeless reports for the entire 2014-2015 school year.

44. Ellis was absent on 41.3 days for personal illness and other personal reasons including 25 days based on a leave of absence.

45. Ellis's job performance in the 2014-2015 school year was unsatisfactory. Ellis refused to sign the evaluation report, even though an employee's signature confirmed that the contents were reviewed and discussed with the appropriate Department Head. At Ellis's request, her union representative attended her evaluation conference, even though it was non-disciplinary in nature.

46. Ellis returned to work in September 2015 and did not attend the annual workshop for Community Aides at the Office of Student Attendance on September 8, 2015, and did not submit the annual DNT report.

47. Ellis wrote email to the respondent with a large list of requests including additional training in Infinite Campus. All items in the list were provided except for air conditioning.

48. On September 22, 2015, Ellis made a request for printer ink and an extension of time to meet weekly reporting deadlines. Ross extended her weekly reporting deadlines by one day and arranged for Rivera to give Ellis one-on-one training on Infinite Campus which was provided on October 8, 2015.

49. On September 24, 2015, Ross was making rounds of the schools and opted to visit Ellis for a general meeting on student attendance for that coming school year. Ross asked to meet with Ellis and Ileya. Ellis demanded that a union representative be present at the meeting. Ileya authorized that a union representative be present even though no disciplinary action was contemplated.

50. Ellis advised the administers that she would attend the meeting after getting a notebook from her office. Ross, Ileya, and the union representative waited in the office, but Ellis did not appear. Ileya paged Ellis to appear at this meeting. Ellis called Ileya to advise that she was not feeling well and was leaving the building.

51. Ellis sat in her car to process what was going on and the meeting did not take place. Ellis attempted to meet with her doctor, however, he was not available. Later that day, Ross saw Ellis at the union office in Jersey City as Ellis felt good enough to attend the union office.

52. Both administrators reprimanded her for refusing to attend the meeting.

53. In fall of 2015, Ellis received numerous reminders to submit weekly activity reports to the Central office.

54. Ross sent to Ellis an email on October 15, 2015, because the Student Attendance Department had not received any weekly activity reports from her at that point in time.

55. Ellis did submit a report for the week of October 9, 2015. Except for this report, Ellis failed to submit any Weekly Attendance Reports during the 2015-2016 school year, nor any monthly homeless reports or weekly home visit logs.

56. Ellis was charged with discipline for failure to perform duties, chronic and excessive absenteeism, neglect of duty, insubordination and other sufficient cause. After a departmental hearing on November 12, 2015, the charges were upheld and Ellis was suspended without pay for nine days.

57. By January 2016, Ellis had taken 14.7 personal days and by the end of February 2016, she had taken an additional 14 personal days.

58. Jones sent a letter to Ellis warning her of her excessive absenteeism on February 29, 2016.

59. In addition, Ellis failed to report to work in March 2016 as Ellis requested a medical leave of absence for the three-month period from February 22, 2016, through May 22, 2016.

60. Ellis requested an accommodation for her disability described as "major depressive disorder—recurrent, moderate severity, hoarding disorder—a type of obsessive compulsive condition."

61. Palmer, a licensed social worker diagnosed Ellis with depression and hoarding.

62. The request for accommodations included: a) extra training; b) regular schedule of reminders of report due dates; c) extra time for completion; d) permission for early departure; e) assistance with establishing and maintaining office organization; f) prior notice and preparation for all administrative meetings and permission to be excluded from any school related tasks outside of primary responsibilities of a Community Aide unless undertaken voluntarily.

63. The leave of absence was extended through June 15, 2016.

64. Ellis returned to work on June 21, 2016, and worked for three half-days through the last day of school on June 23, 2016.

65. Ellis's evaluation in June 2016 was an unsatisfactory overall performance. Once again, Ellis refused to sign the annual evaluation report and once again a union representative accompanied her to the evaluation conference.

66. In August 2016, Ellis entered Timberline Knolls in Illinois for further treatment of her condition.

67. Ellis did not report to work on September 6, 2016, the first day of the 2016-2017 school year. On or about September 9, 2016, Ellis requested a medical leave of absence, retroactively for the period: September 6, 2016 through September 24, 2016.

68. The respondent advised Ellis that her absences would count toward her overall attendance record. Due to this absence, Public School # 38's DNR report was not completed.

69. At the end of the above leave, Ellis did not report to work on Monday, September 26, 2016, or for the next several days thereafter.

70. The respondent's Chief of Talent forwarded a letter to Ellis questioning Ellis's unexplained absence and directing her to return to work no later than September 30, 2016.

71. Ellis reported to work on October 3, 2016, and on October 4, 2016, Ellis left by noon claiming illness. Ellis did not report to work from October 5 to October 12, 2016. Thereafter Ellis reported to work on and off for a couple of weeks and the whole month of November without submitting weekly reports.

72. From the beginning of the school year in 2016 through November 7, 2016, Ellis was absent from work for 35.5 days.

73. Additional disciplinary charges were brought against Ellis for chronic and excessive absenteeism, neglect of duty, conduct unbecoming and other just cause, seeking Ellis's removal. The charge of conduct unbecoming was not pursued in this hearing.

74. Ellis did not submit any weekly reports during the 2016-2017 school year, nor any monthly homeless reports or the home visit reports.

75. After receiving a notice for disciplinary charges for removal, Ellis submitted a second request for accommodations for depression, anxiety and insomnia. Ellis requested a transfer to a teacher aide position, necessary aides/assistance in current position and time to clean her office.

76. On January 19, 2017, the Board of Education voted to remove Ellis from her employment, as the hearing officer had recommended and her employment was terminated, effective January 20, 2017.

LEGAL DISCUSSION

This matter involves two major disciplinary actions brought by the respondent appointing authority against appellant. An appeal to the Merit System Board requires the OAL to conduct a hearing de novo to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent has the burden of proof and must establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds; Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

Ellis was charged with insubordination, conduct unbecoming a public employee, neglect of duty and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(2), (6), and (11).

Conduct unbecoming a public employee constitutes grounds for major discipline under N.J.A.C. 4A:2-2.3(a)(6). Although the term is undefined under the New Jersey Administrative Code, the charge has been interpreted to include any conduct that adversely affects the morale or efficiency of the bureau or that "has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). The employee need not violate the criminal code or a written rule or policy of the employer.

> Nor need a finding of misconduct be predicated upon the violation of any rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.
>
> [Ibid.]

When such conduct creates a hostile and potentially dangerous environment, it also constitutes just cause for major discipline. Perry v. Mercer County Dep't of Pub. Safety, 96 N.J.A.R.2d (CSV) 834, 837.

Insubordination may consist of refusing or failing to follow the instructions of a supervisor. See Eaddy v. Dep't of Transp., 208 N.J. Super. 156, 158-59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986).

The question, therefore, becomes whether the appellant's actions on the date in question amounted to insubordination, conduct unbecoming a public employee and other sufficient cause.[1]

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In West New York v. Bock, 38 N.J. 500, 523-24 (1962), the New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

ANALYSIS

The New Jersey Civil Service Law protects classified employees from arbitrary dismissal and other onerous sanctions. Prosecutor's, Detectives and Investigators Ass'n v. Hudson County Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974);

[1] Misconduct under N.J.S.A. 40A:14-147 and the charges of insubordination, conduct toward a superior officer and conduct in general are basically similar in nature to the charge of insubordination and conduct unbecoming.

Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). The law provides relief to civil service employees from public employers who may attempt to deprive them of their rights. Prosecutor's, supra, 130 N.J. Super. at 41. To this end, the law is liberally construed. Mastrobattista v. Essex Cty. Park Comm'n, 46 N.J. 138, 147 (1965). Consistent with this policy of civil service law, there is a requirement that in order for a public employee to be fined, suspended, or removed, the employer must show just cause for its proposed action. The Merit System Board is charged with the duty of ensuring that the reasons supporting disciplinary action are sufficient and not arbitrary, frivolous, or "likely to subvert the basic aim of the civil service program." Prosecutor's, supra, 130 N.J. Super. at 42 (quoting Kennedy v. Newark, 178 N.J. 190 (1959)).

Public employees' rights and duties are governed and protected by the provisions of the Civil Service Act, N.J.S.A. 11A:1-1 to 12-6, and the regulations promulgated pursuant thereto, N.J.A.C. 4A:1-1.1 to 4A:2-6.2. However, public employees may be disciplined for a variety of offenses involving their employment, including the general causes for discipline as set forth in N.J.A.C. 4A:2-2.3(a). An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority. N.J.A.C. 4A:2-2.3(a)(12). If sufficient cause is established, then a determination must be made on what is a reasonable penalty.

Determinations often turn on credibility. Credibility is the value that a finder of the facts gives to the testimony of a witness. The process of evaluating the credibility of witnesses entails: (a) observing demeanor; (b) evaluating the ability to recall specific details; (c) considering the consistency of the testimony under direct and cross-examination; (d) determining the significance of any inconsistent statements or evidence; and (e) otherwise developing a sense of the witness's candor. This requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. See Carbo v. U.S., 314 F.2d 718 (9th Cir. 1963), cert. denied sub. nom., Palermo v. U.S., 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 2d 498 (1964). In evaluating the weight, trustworthiness and reliability of the evidence, factors such as motive, bias, confirming witnesses or

statements, corroborative evidence, and common sense must be considered. Frequently, the trier of fact relies on the innate sense of whether the testimony has the ring of truth.

Credible testimony must proceed from the mouth of a credible witness and must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base credibility decisions on his or her common sense and life experiences. State v. Daniels, 182 N.J. 80, 99 (2004). Credibility is not dependent on the number of witnesses who appeared, State v. Thompson, 59 N.J. 396, 411 (1971), and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514, 521-22 (1950).

In assessing the testimony and exhibits in this case, I **CONCLUDE** that the testimony of Ross and Jones were particularly credible. Jones seemed to be professional and genuinely truthful about having to testify against Ellis. Generally, her testimony of what occurred corroborated that of Ross and Ileya and the documentary evidence. While Ellis and her witnesses attempted to impeach the testimony of Jones and Ross by saying that Jones had a grudge against Ellis. These witnesses' testimony displayed personal hostility. I believe that running of such a large school must be a challenge and requires that she demand and expect all employees to meet the requirements of their job. It appeared that Jones's goal was to have Public School 38 run effectively and efficiently and protect the students' safety. Ellis's testimony was self-serving and in conflict with other submitted documentary evidence. Ellis was able to present only a few documents which supported her testimony, but were unable to contradict or refute the underlying charges. I have concerns regarding Ellis's testimony because I find it to be inconsistent. Ellis presents a case whereby she made requests for additional training, yet either did not take advantage of the training offered to her or all employees or set up roadblocks to receive one-on-one training by improperly demanding a union representative to be present during training. Such a position is well beyond the scope of any reasonable interpretation of Weingarten rights and not supported by the evidence of the case. Despite the above, Ellis did receive a number of

group and individual training sessions. Particularly concerning was the fact that Ellis admitted that she was aware that she was required to send weekly reports and monthly homeless reports to the central office, yet without a credible and cogent reason, she clearly failed to submit those reports on countless occasions. Therefore, I did not find Ellis's testimony particularly persuasive in the defense of the charges in this case.

The three other employees presented by Ellis in support of her case included Decker Gingles, Oliver, and Leahy. All three witnesses appeared to me as harboring resentment toward Jones and the administration in general. Oliver herself was disciplined for chronic absenteeism.

Leahy demonstrated a clearly blatant hostility toward the administration and Jones in particular. Her testimony showed a near paranoid state whereby she interpreted many of the actions around her as directed toward or about her. I find her testimony as lacking credibility and give it little of no weight in this case.

Ellis's personal therapist, Adrienne Palmer, who was offered as a fact wittiness by the appellant, offered almost no first-hand knowledge of the relevant facts on this case. Any information regarding the conditions at work were obtained by Palmer directly from Ellis, herself. Therefore, Palmer testimony was not compelling regarding the crux of this case.

Nine-Day Suspension and Termination of Employment

During the years when Ellis served as a Community Aide she failed to take any concrete steps to address the lack of abilities which she complained of during employment. Ellis failed to take advantage of the training offered and in fact placed barriers when approached with individuals to provide training.

The respondent offered to Ellis and other employees annual training sessions on how to create and submit weekly and monthly reports. Despite this, Ellis clearly failed to prepare these reports and further failed to report to work on a regular basis. When Ellis first failed to submit these reports, the respondent imposed a five-day unpaid

suspension in the 2013-2014 school year. In addition, Ellis failed to submit reports for the 2014-2015 school year and in the autumn of 2015 (save for one report). In addition, Ellis was chronically absent (note that all leaves of absence count against her record of attendance). Ellis's failure to correct her attendance record resulted in an imposition of a nine-day unpaid suspension.

There is no doubt that Ellis committed a neglect of duty therefore the 2014-2015 and 2015-2016 school years. Such behavior is sufficient cause to suspend (and terminate) employment. In re Carter, 191 N.J. 474, 486 (2007); see also In re Reynolds, Twp. of Irvington, A-0 (App. Div. Nov. 23, 2015), http://njlaw.rutgers.edu/collections/courts/ (which affirmed the CSC decision to consider a police officer's past disciplinary history of repeated misconduct and to remove him for neglect of duty and conduct unbecoming); In re Vena, A-4128-05T1 (App. Div. Oct. 26, 2007), http://njlaw.rutgers.edu/collections/courts/ (the Appellate Division affirmed the fifteen-day suspension of an emergency medical technician who failed to perform duties critical to his position).

In this case, the facts proven in the hearing clearly show Ellis's failure to perform the duties critical to her position by failing to continually prepare and submit reports and failing to report to work for extended periods of time. Despite evidence of a medical condition, Ellis failed to advise the respondent of any medical condition that affected here ability to do her job. Ellis failed to improve her performance in 2015-2016 and 2016-2017 school years, despite additional training and offers of additional training. In addition, Ellis received warnings regarding her job performance and two prior suspension.

As cited by the respondent:

> There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to benefit errant employees. The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlying our statutory scheme.

> [State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).]

I **FIND** that the penalty of removal was reasonable under the facts proven in this case. The respondent provided sufficient training and sufficient offers of training. The respondent also provided Ellis with adequate warning regarding her behavior. Even though Ellis requested and was provided with lengthy periods of leaves of absence, the respondent was not obligated to continue to take additional leaves of absence, all of which counted against her attendance history.

Chronic absenteeism by an employee is a proper basis for an appointing authority to terminate an employee. In re Wiley, Rowan University, CSV 48-13, Initial Decision (Nov. 3, 2014), adopted, CSC (Dec. 17, 2014), http://njlaw.rutgers.edu/collections/oal/. In the Wiley case, the employee appealed a fifteen-day suspension and removal from employment for chronic absenteeism and neglect of duty. The ALJ found that an employer has a right to expect that an employee will report for work as scheduled. The ALJ further stated "added to this is the neglect he showed for his responsibilities even at work, which, in a sense, is no more than another form of 'absence', at least from the responsibilities of the work." Id. at slip op. at 8.

Chronic absenteeism although not defined in the Civil Service Act, is generally understood to be conduct that continues over a long time and recurs often. In re Ciuppa, CSV 04702-11, Initial Decision (Apr. 24, 2014), adopted, CSC (Jun. 4, 2014), http://njlaw.rutgers.edu/collections/oal/. Similarly, Ellis history of reoccurring absences of a number of years can only be defined as chronic absenteeism. Ellis was fully aware, every time she took a leave of absence, that her time off counted toward her history of attendance.

As a result of the above absences, the respondent operated at reduced efficiency and was required to patchwork an employee team through the use of other employees and/or temporary help.

> An institution functions only through the actions of its employees. Where an employee regularly absents himself

> or fails to follow guidelines in connection with attendance such as to cause the institution difficulties in obtaining the necessary staffing . . . . such actions tend to affect the morale of the employees and cause administrative problems which an institution should not be required to bear.
>
> [Brown v. Trenton State Prison, 13 N.J.A.R. 466, 471 (1988).]

The importance of attendance of students and advising the respective parents is an extremely important function of a school. The safety of the students is of the highest importance of a school which even surpasses the educational function of the school, which is the core purpose of the school system in New Jersey. The concerns set forth in the Brown case is equally applicable in this case.

Conduct Unbecoming a Public Employee

"Conduct unbecoming" a public employee is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that Ellis engaged in conduct unbecoming a public employee.

Insubordination

Ellis is also charged with insubordination. The Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, Initial Decision (November 12, 2010), modified, CSC (March 18, 2011) (citing In re Stanziale, A-3492-00T5 (App. Div. April 11, 2002), <http://njlaw.rutgers.edu/collections/courts/> (appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial Decision (June 10, 2010), modified, CSC (July 21, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 23, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 8804-07, Initial Decision (March 13, 2008), modified, Merit System Board (May 21, 2008), <http://njlaw.rutgers.edu/collections/oal/>. (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor.)

The Civil Service Commission also has determined that an appellant is required to comply with an order of his or her superior, even if he or she believed the orders to be improper or contrary to established rules and regulations. See Palamara v. Twp. of Irvington, A-5408-05T3 (App. Div. February 28, 2005), <http://njlaw.rutgers.edu/collections/courts/>; Compare, In re Allen, CSV 11160-04, Initial Decision (May 23, 2005), remanded, Merit System Board (July 14, 2005), CSV 09132-05 Initial Decision, (November 22, 2005), adopted, Merit System Board (January 26, 2006) <http://njlaw.rutgers.edu/collections/oal/> (in which the Board determined that the appellant's disobedience was justified by concerns for the safety of the clients on a bus and reversed his removal).

In this case, there is sufficient evidence that Ellis was insubordinate in dealing with Ross and Jones. There is no dispute that Ellis received a clear directive from Ross and that she decided not to obey that directive by not attending the meeting and simply leaving the school with making an insufficient effort to attend the meeting. This is by definition insubordination.

I further **CONCLUDE** that Ellis engaged in conduct that amounted to insubordination.

Neglect of Duty

Neglect of duty is not defined under the New Jersey Administrative Code, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). It has been applied both to not fully carrying out duties and to acting incorrectly. See, e.g., In re Marucci, CSV 07241-09, Initial Decision (January 1, 2010), modified, CSC (March 6, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-3607-09T1 (App. Div. January 3, 2012), <http://njlaw.rutgers.edu/collections/courts/> (removal of a police officer with no disciplinary record where he failed to remove drugs from under a sewer grate and then lied about his actions); see also In re Dona, CSV 10782-08, Initial Decision (August 3, 2009), modified, CSC (August 8, 2009), <http://njlaw.rutgers.edu/collections/oal/> (affirming twenty-day suspension for failing to pat down inmate properly, missing a wooden shank). Certainly, the failure to submit her weekly reports, annual reports and monthly reports as set forth in the CA's duties constitutes a significant omission, and, thus, I further **CONCLUDE** that the respondent has met its burden with regard to the charge of neglect of duty.

Chronic and Excessive Absenteeism

The District has charged Ellis with violating N.J.A.C. 4A:2-2.3(a)(4), chronic and excessive absenteeism. The Courts have indicated that "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." Bock, supra, 38 N.J. at 522. While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid. Thus, conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4).

In this case, it is undisputed that Ellis had been put on notice and was aware of her punctuality and attendance problems soon after she was hired by the District. The District utilized progressive discipline, first suspending Ellis, and later suspending her again for six days in February 2012. Despite numerous warnings, Ellis's attendance problems continued. Jones, the principal of the District's public-school number thirty-eight, noted in her testimony, that if someone was absent, the work needed to be "picked up" by the other employees in the absent employee's group. Ellis's attorney at the hearing, while not disputing the accuracy of the District's records, noted that the District's disciplinary action for removal in this case is "too severe." However, there is no dispute to Ellis's long history of punctuality and attendance problems while employed by the District. In Gaines, supra, 309 N.J. Super. at 334, the court noted, "There is no constitutional or statutory right to a government job. Our laws, as they relate to discharges or removal, are designed to promote efficient public service, not to benefit errant employees."

The evidence presented at the hearing confirms that during the five and one-half years while Ellis was a CA, she was absent for personal illness and personal business reasons for at least one month and at times up to five months in each of her ten-month work years. In addition, Ellis was absent for other reasons such as a work-related accident and a funeral. The evidence clearly showed that Ellis had the following absents: 2011-12-PI 16 and PB 3 for a total of 19; 2012-13-PI 22.5 and PB 3 for a total of 25.5; 2013-14 PI 30.6 and PB 2 for a total of 32.6; 2014-15-PI38.3 and PB 3 for a total of 41.3; 2015-16-PI 102.7 and PB 1 for a total of 103.7; and 2016-17(half year through 1/19/17)-PI 47.5 and PB 2 for a total 49.5. The evidence demonstrates that her absences from work generally steadily increased.

Therefore, based upon the foregoing facts and applicable law, I **CONCLUDE** that the District has proven, by a preponderance of the competent, credible evidence, the charge of chronic and excessive absenteeism.

There was presented no basis to support the fact that the District was obligated to accommodate Ellis's extensive absences. New Jersey Courts have held that

attendance is an essential function of most jobs and need not be accommodated. Gaines, supra, 309 N.J. Super. at 333 (which stated that "appearing for work on a regular and timely basis is not asking too much)"; Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605-06 (App. Div. 2001), certif. denied, 172 N.J. 355 (2002) (which found that under the Law Against Discrimination, excess absenteeism need not be accommodated even if caused by a disability otherwise protected by the Act); Svarnas v. AT&T Comm'n, 326 N.J. Super. 59, 79 (App. Div 1999) (which found that an employee who does not come to work cannot perform any of her job functions, essential or otherwise).

Many or Ellis's absences were based on extended leaves of absence. The District allowed Ellis to take those leaves of absence and return to her job thereafter, but Ellis was notified repeatedly that the absences would count toward her record. See In re Pribramsky, CSV 11877-14, Initial Decision (July 23, 2015), adopted, CSC (Sept. 2, 2015), http://njlaw.rutgers.edu/collections/oal/, wherein the municipal Department of Roads tolerated a number of excessive lateness and absents from a laborer and then imposed a ten-day suspension for excessive absenteeism. After the employee took all of his paid sick days for two years and then failed to timely report his absence on one day, the employer removed him. The Administrative Law Judge found that the employer had just cause to terminate the employee for excessive absenteeism regardless of its past accommodation of the behavior.

In Svarnas, supra, 326 N.J. Super. at 77, the Superior Court of New Jersey, Appellate Division stated: "[T]here is no way to reasonably accommodate the unpredictable aspect of an employee's sporadic and unscheduled absences." In addition, the Court found:

> [J]ust cause for dismissal can be found in habitual tardiness or similar chronic conduct." West New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference Amounting to neglect of duty.
>
> [Ibid.]

The lack of attendance at work by Ellis speaks for itself and there is no doubt that the District had no duty to further tolerate such behavior given the rippling effect on other employees and the District itself. The District was well within its rights to bring disciplinary charges against Ellis. A fundamental duty of each and every employee is to appear for work and conduct the duties of their job.

Appellant's Request for Accommodations

In the appellant's submission, she claims that her requests for accommodations should have been addressed by the District. In March 2016, both Ellis and Palmer filled out an accommodation request. (P-2.) This request was based upon Palmer's conversations with Ellis. Ellis then filled out a second request for accommodations in November 2016.

The above argument made by the appellant is hereby rejected as this case is not and was not heard as a failure to accommodate case which would be brought under the New Jersey Law Against Discrimination or the Federal Americans with Disabilities Act. Such a position falls outside a Civil Service case and the only issue here is whether the District had just case to discipline Ellis and whether the discipline was reasonable.

Appellant's Position Regarding Her Weingarten Rights

It is Ellis's position that based on her understanding of the applicable law, she was entitled to a union representative when she was meeting with administrators for job-related duties. Incredibly Ellis testified that she was entitled to have a union representative present for **any meeting** (including training) concerning her job-related duties. This not only misrepresents her Weingarten rights, but served as a barrier to the proper functioning of her duties and it also prevented the District from providing a remedy (i.e. training) to some of the complaints asserted by the appellant.

It is beyond reason for Ellis to state that many of her meeting would result in discipline. The meetings included training and well as review of the procedures and general policies in the District. For Ellis to demand a union representative for nearly

every meeting would result in the efficiency of the District to be negatively affected and cause the District to have other employees fail to properly handle their jobs.

The case of NLRB v. Weingarten, 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975), the United States Supreme Court held that public employees have the right to request union representation at investigations where the employees **reasonably** believe that the investigation will result in disciplinary action. The belief must be reasonable and the result of an investigation. Neither of those factors are applicable in this case. They do not apply to "run-of-the-mill shop-floor conversations, as for example, the giving of instructions or training or needed corrections of work techniques." Id. at 257-58, 95 S. Ct. 963, 43 L. Ed. 2d 178. The decision as to whether the belief is reasonable is determined on an objective basis. Non-investigative meetings do not implicate an employee's right to union representation. See Mitchell v. Brough of Roseland Police Dept., A-3046-15T3 (App. Div. Mar. 15, 2017), http://njlaw.rutgers.edu/collections/courts/, in which the Appellate Division analyzed whether a meeting between a police officer and his supervisor constituted an investigation for Weingarten purposes. Id. at *14-15. The Appellate Court found that the meeting was not investigatory because the meeting was held to afford the officer an opportunity to sign a reprimand to indicate his receipt, and not his agreement, with the reprimand. Ibid. That case is akin to Ellis requesting a union representative at numerous meetings with management which could not reasonably lead to discipline.

Weingarten rights do not attach to such business-related conversations as giving instructions, training employees or correcting techniques. New Jersey Dep't of Law and Public Safety, Div. of State Police, 27 NJPER 32119 (July 27, 2001), which found that a union representative was not required, where the meeting is supervisory in nature and was designed to show the employee how to improve his work performance.

There is no rational basis to find that Ellis was entitled to the presence of a union representative during training, or other meetings with supervisors wherein that were discussing policy and procedure. Thus, at no time were Ellis's Weingarten rights violated during the course of her employment.

CONCLUSION

What becomes clear is that Ellis failed to properly do numerous tasks which were assigned to her. Although she claims to have alerted her superiors as to her inability to do her job, nowhere was she able to present written evidence that she took full advantage of the offerings of training to address any possible shortcomings. In addition, Ellis was given notices that she should have done certain tasks and they were not done and nor were her supervisors advised that these tasks were not her responsibility or outside the properly assigned duties. Without any countervailing testimony, I must **CONCLUDE** that the appellant's behavior was conduct unbecoming a public employee, was insubordinate, and neglect of duty. Therefore, I **CONCLUDE** that respondent has sustained its burden of proof as to all the charges filed against the Ellis.

As for the penalty phase, I must consider whether there is prior disciplinary action that should be considered in deciding the progressive-discipline factor. I **CONCLUDE** that exhibits R-2, R-3, and R-6 are relevant; establish prior progressive discipline. The charges contained in the Final Notice of Disciplinary Action (J-1) resulted in a suspension for 120, with forty-five days held in abeyance for one year. Considering the list of prior disciplinary events, I **CONCLUDE** that the nine-day suspension and the termination of employment are appropriate.

ORDER

Based on the foregoing, it is **ORDERED** that all charges against Ellis are **AFFIRMED**. It is further **ORDERED** that Ellis's nine-day suspension and removal are **AFFIRMED** and the appeals are **DISMISSED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision

within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B 10.

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

November 27, 2017
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: November 28, 2017

Date Mailed to Parties: November 28, 2017

jb

APPENDIX

WITNESSES

For Appellant:

Lakesha Oliver
Corinne Decker Gingles
Maggie Leahy
Adrienne Lois Palmer
Yvonne Ellis

For Respondent:

Maribell Rivera
John Ross
Sandra Jones
Hani Ileya

EXHIBITS

For Appellant:

P-1 Email to McCoy from Jones, dated January 20, 2017
P-2 Reasonable Accommodation Medical Authorization Form, dated March 2, 2016
P-3 Application for Leave of Absence, dated 3/4/16
P-4 Letter to Ellis from Donna Karaffa, RN and Barbara Charles
P-5 Letter from High Focus Centers to Celeste Williams, dated February 26, 2016
P-6 Notice for Home Going Celebration for Constance Pooser, for April 8, 2016
P-7 Letter to Ellis from D. Karaffa and B. Charles, dated June 13, 2016
P-8 Letter from Timberline Knolls about Ellis, dated September 9, 2016
P-9 Application for Leave of Absence, dated September 19, 2016
P-10 Letter to Ellis from D. Karaffa and B. Charles, dated September 30, 2016
P-11 Reasonable Accommodation Medical Authorization Form, dated November 9, 2016
P-12 Email from Ellis to Jones, dated November 20, 2014

P-13 Weingarten rights card

For Respondent:

R-1 Email from M. Rivera to Ross, dated October 8, 2015

R-2 Student Attendance Program and Duties of Community Aides and other documents

R-3 Civil Service Job Specifications for Community Aide

R-4 Email from Ross to Ellis, dated September 25, 2015

R-5 Email from Ross to Ellis, dated September 22, 2015

R-6 Email from Jones to Ellis, dated December 11, 2013

R-7 Employee Absence Report for Ellis

R-8 Letter from Jones to Ellis, dated February 29, 2016

R-9 Teachers Time Book

R-10 Letter from Celeste Williams to Ellis, dated September 28, 2016

R-11 Jersey City Public Schools, Performance Appraisal Form, dated June 17, 2015

R-12 Email to Ileya from LR, dated December 12, 2014

R-13 Request for Approval of Early Dismissal, dated December 12, 2016

R-14 Email from Ross to Celeste Williams, dated September 22, 2015

R-15 Email from Ellis to Ross, dated October 2, 2015

R-16 Letter to Ellis from Ileya, dated September 30, 2015

R-17 Notice of hearing to Ellis dated October 15, 2015 with PNDA and FNDA

R-18 (a, b, c, d, e, f, g, h) pictures of Ellis's work area in office

R-19 Letter to Ellis from Celeste Williams, dated January 20, 2017

R-20 Jersey City Public Schools, Performance Appraisal Form, dated June 21, 2016

R-21 Email from Jones to Ellis, dated January 20, 2015

R-22 Email from Ellis to Jones (et. al), dated January 16, 2015

R-23 Disciplinary Hearing for Oliver, dated June 7, 2007

R-24 Disciplinary Meeting in re: Oliver, dated June 19, 2013

R-25 Community Aide Schedule from Ellis to Ileya, dated November 25, 2014

R-26 Email from Ross to Teresa Moore, dated October 15, 2015

R-27 FNDA for Ellis, dated August 19, 2015

R-28 Letter to Ellis from Karaffa and Charles, dated September 30, 2016, with attached documents

R-29 Email from Rivera to Ellis dated October 30, 2015

R-30 Decision on Disciplinary Hearing of May 1, 2002

R-31 Decision on Disciplinary Hearing of November 29, 2001

R-32 Summary of Reports of Community Aides, 2016-2017

R-33 Summary of Reports of Community Aides, 2016-2017

R-34 Summary of Monthly Reports

R-35 Community Aide's Daily Schedule for Ells

11-29-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 12, 2018

Eric B. Sposito, Esq.
17 Viola Avenue
Leonardo, New Jersey 07737-1461

Steven W. Kleinman, Esq.
Monmouth County
1 East Main Street – Room 223
Freehold, New Jersey 07728

Re: *Dana Spivak v. Monmouth County, Department of Police Radio* (CSC Docket No. 2017-2872 and OAL Docket No. CSV 4601-17) - **SETTLEMENT**

Dear Mr. Sposito and Mr. Kleinman:

The appeal of Dana Spivak, a Public Safety Telecommunicator with Monmouth County, Department of Police Radio, of her removal effective March 3, 2017, was before Administrative Law Judge Jacob S. Gertsman (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 29, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 13, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than February 27, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to vote. Based on this information, the parties were asked, as required, to consent to a second extension. However, neither party provided consent. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective February 28, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Jacob S. Gertsman, ALJ (w/out attachment)
Timothy C. King, Esq.
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 04601-17
AGENCY DKT. NO. 2017-2872

IN THE MATTER OF
DANA SPIVAK, MONMOUTH COUNTY
DEPARTMENT OF POLICE RADIO.

Timothy C. King, Esq., and **Eric B. Sposito,** Esq., for petitioner, Dana Spivak

Steven W. Kleinman, Special County Counsel, for respondent Monmouth County (Andrea I. Bazer, County Counsel)

Record Closed: November 16, 2017 Decided: November 29, 2017

BEFORE **JACOB S. GERTSMAN,** ALJ:

This matter, concerning petitioner's appeal of her removal as a Public Safety Telecommunicator with the Monmouth County Department of Police Radio, was transmitted to the Office of Administrative Law on April 3, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following several settlement conferences and continued discussion, the parties have settled this matter and have filed a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement, attached hereto as Exhibit J-1.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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,** who by law is authorized to make a final decision in this matter. If the Director of the Division of Consumer Affairs 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.

November 29, 2017
DATE

JACOB S. GERTSMAN, ALJ

Date Received at Agency: 11/29/17

Date Mailed to Parties: 11/30/17

nd

APPENDIX

EXHIBITS

Jointly Submitted

J-1 Stipulation of Settlement

J-1

SEPARATION AGREEMENT AND COMPLETE RELEASE

This Separation Agreement and Complete Release ("Agreement") is entered into this 8 day of **November, 2017**, and is by and between Monmouth County and the Monmouth County Sheriff's Office (collectively, "County") and Dana Spivak ("Spivak" or "Employee").

RECITALS

WHEREAS, Spivak has been employed by the County as a Public Safety Telecommunicator; and,

WHEREAS, on January 9, 2017, the County issued Spivak a Preliminary Notice of Disciplinary Action (DPF-31A) (the "Disciplinary Action"); and,

WHEREAS, the Disciplinary Action charged Spivak with violating N.J.A.C. 4A:2-2.3(a)(2), (a)(6), (a)(7), and (a)(12); County Policies 110, 507, and 701; and various policies, procedures, rules and regulations of the Monmouth County Sheriff's Office; and,

WHEREAS, based on the charges and specifications contained in the Disciplinary Action, the County determined that removal from employment, on a date to be determined, was the appropriate penalty; and,

WHEREAS, following a departmental hearing conducted on February 14 and February 24, 2017, the charges and proposed penalty of removal, effective at the close of business on Friday, March 3, 2017, were sustained; and,

WHEREAS, following her removal, Spivak timely filed an appeal of the Disciplinary Action to the New Jersey Civil Service Commission ("Commission"), which was transmitted to the Office of Administrative Law ("OAL") for hearing as a contested case under docket number CSV 04601-2017S; and,

DMS

WHEREAS, prior to the scheduling of a hearing date at the OAL on the Disciplinary Action, the parties engaged in settlement discussions; and,

WHEREAS, the County and Spivak now desire to resolve all outstanding issues with respect to the Disciplinary Action and agree upon the terms of Spivak's amicable, permanent separation from employment with the County via this Agreement.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the adequacy of which is hereby acknowledged, the County and Spivak hereby agree as follows:

1. **RESOLUTION OF THE DISCIPLINARY ACTION; GENERAL RESIGNATION OF DANA SPIVAK; TERMS AND CONDITIONS OF SAME.**

   a. The Disciplinary Action shall by resolved by Spivak permanently and irrevocably resigning from her County employment. However, her final date of employment shall be adjusted from Friday, March 3, 2017, to Friday, March 31, 2017. For that period of time, Spivak shall be recorded as having been on a paid administrative leave. The compensation she is owed as a result of this adjustment, reflecting four (4) weeks of additional service at the salary rate she was earning as of March 2017, shall be paid within thirty (30) days after this Agreement is approved by the Commission.

   b. Spivak's resignation, which shall be recorded as taking effect at the close of business on Friday, March 31, 2017, shall be recorded as a "general resignation" as defined in N.J.A.C. Title 4A.

   c. The parties acknowledge that no final determination had been reached as to whether or not the charges contained in the Disciplinary Action were ultimately sustained or the proposed penalty was appropriate.

d. Spivak, by signing this Agreement, does not concede or admit in any way to any of the allegations contained in the Disciplinary Action.

e. Spivak agrees that she will not be eligible for any future employment with the County or any of its agencies or instrumentalities, and will not apply for any such employment, unless this provision is later waived by the County in its sole discretion. Any such waiver shall be in writing and shall make express reference to this Agreement. However, this provision is not intended to limit in any way Spivak's ability to seek either public or private employment other than with the County or its agencies or instrumentalities.

f. Spivak waives any and all claims arising from or relating to the Disciplinary Action, including, but not limited to, back pay, benefits, seniority, and attorneys' fees and/or costs.

g. The County will ensure its records conform to the terms of the Agreement, including specifically that Spivak resigned from County employment, rather than was removed as a result of disciplinary action. All internal County records will remain intact.

h. Spivak agrees to immediately withdraw, with prejudice, the Unfair Labor Practice she filed with the Public Employment Relations Commission, which has been assigned docket number CI-2017-033.

i. The parties agree to execute any further documents and to take any further action required to effectuate the purposes and intent of this Agreement.

2. **COMPLETE RELEASE AND RELINQUISHMENT OF CLAIMS.**

In consideration of the settlement hereinabove, and to the fullest extent permissible by law, Spivak, along with her successors, assigns, heirs, representatives and estates (collectively, "**Releasor**"), agrees to irrevocably and unconditionally relinquish any and all causes of Action, demands or claims, including claims for attorney's fees and costs, Releasor had, has or may have from the beginning of time up to the date this Agreement is executed against the County of Monmouth, the Monmouth County Sheriff's Office and all of their elected and appointed officials, officers, agents, employees, agencies and instrumentalities (collectively, "**Releasees**"), regardless of whether such claims are presently known or unknown to Releasor. This full and unconditional relinquishment and release of claims includes, but is not limited to, any causes of action, demands or claims relating in any way to Spivak's employment with the County, including the events, information or disputes giving rise to this matter, the Disciplinary Action, or the Agreement.

This full release also specifically includes, but is not limited to, matters arising at common law, such as breach of contract, expressed or implied, promissory estoppel, wrongful discharge, tortious interference with contractual rights, infliction of emotional distress, defamation and any other common-law tort.

This full release also specifically includes, but is not limited to, matters arising under federal, state or local laws, statutes, regulations, ordinances, orders or policies, including, but not limited to, the United States Constitution, the federal Fair Labor Standards Act, the federal Employee Retirement Income Security Act of 1974 (ERISA), the federal Family and Medical Leave Act (FMLA), the federal Equal Pay Act, the

federal Civil Rights Act of 1866, Title VII of the federal Civil Rights Act of 1964, the federal Civil Rights Act of 1991, the federal Age Discrimination and Employment Act (ADEA), the federal Older Workers Benefit Protection Act (OWBPA), the federal Rehabilitation Act of 1973, the federal Americans With Disabilities Act (ADA), the New Jersey Constitution, the New Jersey Conscientious Employee Protection Act (CEPA), the New Jersey Law Against Discrimination (NJLAD), the New Jersey Family Leave Act, and the New Jersey Civil Rights Act.

This full release also specifically includes, but is not limited to, claims for reemployment by contract or recall rights, compensatory damages, punitive damages, reinstatement, back pay, overtime compensation, back benefits, back emoluments, seniority credit, attorneys' fees, equitable relief, or any other relief.

This full release also specifically includes, but is not limited to, the right to receive any monetary relief in connection with the prosecution of a charge or suit brought on the Releasor's behalf by a third party, including any federal, state or local governmental agency or entity.

Nothing in this release shall apply to any vested benefits or any claim to determine or enforce rights with respect to said benefits, nor with respect to any claim filed under the New Jersey Workers Compensation Act.

3. **OLDER WORKERS BENEFIT PROTECTION ACT REVOCATION PERIOD.**

This Agreement is intended to comply with the federal Older Workers Benefit Protection Act (OWBPA), and Spivak acknowledges she specifically is waiving rights and claims under the OWBPA. Therefore, this Agreement and Release shall not be

effective nor shall any payments hereunder be made, until the expiration of the seven (7) day revocation period set forth in the OWBPA.

4. **ACKNOWLEDGEMENT.**

Spivak acknowledges that this Agreement shall resolve all issues related to the Disciplinary Action and that she has had the right and opportunity to discuss all aspects of this Agreement with her legal counsel prior to entering into it and that she has availed herself of this right, that she has carefully read and fully understands all of the provisions of this Agreement, and that she is entering into this Agreement knowingly and voluntarily in exchange for good and valuable consideration.

5. **REPRESENTATION.**

Spivak acknowledges that was she has been advised by her legal counsel of her options in this matter, including her right to further pursue the appeal of her removal to the Commission through the OAL. Understanding the foregoing, Spivak certifies that (1) she is satisfied with the representation her counsel has provided her in this matter, (2) her counsel has not made any representations concerning the terms or effects of this Agreement other than those contained herein; and (3) she has been advised by her counsel that by entering into the Agreement, she is irrevocably giving up her right to further pursue the appeal of her removal to the Commission through the OAL. Spivak has informed her counsel that with these understandings, she wishes to resign pursuant to the terms of the Agreement.

6. **GOVERNING LAW AND FORUM.**

The parties agree that the laws of the State of New Jersey shall govern this Agreement and Release and the parties will submit to the jurisdiction of the state and/or

federal courts located within the State of New Jersey for the resolution of any dispute that may arise hereunder.

7. **HEADINGS.**

The headings contained in the Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

8. **SEVERABILITY CLAUSE.**

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not part of this Agreement.

9. **AMBIGUITIES.**

Each party and their counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in interpreting this Agreement. The language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any party.

10. **MODIFICATIONS TO BE IN WRITING.**

The parties agree that this Agreement and Release may not be altered, amended, modified, superseded, canceled or terminated except in writing and duly executed by all the parties, or their attorneys on their behalf, which makes specific reference to this provision.

11. **ENTIRE UNDERSTANDING.**

This Agreement and Release sets forth the entire understanding between Spivak and the County, and fully supersedes any and all prior agreements or understandings between them pertaining to the subject matter thereof, if any.

12. **NON-ADMISSION.**

Nothing in this Agreement shall be construed as an admission by any party that any action taken was unlawful or wrongful, or that any action constituted a breach of contract or violated any federal, state, or local law, policy, rule or regulation.

13. **AGREEMENT NON-PRECEDENTIAL.**

The parties agree that this Agreement shall be non-precedential, is limited to specific, unique facts and circumstances, and is not intended to create a past practice nor shall it be binding with respect to any other employee of the County.

14. **NON-DISPARAGEMENT.**

Spivak agrees that, unless required by legal process or applicable law, she will not say anything to any person or entity that disparages or defames the County, or any of its officers, employees, agents, agencies or instrumentalities. The County [and anyone acting in an official capacity on the County's behalf] agrees that, unless required by legal process or applicable law, it will not say anything to any person or entity that disparages or defames Spivak.

Additionally, Spivak agrees that: (i) she will not advise or encourage any person or entity to bring a claim against the County, or any of its officers, employees, agents, agencies or instrumentalities; and (ii) she will not assist any person or entity in connection with any such claim unless required to do so by law.

If it is contacted by any person or entity regarding Spivak's employment with the County, including, but not limited to, a request for a job or other reference, the County will only confirm the information required to be made public by the New Jersey Open Public Records Act ("OPRA"), more specifically, Spivak's title, position, salary, payroll record, length of service, date of separation, the amount and type of any pension received, and that Spivak resigned her employment with the County.

15. **CONFIDENTIALITY.**

The parties agree that this document constitutes a confidential personnel record under OPRA and/or the common law governing public records, and will not be publicly disclosed, except as consistent with law. However, the parties specifically acknowledge that the County will disclose this agreement to the New Jersey Public Employees' Retirement System if so required by N.J.S.A. 43:1-3.3. Spivak agrees that she will not, in another action or proceeding before any state, federal or local court or any governmental or administrative agency or during any arbitration or mediation, obtain discovery or offer evidence, unless required by law or court order (in which case she agrees to notify the County before doing so to provide for an opportunity to oppose such a request), relating to the terms or execution of this Agreement.

16. **APPROVALS.**

The parties acknowledge that this Agreement is subject to approval by the Commission and shall be provided to the Commission and/or the assigned Administrative Law Judge for approval. Any disapproval by the Commission shall not interfere with the rights of either party to pursue the matter further.

17. **Dana Spivak** agrees to and acknowledges the following:

(a) I agree and acknowledge that I was represented by and consulted with an attorney of my choosing throughout the negotiation and execution of this Agreement and Release. I further acknowledge and agree that I was given a reasonable and sufficient amount of time within which to consider the Agreement and Release before signing it.

(b) I agree and acknowledge that I have the right to reflect upon this Agreement and Release for a period of twenty-one (21) days before executing it, and I will have an additional period of seven (7) days after executing the Agreement and Release to revoke it under the terms of the Older Workers Benefit Protection Act by notifying in writing: *Steven W. Kleinman, Special Monmouth County Counsel, Hall of Records, 1 East Main Street, Freehold, NJ 07728.*

(c) I understand and acknowledge that if I sign this Agreement and Release, along with the waiver attached hereto, prior to the expiration of the twenty-one (21) day review period, I am voluntarily and knowingly waiving the twenty-one (21) day review period.

18. **ACKNOWLEGEMENT.**

By signing this Agreement and Release, Dana Spivak acknowledges:

i. I HAVE READ THIS AGREEMENT AND RELEASE COMPLETELY.

ii. I HAVE HAD AN OPPORTUNITY TO CONSIDER THE TERMS OF THIS AGREEMENT AND RELEASE.

iii. I ACKNOWLEDGE I HAVE BEEN ADVISED BY THE COUNTY TO CONSULT WITH AN ATTORNEY OF MY

CHOOSING PRIOR TO EXECUTING THIS AGREEMENT AND RELEASE TO EXPLAIN THE LEGAL CONSEQUENCES OF SIGNING THIS DOCUMENT AND REPRESENT THAT I HAVE IN FACT CONSULTED WITH AN ATTORNEY.

iv. I KNOW THAT I AM GIVING UP IMPORTANT LEGAL RIGHTS BY SIGNING THIS AGREEMENT AND RELEASE.

v. I UNDERSTAND AND MEAN EVERYTHING THAT I HAVE SAID IN THIS AGREEMENT AND RELEASE, AND I UNDERSTAND AND AGREE TO ALL ITS TERMS.

vi. I HAVE NOT RELIED UPON ANY REPRESENTATION, WRITTEN OR ORAL, NOT SET FORTH IN THIS AGREEMENT AND RELEASE.

vii. I HAVE SIGNED THIS AGREEMENT AND RELEASE VOLUNTARILY AND ENTIRELY OF MY OWN FREE WILL.

viii. I REPRESENT AND AGREE THAT I AM FULLY ABLE TO UNDERSTAND AND ENTER INTO THIS AGREEMENT IN ITS ENTIRETY. I UNDERSTAND IT AND KNOWINGLY AND VOLUNTARILY AGREE TO IT.

ix. I AGREE AND ACKNOWLEDGE THAT THIS AGREEMENT IS NOT THE RESULT OF ANY FRAUD, DURESS OR UNDUE INFLUENCE EXERCISED UPON ME BY THE COUNTY OR BY ANY THIRD PARTY.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Dana Spivak executed the foregoing Agreement this 8 day of November 2017.

Sworn and subscribed to before me this 8 day of November 2017

DANA SPIVAK

Notary Public of the State of New Jersey

KRISTEN MORRIS
Notary Public - State of New Jersey
My Commission Expires Oct 28, 2021

County of Monmouth

Date: 11/13/17

By: Stan Klein
Special County Counsel

Monmouth County Sheriff

Date: 11/13/17

By: Stan Klein
Special County Counsel
(By authorization of U/S Robert Dawson)

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 17(c) of this Agreement.

DANA SPIVAK

Date: 11/8/17

11-29-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 21, 2018

William Hannan, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Kimberly K. Holmes, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Nyreek Ali-Uthmar v. City of Newark* (CSC Docket No. 2017-3665 and OAL Docket No. CSV 10348-17) - **SETTLEMENT**

Dear Mr. Hannan and Ms. Holmes:

The appeal of Nyreek Ali-Uthmar, a Truck Driver with the City of Newark, Department of Public Works, of his removal, effective May 8, 2017, was before Administrative Law Judge Elissa Mizzone Testa (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 29, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 15, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 1, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, there is currently not a quorum of members available to vote. Based on this information, the parties were asked, as required, to consent to a second extension. However, neither party provided consent. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 2, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Elissa Mizzone Testa, ALJ (w/out attachment)
Kelly Glenn
Records Center

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 Merit System Board does not adopt, modify or reject this decision within forty-five (45) 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.

November 29, 2017

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: 11/29/17

Date Mailed to Parties:
sej

CL No. 17-00152

NYREEK ALI UTHMAR,

Appellant,

-v-

CITY OF NEWARK

Respondent,

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL DOCKET NO.: CSV 10348-2017
AGENCY REF. NO.: 2017-3665

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Agreement",) is made and entered into between CDL Truck Driver, Nyreek Ali-Uthmar ("Uthmar" or "Appellant"), The LOCAL 617 SEIU ("Union") and the City of Newark ("City" or "Respondent") (Uthmar, the Union and the City are collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against him by the City's Preliminary Notice of Disciplinary Action dated January 30, 2017 (PNDA) and Final Notice of Disciplinary Action dated May16, 2017 (FNDA).

In consideration of the promises contained herein, it is agreed as follows:

1. On or about January 20, 2017, CDL Truck Driver, Nyreek Ali-Uthmar, gave a urine specimen to an employee of Ironbound Medical Services as he was randomly selected under the Federal Regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles and state and local polices issued there under.

2. When the employee of Ironbound dropped a temperature strip into the specimen provided by Uthmar, it did not register a temperature. Accordingly, Uthmar was advised by the employee of Ironbound to remain at the facility to provide another specimen. Uthmar was also advised that if he left the facility that day, the prior urine specimen he

gave earlier that day would constitute a positive reading for the randomized drug test.

3. Despite those instructions, Uthmar left the facility and advised the employee of Ironbound that he had to go to another job.

4. On January 20, 2017, Uthmar went to another facility that was not authorized by the City for a second urine test. The results from that facility proved to be negative.

5. Prior to the January 20, 2017 incidents, Uthmar was terminated and reinstated to the City. At that time, Uthmar signed a Letter of Conditional Employment dated February 12, 2012.

6. Pursuant to the terms of that Conditional Employment Letter, paragraph 3 stated that Uthmar "[would] refrain from the use of un-prescribed drugs, alcohol, or any mood altering substance for the duration of [his] career with the City of Newark."

7. As a result of the conduct outlined in paragraphs one (6) through six (6) herein, a PNDA was issued and Uthmar was brought up on disciplinary charges for an immediate suspension prior to a hearing (*See attached PNDA*).

8. On March 23, 2017, a departmental hearing was held and a finding was made that there was sufficient cause for removal based upon the Federal Regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles and state and local polices issued there under.

9. Uthmar was removed from City employment on May 8, 2017. The FNDA was issued on May 15, 2017(*See attached FNDA*).

10. Uthmar appealed the decision on the FNDA to the Office of Administrative Law.

11. The parties have agreed to resolve all issues herein and referenced as follows:

a. The City agrees to Uthmar's request to resign in good standing from employment as a CDL Truck Driver effective May 8, 2017 (*See attached FNDA*).

b. Uthmar agrees that he is barred from future employment with the City in any capacity.

c. Uthmar further waives any and all rights and/or claims which he has and/or may have to: (1) A hearing on the merits of the disciplinary action taken under the PNDA, FDNA and/or this Agreement; (2) To challenge the PNDA, FNDA and/or this Agreement; (3) Initiate and/or partake in Grievance procedures; and/or (4) Initiate, pursue and/or partake any and all litigation against the City in State, Federal and/or Administrative Courts.

d. Uthmar and the Union each further agree that there is no consideration due Uthmar, his counsel (if applicable) and/or the Union, including, but not limited to, any claim for back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement.

e. Uthmar and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Public Employee Relations Commission, the New Jersey Civil Service Commission and/or to

any other New Jersey State Court or agency and/or to any United States Court or agency.

f. Uthmar and the Union further acknowledge that this Agreement further precludes either of them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or United States Federal Court, filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

g. The Parties are bound by this Agreement. Anyone and/or entity who succeeds to the Parties' rights and/or responsibilities, such as heirs, the executor/administrator of Uthmar's estate, and purchasers and/or assignees of Uthmar's, the City's and/or the Unions interests shall also be bound.

h. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees.

i. Uthmar and the Union further acknowledge and agree that this Agreement is based upon a unique set, combination and weighing of factors and shall not be used and/or construed as precedent and/or to in any way dictate, bind, limit and/or even guide the decisions that the City may make in future and/or currently pending disciplinary matters and/or labor negotiations.

j. Uthmar and the Union each agree this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.

k. This Agreement contains the sole and entire agreement between Uthmar, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Uthmar specifically represents and acknowledges in executing this Agreement that he has not relied upon any representation or statement by the City, or City's counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.

l. Uthmar agrees and acknowledges that he has been fully and fairly represented by his Attorney and the Union in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.

m. Uthmar agrees and acknowledges that he has had a full opportunity to review this Agreement with his Attorney and/or Union representative and he enters into same knowingly and voluntarily.

n. The Parties agree that upon inquiry from a third party regarding Uthmar's employment, that the City will confirm only his employment, position, salary and resignation.

o. The Parties agree that Uthmar's personnel records will be amended to conform to this Agreement.

p. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.

q. By signing **this Settlement Agreement, Uthmar states that:**

1. He has read it;
2. He understands it and knows that he is giving up important rights, and any and all other federal and state employment related causes of any kind, not including potential Worker's Compensation claims, but including but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1964, The Age Discrimination in Employment Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or any other State;
3. He agrees with everything contained in this Agreement;
4. His Attorney and Union representative negotiated this Agreement in his presence and with his knowledge and consent;
5. He consulted with his Attorney prior to executing this Agreement;
6. He has signed this Settlement Agreement knowingly and voluntarily.

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

10/23/17
Date

BY: Khalif Thomas, Director
Department of Public Works

10 23 17
Date

BY: Nyreek Ali-Uthmar

10/23/17
Date

William P. Hannan, Esq.
Attorney for Nyreek Ali-Uthmar

Approved as to Form and Legality:

10/23/17
Date

Kimberly K. Holmes, Esq.
Law Department, City of Newark

11-29-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Chair/Chief Executive Officer

December 6, 2018

Steven Pinto
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Danna Brown, Director
Department of Health
P.O. Box 360
Trenton, New Jersey 08625

Re: *Michael Lindeborn v. Ancora Psychiatric Hospital, Department of Health* (CSC Docket Nos. 2019-751 and 753 and OAL Docket Nos. CSV 15506-18 and 15508-18) – (Consolidated) - **SETTLEMENT**

Dear Mr. Pinto and Ms. Brown:

The appeals of Michael Lindeborn, a Senior Repairer at Ancora Psychiatric Hospital, of two removals, effective May 24, 2018 on charges, were before Acting Director and Chief Administrative Law Judge Lisa James-Beavers (ALJ), who issued her consolidated initial decision on November 29, 2018 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 1, 2018. Accordingly, the time frame for the Commission to make its final decision expires on January 15, 2019. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, as one of the three Commission members must be recused from participating on this matter, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that these appeals were settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition. Thus, the Commission has determined not to seek any extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 16, 2019.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15506-18

AGENCY DKT. NO. 2019-753

IN THE MATTER OF
MICHAEL LINDEBORN,
DEPARTMENT OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL.

IN THE MATTER OF
MICHAEL LINDEBORN,
DEPARTMENT OF HEALTH,
ANCORA PSYCHIATRIC HOSPITAL.

OAL DKT. NO. CSV 15508-18

AGENCY DKT. NO. 2019-751

Steven Pinto, Local 195 IFPTE, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Danna Brown, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)2

Record Closed: November 29, 2018 Decided: November 29, 2018

BEFORE **LISA JAMES-BEAVERS**, Acting Director and Chief ALJ:

These matters concern the appeal of Michael Lindeborn from the actions of the respondent/appointing authority. Upon receipt of the appellant's hearing requests, the matters were transmitted to the Office of Administrative Law for determination as

contested cases on October 25, 2018, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that these matters are no longer contested cases before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

November 29, 2018
DATE

LISA JAMES-BEAVERS
Acting Director and Chief ALJ

Date Received at Agency: 11-30-18

Date Mailed to Parties: 11-30-18

cmo

OAL DKT. NO. CSV #15508-2018S&#15506-2018S

AGENCY DKT. NO. #2019-1883 751 & 753

SETTLEMENT AGREEMENT

IN THE MATTER OF

Michael Lindeborn

AND

Department of Health / Ancora Psychiatric Hospital

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Action dated 8/20/2018 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
(1)	1. NJAC 4A:2-2.3(a)6	Removal	5/24/18
	2. NJAC 4A:2-2.3(a)2		
	3. NJAC 4A:2-2.3(a)12		
(2)	4. AO-C.9.1/E.1.2/C.19.1		
	5.		

B. The Appellant Michael Lindeborn withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. NJAC 4A:2-2.3(a)6	Dismissed	General Resignation
2. NJAC 4A:2-2.3(a)12	Sustained	(no reemployment w/ Dept. of Health)
NJAC 4A:2-2.3(a)2		
AO-C.9.1/E.1.2/C.19.1		

3. _____

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, Appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following:

1. To date, Appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the Appointing Authority to the Appellant is as follows: 0.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

✓ general resignation (No reemployment w/ Dept. of Health)

which shall be effective 5/24/18 [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Michael Lindhorn 's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with

Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A—the Civil Service Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Public Employees' Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers' compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

11/29/2018
DATE

Michael Lenderoth
Appellant

11/29/2018
DATE

Donna Brown (DW)
Respondent

11-29-2018
DATE

Stacy Pinto Zoo195
ON BEHALF OF

DATE

ON BEHALF OF

CERTIFICATION

I, Michael Lindeborn, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11/29/2018
DATE

Michael Lendeborn
NAME

11-20-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 2, 2018

Jeffrey S. Ziegelheim, Esq.
Alterman & Associates
8 South Maple Avenue
Marlton, New Jersey 08053

Theodore Baker, County Counsel
Cumberland County
164 West Broad Street
Bridgeton, New Jersey 08302

Re: *Rana Williams v. Cumberland County Department of Corrections* (CSC Docket No. 2016-2359 and OAL Docket No. CSR 871-16)

Dear Mr. Ziegelheim and Mr. Baker:

The appeal of Rana Williams, a County Correction Officer with Cumberland County, of her removal, on charges, was before Administrative Law Judge John S. Kennedy (ALJ), who rendered his initial decision on November 29, 2017, recommending dismissing the appeal. No exceptions were filed by the parties.

The time frame for the Commission to make its final decision was to initially expire on January 13, 2018. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that time the Commission secured one 15-day extension of time, and since if does not currently have a quorum, one additional 15-day extensions with the consent of the parties, as required, to render its final decision no later than February 12, 2018. *See N.J.A.C.* 1:1-18.8. However, the appointing authority did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 40A:14-204, effective February 13, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable John S. Kennedy, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. CSR 00871-16

IN THE MATTER OF RANA WILLIAMS, CUMBERLAND COUNTY DEPARTMENT OF CORRECTIONS.

Jeffrey S. Ziegelheim, Esq., for Rana Williams, appellant (Alterman & Associates, LLC, attorneys)

Theodore Baker, Esq., County Counsel for County of Cumberland, Department of Corrections, respondent

Record Closed: November 3, 2017 Decided: November 29, 2017

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals Cumberland County Department of Corrections' (County) Final Notice of Disciplinary Action (FDNA), dated January 5, 2016, terminating her employment for conduct unbecoming a public employee. She filed a timely appeal and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, and perfected on January 12, 2016. The matter was originally assigned to the Honorable William T.

Miller, ALJ and later reassigned to the undersigned upon Judge Miller's transition to Superior Court. On June 2, 2016, appellant filed a waiver of the 180-day rule to allow this matter to continue to a full hearing. On May 8, 2017, the parties appeared before this tribunal and placed a settlement on the record. Appellant was present and approved the terms of the settlement. The parties agreed to submit a fully executed settlement agreement for consideration and approval. No agreement was ever produced.

FACTUAL DISCUSSION

On September 11, 2017, notice was sent advising of a telephone conference scheduled for October 12, 2017 at 4:00 p.m. The purpose of the call was to determine the status of the signed agreement memorializing the settlement placed on the record on May 8, 2017. No one participated in the call for either appellant or respondent.

On October 23, 2017, counsel for respondent advised that the settlement agreement was forwarded to appellant but she did not return it and could not be reached. On October 31, 2017, counsel for appellant advised that since the settlement was placed on the record and appellant is neither available, non-responsive and/or refusing to cooperate, there would be no objection if the matter was dismissed.

Based on the foregoing, I **FIND** as **FACT** that appellant has not been in contact with her representative and has failed to return the signed copy of the Settlement Agreement.

LEGAL ANALYSIS AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-14.14(a), an Administrative Law Judge "may grant or deny a motion, suppress a claim or defense, or take other case-appropriate action against a party who unreasonably fails to comply with any order of an ALJ or with any requirements of the Uniform Administrative Procedure Rules." Navarro v. The B. Manischewitz Co., LLC, OAL No. 1884-99, 2001 WL 34604601, *2 (N.J. Adm. January 22, 2001) (citing N.J.A.C. 1:1-14.14(a)); see also Statlend v. Dept. of Community

Affairs, Sandy Recovery Division, OAL No. CAF 10794-14, 20114 WL 5834274 (N.J. Adm. October 10, 2014) (dismissing appeal where appellant failed to pursue appeal and contact number was "no longer in service").

Similarly, the Merit System Board has affirmed the dismissal of an appeal where the facts presented "a clear indication of [the] appellant's intent to abandon her appeal." See In the Matter of Rebecca Oliver, OAL No. CSV 9504-96, 1999 WL 33883392, *2 (N.J. Adm. January 12, 1999). There, the appellant failed to provide her new address to counsel and had not been in contact with her counsel for more than six months.

Appellant has not shown any interest in pursuing this matter since she agreed to the terms of the settlement on the record on May 8, 2017. The OAL regulations and case precedent demonstrate that an appeal will be dismissed with prejudice when an appellant shows no intention of pursuing his or her appeal. See Navarro and Statlend, supra. Here, appellant has not responded to his counsel's attempts to contact her, nor has appellant returned the Settlement Agreement memorializing the settlement placed on the record.

Like the claimant In the Matter of Rebecca Oliver, appellant has not been in contact with her counsel for over six months. Moreover, if appellant has moved over the last six months, she has failed to advise counsel or the Court of her new address. See also In the Matter of Rebecca Oliver, 1999 WL 33883392 at *2. Therefore, I **CONCLUDE** that appellant has abandoned her appeal and the appeal is **DISMISSED**.

Appellant's appeal would require a determination on the merits of the case without conducting a hearing. OAL regulations require a hearing be conducted and an initial decision be based exclusively on the testimony, documents and arguments accepted by the judge. See N.J.A.C. 1:18.1(a). Civil Service regulations authorize an award of back pay only where a disciplinary penalty has been reversed. See N.J.A.C. 4A:2-2.10(a). As a result of appellant's lack of involvement in this appeal, no hearing can be conducted and no record can be established upon which to rely in order to reverse appellant's removal from employment. As a result, I **CONCLUDE** that the

appellant has not established any facts whatsoever to permit this tribunal to reverse her removal from employment. Therefore, appellant's appeal is **DENIED**.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the appeal in this matter is **DISMISSED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

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

November 29, 2017
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: 11/29/17

Date Mailed to Parties: 11/29/17
JSK/jdw/lam

11-30-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Seth Gollin, Esq.
AFSCME New Jersey
1099 Wall Street West – Suite 396
Lyndhurst, New Jersey 07071

Heather W. Goldstein, Esq.
Buglione, Hutton & DeYof, LLC
P.O. Box 206
Wayne, New Jersey 07474

Re: *Linda Moore v. Paterson City Public Library* (CSC Docket No. 2016-1335 and OAL Docket No. CSV 857-17) - **SETTLEMENT**

Dear Mr. Gollin and Ms. Goldstein:

The appeal of Linda Moore, a Senior Library Assistant with the Paterson City Public Library, of her removal effective October 5, 2015, was before Administrative Law Judge Joan Bedrin Murray (ALJ), who returned the matter to the Civil Service Commission (Commission) on November 30, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 26, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 12, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 13, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Joan Bedrin Murray, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 00857-17
AGENCY DKT. NO. 2016-1335

IN THE MATTER OF LINDA MOORE,
PATERSON CITY PUBLIC LIBRARY.

Seth M. Gollin, Esq., for petitioner (Jacqueline McAnuff, President, AFSCME Local 2903)

Heather W. Goldstein, Esq. for respondent Buglione, Hutton and DeYof, LLC, attorney)

Record Closed: November 30, 2017 Decided: November 30, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law (OAL) on April 3, 2017, for determination as a contested case. On January 19, 2017, the parties reached an amicable resolution of the matter and submitted the attached Settlement Agreement indicating the terms thereof.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties and/or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

Joan Bedrin Murray

Nov. 30, 2017
DATE

JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: 12-11-17

Date Mailed to Parties: DEC 11 2017

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

kep

LINDA MOORE, Petitioner, v. PATERSON CITY PUBLIC LIBRARY Respondent.	BEFORE THE CIVIL SERVICE COMMISSION Agency Dkt No. CSV 00857-2017 SETTLEMENT AGREEMENT

WHEREAS, Linda Moore (hereinafter referred to as "Moore") filed an appeal of her termination of employment by the Paterson Free Public Library (hereinafter referred to as the "Library") with the New Jersey Civil Service Commission, which was assigned docket number CSV 00857-2017N; and

WHEREAS, Moore's appeal under docket no. CSV 00857-2017N was assigned to the New Jersey Office of Administrative Law for a hearing before the Honorable Joan Bedrin Murray, A.L.J.; and

NOW HEREFORE, the parties, on this date, November 29 2017, agree as follows in full and final settlement of the matter under docket no. CSV 00857-2017N:

1. Moore's termination from employment with the Library is hereby rescinded and her separation from employment with the Library shall be deemed a resignation in good standing.

2. The disciplinary charges appealed under docket no: CSV 00857-2017N are hereby dismissed with prejudice.
3. Moore hereby withdraws her appeal under docket no. CSV 00857-2017N with prejudice.
4. The Library shall submit to the New Jersey Civil Service Commission any and all information necessary for Moore's separation from employment with the Library to be recorded a resignation in good standing, with the cooperation of Moore.
5. The parties hereby waive any and all claims against each other in connection with Moore's separation from employment with the Library.
6. This is the entire understanding among the parties.

For: Paterson Free Public Library

Cindy Czesak
Date: 8/30/17

Linda Moore
Date: 11/29/17

Heather W. Goldstein, Esq.

Date: 8-31-17

Seth Gollin
Organizer/Field Representative
AFSCME NJ
Date: 11/29/17

new jersey
civil service commission

Leaves, Separations and Transfers Form

Transaction Codes: 04, 05, 06, 08, 10, 11

*EMPLOYEE ID	*JOB NO.	*EFFECTIVE DATE
000017222	1	10/05/15 mm/dd/yyyy

EMPLOYEE'S CURRENT INFORMATION:

*First Name	MI	*Last Name	Suffix
Linda		Moore	

*Jurisdiction Code	*Jurisdiction Name	*Jurisdiction Department
N16080500	Paterson	Library

*Title Code	*Title Name
03416	Senior Library Assistant

LEAVE / SEPARATION / TRANSFER ACTION

*Transaction Code	*Request Reason Code
06 - Resignation	025

Receiving Jurisdiction Code	Receiving Department

Start Date	End Date	Half Day Code

Extended Leave Y/N	With Pay Y/N	Aggregate No. of Leave Days	Resigned Perm. Status Y/N	Signature Sent Y/N

Comments

AUTHORIZING SIGNATURES:

Employee: Required for voluntary transfers.

* SIGNATURE OF EMPLOYEE: Linda Moore DATE: 11/29/17

The Appointing Authority takes responsibility for informing the employee and accepts responsibility for the accuracy of this request. Signature of Appointing Authority is required if submitted by US mail; courier or facsimile. Signature is not required if form is submitted electronically.

Appointing Authority: I certify that the action requested conforms to Civil Service Commission Rules and Regulations. This request has been made in accordance with local requirements.

SIGNATURE OF AA: [signature] DATE: 8/3/17 TITLE: Library Director

FOR APPOINTING AUTHORITY USE: X _____ X _____

SUBMIT FORM* TO: CAMPS Forms@CSC.state.nj.us or the NJ Civil Service Commission; CAMPS Forms, PO Box 354 Trenton, NJ, 08625-0354

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
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DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Paul W. Mackey, Esq.
406 Second Avenue
Toms River, New Jersey 07762

Scott Carbone, Esq.
City of Jersey City Law Department
280 Grove Street
Jersey City, New Jersey 07302

Re: *Amanda Vincent v. City of Jersey City, Department of Public Safety* (CSC Docket No. 2017-2812 and OAL Docket No. CSV 4240-17) - **SETTLEMENT**

Dear Mr. Mackey and Mr. Carbone:

The appeal of Amanda Vincent, a Public Safety Telecommunicator with the City of Jersey City, of her removal effective February 1, 2017, was before Administrative Law Judge Ellen S. Bass (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 4, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 22, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 8, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 9, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Ellen S. Bass, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 04240-17

AGENCY DKT. NO. 2017-2812

IN THE MATTER OF AMANDA VINCENT, CITY OF JERSEY CITY, DEPARTMENT OF PUBLIC SAFETY.

Paul W. Mackey, Esq. for petitioner, Amanda Vincent

SCOTT CARBONE, Esq., for respondent, City of Jersey City, Law Department

Record Closed: December 1, 2017 Decided: December 4, 2017

BEFORE **ELLEN S. BASS,** ALJ:

The Civil Service Commission transmitted this matter to the Office of Administrative Law on March 28, 2017 for determination as a contested case.

The parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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**, who 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.

December 4, 2017
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-6-17

Date Mailed to Parties: DEC 6 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release ("Settlement Agreement" or "Agreement") is by and between: (1) Amanda Vincent ("Vincent"); and (2) City of Jersey ("Jersey City"). Vincent and Jersey City will sometimes collectively be referred to herein as "the Parties."

WHEREAS, Vincent was served with Preliminary Notice of Discipline ("PNDA") seeking her termination by Jersey City on August 1, 2016; and

WHEREAS, a disciplinary hearing was held on December 29, 2016 after which the hearing officer issued a written decision ("Hearing Officer's Decision") on January 24, 2017 sustaining the charges in the PNDA and imposing a penalty of termination; and

WHEREAS, on February 17, 2017, Jersey City issued a Final Notice of Disciplinary Action ("FNDA") terminating Vincent's employment;

WHEREAS, Vincent filed an Appeal ("Appeal") of her termination with the New Jersey Civil Service Commission, Agency Ref. No.: 2017-2812, which was transmitted to the New Jersey Office of Administrative Law for a hearing as a contested case bearing OAL Docket No.: CSV-04240-2017N; and

WHEREAS, the PNDA, the Hearing Officer's Decision, the FNDA and the Appeal are incorporated herein by reference; and

WHEREAS, Jersey City disputes the merits of the Appeal, and further denies that Jersey City, or any of its subsidiaries, affiliates, divisions, agents, servants, officers, directors, employees, insurers, or successors are liable for any allegations made by Vincent; and

WHEREAS, the Parties now mutually desire to resolve all of their disputes.

NOW THEREFORE, in consideration of the foregoing, and of the promises and mutual covenants herein contained, the Parties agree as follows:

1. CONSIDERATION TO VINCENT

In consideration for Vincent's agreement to all of the terms, conditions and promises in this Agreement, Jersey City shall issue a check payable to "Amanda Vincent" in the amount of $5,000 (no tax deductions or withholdings) in full and complete satisfaction of all of Vincent's claims, including any claims for attorneys' fees, costs, and other legal expenses, and this payment shall be reported as

income on IRS Form 1099 ("Settlement Payment"). The Parties agree that the Settlement Payment constitutes damages for Vincent's emotional distress, including any physical manifestations and medical expenses related thereto. The Parties further agree that no part of any Settlement Payment constitutes: (a) a fine or penalty under any law; or (b) a payment to settle any actual or potential liability for a fine or penalty under any law.

Separate and apart from the Settlement Payment, the Parties agree that Vincent shall be compensated by Jersey City for a retroactive union wage increase under Article 30(F) of the Collective Negotiations Agreement between Jersey City and Local 246 as amended by the Memorandum of Agreement dated February 2, 2017 ("Article 30 Payment"). The Article 30 Payment shall be based on Vincent's actual hours worked from January 1, 2015 through the date of her resignation as set forth below. The Article 30 Payment shall be considered wages and will be subject to all applicable taxes and withholdings. Jersey City shall issue the appropriate W-2 form to Vincent for the Article 30 Payment.

Within 60 days of the execution of this Settlement Agreement, and full performance of all obligations thereunder by Vincent, Jersey City shall deliver checks representing (a) the Settlement Payment and (b) the Article 30 Payment to Vincent's attorney at the following address: Paul W. Mackey, Esq., 406 Second Avenue, Spring Lake, NJ 07762.

2. TAX LIABILITY

Vincent agrees that she shall be liable for the payment of all federal, state and local taxes which may be due as the result of the consideration received in the Settlement Payment described above, and that such Settlement Payment is made for the settlement of disputed claims as set forth herein. Vincent represents that she shall pay such taxes at the time and in the amount required by law. In addition, Vincent agrees fully to defend, indemnify and hold Jersey City harmless from any liability for payment of taxes, penalties, withholding obligations and interest that are required of her by any government agency due to the Settlement Payment.

3. WITHDRAWAL OF APPEAL

Vincent agrees that upon execution of this Agreement, she shall withdraw, with prejudice, the Appeal, and further agrees to take all steps to facilitate the withdrawal with prejudice of the Appeal, if necessary. Vincent represents that, other than the Appeal, she is not a party in any pending administrative charge, lawsuit, civil action, collective action, class action, or claim

of any kind against Jersey City, including Jersey City or any of its subsidiaries, affiliates, divisions, agents, servants, officers, directors, employees, insurers, benefit plan, fiduciaries or successors.

4. SUFFICIENCY OF CONSIDERATION

Vincent recognizes that Jersey City disputes the allegations in the Appeal and that the consideration provided in this Agreement accordingly confers upon her a benefit to which she is otherwise not entitled. Therefore, Vincent acknowledges and agrees that the consideration provided by Jersey City to her pursuant to this Agreement constitutes good and valuable consideration for the general release and the other promises and terms in this Agreement. Vincent understands and agrees that she is not eligible for or entitled to any other benefit or consideration from Jersey City, except as provided in this Agreement.

5. GENERAL RELEASE

In exchange for the consideration set forth above in Paragraph 1, Vincent agrees, intending to be legally bound, to the maximum extent permitted by law, to release and forever discharge Jersey City, including its subsidiaries, affiliates, divisions, agents, servants, officers, directors, employees, insurers, benefit plan fiduciaries, or successors (collectively, the "Released Parties") individually and collectively, from any and all claims, causes of action, complaints, lawsuits or liabilities of any kind (collectively "Claims"), which Vincent, her heirs, agents, attorneys, administrators or executors may have against the Jersey City or any of the other Released Parties.

A. RELEASED CLAIMS - By agreeing to this General Release, Vincent is waiving, to the maximum extent permitted by law, any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys' fees against the Released Parties, whether known or unknown, which Vincent ever had, now has or which Vincent or Vincent's heirs, executors, administrators, successors or assigns may have prior to the date this Agreement is signed by Vincent, due to any matter whatsoever relating to Vincent's employment, compensation and/or benefits of Vincent's employment with Jersey City (collectively, the "Released Claims") including but not limited to the following:

- any Claims relating to or arising out of Vincent's employment with Jersey City and/or any of its departments, agencies and/or affiliated entities;
- any Claims for unpaid or withheld wages, severance, benefits, bonuses, commissions and/or other compensation of any kind;
- any Claims for reimbursement of expenses of any kind;
- any Claims for attorneys' fees, costs or expenses;
- any Claims of discrimination and/or harassment and/or retaliation based on age, sex, race, religion, color, creed, disability, handicap, citizenship, national origin, ancestry, sexual orientation, or any other factor protected by Federal, State or Local law (such as the Age Discrimination in Employment Act, 29 U.S.C. §621 et. seq. (ADEA), Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Equal Pay Act and the New Jersey Law Against Discrimination) and any Claims for retaliation under any of the foregoing laws;
- any Claims regarding leaves of absence under federal, state or local law including any Claims under the Family and Medical Leave Act (FMLA) and the New Jersey Family Leave Act (FLA);
- any Claims under the National Labor Relations Act;
- any Claims under the Sarbanes-Oxley Act;
- any Claims for violation of public policy;
- any Claims for retaliation and/or any whistleblower Claims (including any Claims under the New Jersey Conscientious Employee Protection Act);
- any Claims for emotional distress or pain and suffering;
- any other statutory or common law Claims, now existing or hereinafter recognized, known or unknown, asserted or unasserted, including, but not limited to, breach of contract, libel, slander, fraud, wrongful discharge, promissory estoppel, equitable estoppel and misrepresentation; and/or
- any Claims for unemployment compensation benefits or disability benefits under New Jersey law

B. NON-RELEASED CLAIMS - It is important that Vincent understand that this General Release includes all Claims known or unknown to her, including those that she may have asserted or raised previously as well as those that

she has not raised or asserted previously. The General Release above does not apply to:

- Any Claims for vested benefits under any City retirement and/or 401(k) plan;
- Any Claims to require Jersey City to honor its commitments set forth in this Agreement;
- Any Claims to interpret or to determine the scope, meaning or effect of this Agreement;
- Any Claims relating to any conduct, matter, event or omission occurring after she signed this Agreement;
- Any past, pending or future claims for Worker's Compensation benefits and awards; and/or
- Any claim which cannot be waived as a matter of law.

6. RESIGNATION; TEMPORARY REINSTATEMENT; PROMISE NOT TO REAPPLY; DISPOSITION OF DISCIPLINARY ACTION

Contemporaneous with the execution of the Settlement Agreement, Vincent agrees to submit a retroactive and irrevocable letter of resignation to Jersey City dated and effective February 17, 2017 and, further agrees not to apply for employment with Jersey City at any time in the future. Upon receipt of Vincent's irrevocable letter of resignation, Jersey City shall reinstate Vincent's employment through February 16, 2017 and shall amend any applicable records to indicate that Vincent's separation from Jersey City, effective February 17, 2017, was a Resignation in Good Standing under New Jersey Civil Service Commission Regulations. The Parties acknowledge that Vincent shall not be entitled to any pay or other compensation for February 16, 2017 or February 17, 2017. Upon Vincent's full and complete performance of all her obligations under this Settlement Agreement, the PNDA, the Hearing Officer's Decision and the FNDA shall be considered null and void.

7. COVENANT NOT TO SUE

Vincent agrees not to file or initiate a lawsuit in any court, initiate any grievance or arbitration proceeding, or opt into any collective action or class action, asserting any of the Released Claims against any of the Released Parties. Vincent further agrees that she will not permit himself to be a member of any class in any court or in any arbitration proceeding seeking relief against the Released Parties based on claims released by this Agreement, and that even if a court, arbitrator, or government agency rules

that she may not waive a claim released by this Agreement, she will not accept or be entitled to any money damages or other relief in connection with any other action or proceeding asserting any of the Released Claims against any of the Released Parties. Nothing herein is intended to or shall interfere with Vincent's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing federal or state discrimination laws and/or cooperating with said agency in its investigation. Vincent, however, shall not be entitled to receive any relief, recovery or monies in connection with any complaint or charge brought against any of the Released Parties, without regard as to who brought any such complaint or charge.

8. NO FAIR LABOR STANDARDS ACT CLAIM

Vincent represents that she is not aware of any facts that would support a claim against any of the Released Parties for unpaid overtime or any other alleged violation of the Fair Labor Standards Act or comparable state or local law.

9. NON-DISPARAGEMENT

Vincent agrees that she will not make any negative comments or disparaging remarks, in writing, orally or electronically, about Jersey City, including any other Released Party. However, nothing in this Agreement shall be interpreted to restrict her right and obligation: (a) to testify truthfully in any forum; (b) to cooperate fully and provide information as requested in any investigation by a governmental agency or commission or as required by law; or (c) to exercise her First Amendment rights to participate in public discourse about public issues unrelated to her employment with Jersey City.

10. NO ADMISSION OF WRONGDOING

The Parties acknowledge that this Agreement does not constitute an admission by Jersey City or any of the Released Parties of any of the matters alleged in the Appeal or of any violation by them of any federal, state or local law, ordinance or regulation, or of any violation of any policy or procedure, or of any liability or wrongdoing whatsoever. Neither this Agreement nor anything in this Agreement shall be construed to be or shall be admissible in any proceeding as evidence of liability or wrongdoing by Jersey City or the Released Parties. This Agreement may be introduced, however, in any proceeding to enforce this Agreement.

11. GOVERNING LAW

This Agreement shall be governed by and conformed in accordance with the laws of the State of New Jersey without regard to its conflict of law jurisprudence.

12. COUNTERPARTS

This Agreement may be executed, by the Parties or their attorneys, in counterparts and each counterpart will be deemed an original.

13. UNDERSTANDING OF AGREEMENT BY VINCENT

Vincent agrees and represents that:

- she has read carefully the terms of this Agreement, including the General Release;
- she has had an opportunity to and has been encouraged to review this Agreement, including the General Release, with an attorney;
- she understands the meaning and effect of the terms of this Agreement, including the General Release;
- her decision to sign this Agreement, including the General Release, is of his own free and voluntary act without compulsion of any kind;
- No promise or inducement not expressed herein has been made to her; and
- she has adequate information to make a knowing and voluntary waiver.

14. SEVERABILITY

Should any term or provision of this Agreement be declared illegal, invalid or unenforceable by any court of competent jurisdiction and if such provision cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.

15. ENTIRE AGREEMENT

This Agreement sets forth the entire agreement between the Parties hereto and fully supersedes any and all prior and/or supplemental understandings, whether written or oral, between the Parties concerning the subject matter of this Agreement. Vincent acknowledges that she has not relied on any representations, promises or agreements of any kind made to her in connection with the decision to accept the terms of this Agreement, except for the representations, promises and agreements herein. Any modification to this Agreement must be in writing and signed by Vincent and Jersey City's Corporation Counsel.

IN WITNESS WHEREOF, the Parties knowingly and voluntarily executed this Settlement Agreement and General Release as of the date set forth below.

FOR VINCENT:

Amanda Vincent

Amanda Vincent

Dated: 11/4/17

WITNESS:

Amanda Vincent

Print Name:

Dated:

FOR JERSEY CITY:

Scott W. Carbone,
Assistant Corporation Counsel

Dated: 11/27/17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 23, 2018

Arnold Shep Cohen, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Georgina Pallitto, Esq.
Hudson County
567 Pavonia Avenue
Jersey City, New Jersey 07306

Re: *Tiffany Dabney v. Hudson County, Department of Health and Human Services, Meadowview Psychiatric Hospital* (CSC Docket No. 2017-283 and OAL Docket No. CSV 11827-16)

Dear Mr. Cohen and Ms. Pallitto:

The appeal of Tiffany Dabney, a Keyboarding Clerk 1 with Hudson County, Department of Health and Human Services, Meadowview Psychiatric Hospital, of her removal effective June 13, 2016 on charges, was before Administrative Law Judge Joan Bedrin Murray (ALJ), who rendered her initial decision on December 6, 2017, recommending modifying the removal to a seven working day suspension. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on January 23, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time, the Commission secured one 45-day extension of time and requested consent of the parties, as required, for an additional 45-day extension to render its final decision no later than April 22, 2018. *See N.J.A.C.* 1:1-18.8. However, the appellant did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 9, 2018.

Since the appellant's removal has been modified, she is entitled to be reinstated with back pay, benefits and seniority for the period seven working days after the onset of her separation until she is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve

any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any pending back pay dispute. Proof of income earned and an affidavit of mitigation should be submitted to the appointing authority within 30 days of said reinstatement. Additionally, pursuant to *N.J.A.C.* 4A:2-2.12, as charges have been upheld and major discipline imposed, the appellant is not entitled to counsel fees.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Joan Bedrin Murray, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11827-16
AGENCY DKT. NO. 2017-283

IN THE MATTER OF TIFFANY DABNEY,
HUDSON COUNTY, HEALTH & HUMAN SERVICES
MEADOWVIEW PSYCHIATRIC HOSPITAL.

Arnold Shep Cohen, Esq., for appellant Tiffany Dabney (Oxfeld Cohen, P.C., attorneys)

Georgina Giordano Pallitto, Assistant County Counsel (Donato J. Battista, Hudson County Counsel)

Record Closed: June 6, 2017 Decided: December 6, 2017

BEFORE **JOAN BEDRIN MURRAY**, ALJ:

STATEMENT OF THE CASE

Respondent Hudson County (respondent or the County), removed appellant Tiffany Dabney (appellant or Dabney), from her employment as a Clerk Typist in the Department of Health and Human Services at Meadowview Psychiatric Hospital (Meadowview), effective June 13, 2016. The basis for the removal is two-fold, to wit: appellant was absent from work for five consecutive days due to her arrest and incarceration in a non-work-related matter. Respondent asserts that her failure to "call

out" each day prior to the start of her shift constitutes conduct unbecoming a public employee. Also, appellant was late on four occasions and absent five days during a certain five-week period of time beginning September 2014. Appellant does not dispute this record, but contends that it does not merit termination. In addition, appellant contends that her failure to report her absence from work during the week she was incarcerated does not constitute unbecoming conduct.

At issue is whether appellant's conduct warrants termination from her employment.

PROCEDURAL HISTORY

On May 16, 2016, the County issued a Preliminary Notice of Disciplinary Action (PNDA) informing appellant of the charges of conduct unbecoming a public employee, neglect of duty, insubordination, failure to perform duties, resignation not in good standing, and other sufficient cause against her. N.J.A.C. 4A:2- 2.3(a)(2), (8), (12).

After a departmental hearing, the County issued a Final Notice of Disciplinary Action (FNDA) dated June 30, 2016, sustaining the charges of conduct unbecoming a public employee relative to appellant's arrest in a non-work-related matter, and chronic and excessive absenteeism and lateness. The FNDA provided for appellant's removal effective June 13, 2016. Appellant requested a hearing, and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on August 5, 2016, for hearing and determination as a contested matter. A pre-hearing telephone conference was held on September 21, 2016. The initial hearing date of January 25, 2017, was adjourned at the request of respondent with the consent of appellant. The matter was heard on April 25, 2017. The record remained open to permit the parties to file post-hearing memoranda, and closed on June 6, 2017, upon receipt of the last submission.

THE CHARGES

At the hearing, the parties stipulated to the following:

1. Evidence of appellant's absenteeism before July 21, 2014, would not be considered as part of the absenteeism charges.

2. Evidence of appellant's lateness before July 18, 2014, would not be considered as part of the lateness charges.

Respondent tailored the charges at the hearing accordingly. In short, the specifications attached to the May 16, 2016, PNDA [1] were limited to only those charges contained in Paragraphs 3(a), 3(b), 3(c) and 4(a) as follows:

3. Chronic and Excessive Absenteeism and Lateness:

Employee has a pattern of calling out and taking unplanned ½-days off, in general, and there is a pattern of this occurring on Mondays and Fridays. Further, this was an ongoing problem that was addressed in previous discipline, but the performance never improved.

a. Absenteeism: [Appellant] was absent on Wednesday 9/17/14, Thursday 9/18/14, Friday 9/19/14, and Monday 9/22/14.

b. Absenteeism: On 10/16/14 [appellant] informed the Hospital Administrator at the time that she had a family emergency. She was advised to take a half a personal day and she replied that she would be in early the next day. Because she had no benefit time remaining, she was absent that afternoon and was out the next day as well, 10/17/16. (See attachments.)

c. Chronic Lateness: The employee continued to show up late for work: 9/23/14, 9/24/14, 10/21/14, 10/22/14, 1023/14, and 10/24/14.

4. Conduct Unbecoming a Public Employee:

a. The employee was arrested for child endangerment charges and subsequently for failing to attend a court appearance.

[1]The FNDA does not contain the specifications for the sustained charges; these are found in the attachment to the PNDA. (R-1.)

> As a result of her arrest the hospital and County learned of the extent of the charges, which had not been shared previously. These behaviors are deemed unbecoming a public employee and especially given the vulnerable population the Hospital serves.
>
> (R-1.)

In addition, respondent clarified that the conduct unbecoming charge, Paragraph 4(a) above, was limited to appellant's failure to notify the County of her absence during her incarceration from October 27, 2014 to October 31, 2014.

FACTUAL DISCUSSION AND FINDINGS

The facts in this matter are undisputed; as such, I **FIND** them to be the **FACTS** of this case. Marissa Feldman (Feldman), Quality Assurance Director for Meadowview and the sole witness at the hearing, was appellant's supervisor for approximately one year. Appellant's job was to take meeting minutes, file them, and maintain certain binders in an organized manner. The binders needed to be prepared in the event of a state or federal review of the hospital. Without appropriate documentation, Meadowview could risk losing funding or licensing. She testified that appellant had one-half of a vacation day remaining at the time of the first absence on September 17, 2014. As mentioned above, appellant does not dispute that she was absent on Wednesday, September 17, 2014, Thursday, September 18, 2014, Friday, September 19, 2014, and Monday, September 22, 2014. Nor is there a dispute as to appellant's absence on Friday, October 17, 2014, the fifth absence in this matter. (See Exhibit R-2, Attendance Record.) While there was no testimony as to the reasons for the earlier absences, Feldman stated that appellant notified her the day before that she had a family emergency. Appellant was advised to take a half-day and leave early. She was expected to return to work on October 17, 2014, but did not report in. Ibid. Feldman noted that appellant had a number of absences on Mondays and Fridays, and that she counseled her about this issue.

Regarding the issue of lateness, appellant's work hours were from 8:00 a.m. to 4:00 p.m., Monday through Friday. Feldman referred to respondent's Bi-Weekly

Attendance Sheet as evidence of appellant's late arrival and early departure on four consecutive days, as follows:[2]

	Time In	Time Out
Tuesday, October 21, 2014	8:21 a.m.	3:58 p.m.
Wednesday, October 22, 2014	8:15 a.m.	3:58 p.m.
Thursday, October 23, 2014	8:31 a.m.	3:52 p.m.
Friday, October 24, 2014	8:15 a.m.	3:54 p.m.

(R-3.)

The conduct unbecoming charge stems from appellant's arrest on a warrant on October 27, 2014, for failing to attend a court appearance. Feldman testified that she does not recall seeing appellant on that day; however, appellant advised her that the arrest was effectuated that morning at the Meadowview security desk. Feldman stated that according to County policy, an employee must call out approximately one hour before the start of her shift, and that appellant failed to call out or otherwise notify the County of her incarceration until she was released. Feldman did not offer a written policy regarding absences, nor did she aver that one existed. She stated that she tried to find out what happened to her, calling County Investigator Steve Krywinski for assistance. Krywinski advised Feldman on October 28, 2014, that appellant was incarcerated. Regardless, Feldman marked appellant "no call, no show" for Monday, October 27, 2014, and Tuesday, October 28, 2014. When asked how she would handle a situation in which an employee is hospitalized and unable to contact the County, Feldman testified that she would permit the employee to submit a medical note upon returning to work, with no attendant disciplinary action.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20;

[2] Although the early departures were noted by Feldman, the sustained charges as amended do not include allegations that appellant left work early. Further, as mentioned above, appellant does not dispute that she arrived to work after 8:00 a.m. on those four days.

N.J.A.C. 4A:2-2.2, -2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

Appellant has been charged with chronic and excessive absenteeism and lateness, and conduct unbecoming a public employee.

"Unbecoming conduct" is broadly defined as any conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

Here, appellant was arrested on a warrant for failing to appear at a scheduled court hearing. Initially, the specifications underpinning this particular charge pertained to the nature of the criminal charges against appellant, which were non-work related. However, respondent offered no evidence in this regard, instead modifying the basis for the charge of conduct unbecoming to appellant's failure to notify the County of her incarceration and absence. The arrest took place at Meadowview's security desk. It is unlikely that appellant had an opportunity to plan in advance for her incarceration, or

give notice of her pending absence to Meadowview. Moreover, Feldman was informed of appellant's incarceration by Hudson County Investigator Krywinski on the second day of her failure to appear at work. While she conceded that she would excuse a hospitalized employee from the obligation to call out, she did not extend the same accommodation to appellant, who was in custody for a number of days and less likely to have access to a telephone.

Based on the foregoing, I **CONCLUDE** that the County has not met its burden of proving by a preponderance of the credible evidence that appellant engaged in conduct unbecoming a public employee.

Turning to the remaining charge of chronic and excessive absenteeism and lateness, it is undisputed that appellant was absent for four consecutive days and on a fifth unrelated day. Also, she was late to work on four consecutive days. I **CONCLUDE** that her behavior constitutes excessive absenteeism and lateness. I note, however, that there is insufficient evidence to sustain the charge that appellant took half-days off, particularly on Fridays and Mondays.

The sole remaining issue concerns the penalty that should be imposed. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to reevaluate the proofs and penalty on appeal based on the charges presented. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.S.A. 4A:2-2.2, -2.4. Removal may be supported by habitual tardiness or other similar chronic conduct, even if such conduct takes place over a reasonably short period of time. West New York, supra, 38 N.J. at 522. Yet, "such conduct is particularly serious on the part of employees whose job is to protect the public safety and where the men serve precise shifts to afford continuous protection." Ibid. Here, while appellant's conduct took place over a short period of time and reasonably caused a disruption to the flow of the workplace, her dereliction of duty did not compromise the public safety.

Further, a system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions evaluated by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In the instant matter, appellant concedes that she was suspended on two prior occasions for a period of one day and three days. Yet, respondent offered no documentation of these suspensions; as a result, the nature and proximity of these disciplinary infractions are unknown. Our Supreme Court in Bock discussed the weight afforded to an employee's disciplinary history in determining an appropriate penalty, stating that fully presenting such a history at the hearing promotes fairness to both sides. Id. at 524.

Based on the foregoing, I **CONCLUDE** that removal of appellant from her position as Clerk Typist is not warranted. Although the nature and proximity of her two prior suspensions are unknown, I **CONCLUDE** that her absences and lateness, seemingly without explanation, are serious enough to merit a major discipline. While not charged with protecting the public safety or well-being, appellant's job was nonetheless important. Feldman credibly testified that the binders in appellant's care needed to remain in proper order to meet with state and federal review standards, and to ensure the continuing funding and licensure of Meadowview. Accordingly, I **CONCLUDE** that a seven-day suspension is warranted in this matter.

ORDER

It is **ORDERED** that the charge by the appointing authority of conduct unbecoming a public employee be and hereby is **DISMISSED**.

It is **ORDERED** that the charge by the appointing authority of chronic and excessive absenteeism and lateness be and hereby is **AFFIRMED**, and that a seven-day period of suspension issue with regard to said sustained charge.

It is also **ORDERED** that the penalty imposed by the appointing authority of removal of appellant from the position of Clerk Typist be and hereby is **REVERSED**.

It is also **ORDERED** that appellant, Tiffany Dabney, be reinstated and that back pay and other benefits be issued to her in accordance with 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.

Dec. 6, 2017
DATE

JOAN BEDRIN MURRAY, ALJ

Date Received at Agency: Dec. 6, 2017

Date Mailed to Parties: Dec. 6, 2017

kep

APPENDIX

WITNESSES

For Appellant:

None

For Respondent:

Marissa Feldman

EXHIBITS

For Appellant:

None.

For Respondent:

R-1 Preliminary Notice of Disciplinary Action (PNDA) dated May 16, 2016

R-2 Attendance Record for Appellant for 2014

R-3 County of Hudson Bi-Weekly Attendance Sheet from October 18, 2014 to October 31, 2014

D-1-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER-COBB
Acting Chair/Chief Executive Officer

February 27, 2018

George R. Szymanski, Esq.
1370 Chews Landing Road
Laurel Springs, New Jersey 08021

Christine P. O'Hearn, Esq.
Brown & Connery, LLP
390 Haddon Avenue
Westmont, New Jersey 08108

Re: *Kenyetta Williams v. Gloucester County, Department of Social Services* (CSC Docket No. 2014-2978; OAL Docket No. CSV 915-14)

Dear Mr. Szymanski and Ms. O'Hearn:

The appeal of Kenyetta Williams, a Human Services Specialist 2 with Gloucester County, Department of Social Services, of her removal effective December 2, 2013 on charges, was before Administrative Law Judge Elia A. Pelios (ALJ), who rendered his initial decision on December 7, 2017, recommending upholding the removal. No exceptions were filed on behalf of the parties.

The time frame for the Commission to make its final decision was to initially expire on January 22, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time the Commission secured a 45-day extension of time until March 8, 2018 to render its final decision. However, since the next scheduled meeting is March 21, 2018, it requested consent of the parties, as required, for an additional 45-day extension to render its final decision no later than April 22, 2018. *See N.J.A.C.* 1:1-18.8. However, the appointing authority did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 9, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Elia A. Pelios, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00915-14
AGENCY DKT. NO. 2014-2978

IN THE MATTER OF
KENYETTA L. WILLIAMS,
GLOUCESTER COUNTY,
DEPARTMENT OF SOCIAL SERVICES.

George R. Szymanski, Esq., for appellant (The Law Offices of George R. Szymanski, attorneys)

Christine P. O'Hearn, Esq.,[1] for respondent (Brown & Connery, LLP, attorneys)

Record Closed: June 9, 2016 Decided: December 7, 2017

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

Respondent, Gloucester County Department of Social Services (respondent, County), removed Human Service Specialist 2, Kenyetta L. Williams (appellant, Williams) for a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, respondent alleges that appellant refused to comply with a mandatory directive that she enroll in the

[1] Eric D. Milavsky, Esq., attorney of record for the hearing and on the brief.

county Employee Assistance Program "EAP" after respondent observed what it determined to be bizarre and aggressive behavior exhibited by appellant. Appellant believes the EAP referral was an act of harassment on the part of the respondent.

PROCEDURAL HISTORY

On December 3, 2013, appellant received a Final Notice of Disciplinary Action (31-B) removing the appellant. On December 26, 2013, appellant requested a hearing. On January 23, 2014, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL) where it was filed as a contested case.

Hearing dates were scheduled for and held on August 7, 2014 and July 27, 2015. The second hearing date was adjourned during cross examination of appellant due to a medical emergency. After a number of attempts to reschedule, a peremptory hearing date was scheduled for January 7, 2016.

On January 4, 2016, counsel for the appellant notified the undersigned of appellant's inability to attend the hearing due to her worsened emotional condition, and stated his intent to withdraw as counsel. On January 7, 2016, the undersigned issued an order adjourning the hearing for that date and allowing appellant to be heard on her attorney's request to withdraw and to state her plans for proceeding with the hearing. On February 2, 2016, appellant's mother submitted a letter objecting to her counsel's withdrawal after two hearing dates had been completed but also noting her daughter's inability to participate in the proceedings at the time.

On April 4, 2016, a conference call was held between the undersigned and counsel for both parties. It was determined that appellant was not going to be able to present herself for conclusion of her cross-examination. As she was the only remaining witness, it was determined that the parties would submit written closing arguments on the record as constituted at that time. Respondent's written summation was received June 3, 2016. No summation was received from appellant. On June 9, 2016, the record was deemed closed. Orders were entered in this matter to allow for the extension of time in which to file the initial decision.

FACTUAL DISCUSSION AND FINDINGS

The County called Deborah Cox (Cox) as its first witness. Deborah Cox (formerly Debra McCall) is a human service specialist for the Department of Social Services. She is in the adult Medicaid division and has been there for five years. She supervises eight caseworkers and specialists and one clerk. She noted that appellant often took hostile actions and would often become hostile when approached by her supervisor. Appellant did not want to complete tasks. Cox repeatedly asked her to empty her voicemail and she would not. When she did not check her voicemail she would not return calls.

Cox supervises human service specialists 2. She reviewed the job description for that position. She reviewed examples of their work and described their expected knowledge and abilities. She is familiar with the appellant in this matter, and was aware of performance problems that appellant experienced. Williams was disorganized and did not want to take advice. She would take a long time completing applications and could not keep up with the work.

Appellant would often sit at her desk and stare at the blank computer screen. She would also sit on the phone not talking to anyone. Cox believed this was to deter people from approaching her. Cox also described odd behavior by the appellant toward a male colleague who was getting married. Cox spoke to her supervisor, Edward Smith (Smith), who contacted human resources.

Cox also described two disciplinary matters involving the appellant, one in 2011 and the other in 2012. She reviewed a disciplinary memo (R-2). Appellant was accused of using abusive language outside the building and directing it toward a coworker. Williams pulled up in a vehicle with her mother outside, and verbally assaulted an employee for insulting her mother.

Cox also described another disciplinary memo (R-3). Appellant refused to discuss that matter with her supervisors and received a three day suspension.

Cox stated that most employees in the department came to tell her that they were afraid to work with the appellant, and afraid to walk to their cars at night. Some had difficulty sleeping because of the impact appellant had on the workplace. There are eleven employees in the division. Ms. Cox again notified Mr. Smith who notified human resources.

On cross-examination, Cox indicated that there were many instances involving emptying the voicemail. Cox stated that employees are required to retrieve their voicemail once a day. She indicated that appellant would often make rude comments to the unit clerk who would hand her working assignments. Cox personally observed this. Cox never listened in on appellant's phone calls, but it appeared that no one was on the other end. Cox considered it strange that appellant was so concerned that another employee was getting married. She stated that appellant believed she had a relationship with that employee.

The employee that was verbally assaulted outside was Loretta Driver (Driver). Carolyn Rapp (Rapp) was also involved. Loretta Driver did not insult appellant's mother. Appellant had identified and verbally assaulted the wrong employee. The second disciplinary matter involved an incident with Sally Heidi (Heidi). Appellant was on lunch break, Cox was not present. Cox only knows the incident because Heidi told her about it.

Cox never spoke to Smith about the appellant being referred to the employee assistance program. Smith referred the matter to human resources. Cox does not know who he spoke to in that department.

Edward Smith, the superintendent of the division of social services, also testified on behalf of respondent. He is familiar with the appellant as she worked for the division in 2011. He became aware of her problems. He described them as performance and behavioral problems. Smith tries to keep up with all employees in the division, but relies on twenty-two supervisors. Appellant's supervisor brought her problems to Smith's attention. Appellant was disciplined on two occasions; once for threatening a fellow employee and once for being insubordinate.

One day, appellant had a discussion with Cox after which appellant left sick for the remainder of the day, and called out sick the next day. Appellant told Smith that it was

because Cox and another employee had hacked her telephone and set up a website attacking her. She refused to provide the web address to Smith. She told Smith that he did not need the web address as she had already informed the FBI and complained to the EEOC. Smith called County Counsel for direction in the matter, and afterwards contacted human resources. Human resources took action.

Smith reviewed an email from Kathleen McMahon (A-4). He received the email before he called the County Counsel. He forwarded the email to human resources and a request for mandatory employee assistance program referral was made by human resources. He noted that he did not impose discipline—only the County can impose discipline. He can only recommend discipline. He said he made no recommendation regarding appellant.

On cross-examination, Smith acknowledged he was not witness to either of the incidents appellant was disciplined for. He never contacted law enforcement as he saw no need to. He noted that with regard to the first incident, appellant drove up to Ms. Driver and asked her "are you the piece of shit disrespecting my mother this morning." Driver said that she was not and left. Driver went straight to Smith's office to report the incident. Appellant was reprimanded for that matter.

Michelle Pandolfo (Pandolfo), special projects manager for Gloucester County human resources, also testified on behalf of the County. She is aware of the appellant and her problems. She became aware when a complaint came to her to address the EAP referral. Concerns have been raised about bizarre and abnormal behavior on behalf of appellant. The EEO officer was also involved. He came to human resources with specific examples and concerns about things that appellant said. Consideration of this, coupled with contact from Edward Smith and the email that had been provided, caused Pandolfo to make an Employee Assistance Program (EAP) referral.

EAP referrals are contracted out. Quantum Service is the provider to the County. A notice is sent to the employee who is asked to contact Quantum to set-up an appointment. The County directed a mandatory EAP referral. Appellant did contact Quantum and made an appointment. However, she canceled the appointment and did not make another. Follow-up was sent requiring that appellant comply with the EAP referral within five days. Again,

appellant did not comply. The County then took disciplinary action to terminate appellant for failing to comply with the EAP referral. The County was contacted by the union, and after speaking with the union president, issued a third chance to comply to appellant. They held the disciplinary matter in abeyance, and issued the third notice. Once again appellant did not comply. The County received a noncompliance letter from the vendor and sent a new hearing notice for the disciplinary matter. A hearing date was set and appellant did not show.

Pandolfo is aware that appellant did ask for a reasonable accommodation. She requested a specific supervisor, and to not have to answer phones. An accommodation that was made was to offer appellant a position as a human services specialist one, which required less telephone work. The County denied the request for specific supervisor. A request was also made for a specific unit. That unit had no vacancies and the request was denied. The committee that reviewed the reasonable accommodation requests was comprised of Pandolfo, the County administrator, and the County Counsel. The decision for the EAP referral was made by the County Counsel and human resources. The human resources department reports the County administrator. Pandolfo agrees with the decision. Milton Hanna, the EEO officer, also had concerns. Pandolfo noted that EAP procedures are addressed consistent with the provisions the collective bargaining agreement regarding fitness for duty requirements, and can be grieved. Appellant did not grieve the referral, she just did not comply.

Barbara J. Williams (B. Williams), the mother of appellant, testified on her behalf. She is seventy-years old, and lives in Glassboro, New Jersey. She noted that in September 2006 the appellant had a car accident before she started working. The accident resulted in permanent brain damage and cognitive disabilities. The injury did not prevent appellant from working.

B. Williams then described an incident occurring on December 22, 2011, with Carolyn Rapp. The witness was at the appellant's work. She went to use the restroom while appellant went to get files. Appellant was going to work off-site at the Kennedy Hospital. The witness was on the phone with the appellant, and a woman came out of the office yelling at the witness to get out. The woman who was yelling was Carolyn Rapp, who was Edward Smith's assistant. She was yelling at the witness and waving her arms. Still on the phone, the appellant told her mother not to do anything and just come outside. The witness did enter the building again later because she had to use the restroom again. A

woman came out and yelled again, and appellant told the woman that it was her mother. The woman remarked she thought the witness was a client. B. Williams stated that her daughter was bullied and harassed at work.

Appellant testified on her own behalf. She is forty-years old, and currently lives in Glassboro, New Jersey. She attended Rutgers University, and got her B.A. in 1997. At this time in her testimony it was noted that she was under stress. Appellant displayed a bit of a physical tick, and she appeared to be having physical difficulty answering questions.

In April 2011, appellant began working at the Gloucester Board of Social Services. An accident in September 2006 left her with a cognitive disability and neurological deficits. She began her employment as a human service specialist two. She was working with adult Medicaid taking applications. She enjoyed her job very much. She reviewed a note from her doctor (A-5). McCall's Supervisor was Sally Heidi, technically a coequal who had been there longer. The doctor's note was provided to human resources.

Appellant stated that she was bullied by coworkers in her unit and in the recovery unit. She believes that she was good at her job, and her first review was excellent. She also reviewed several statements from her clients that were praising her. (A-6 through A-9.) She noted that she received favorable evaluations at first (A-10).

She stated that her mother's story about being attacked while trying to use the restroom at appellant's office was accurate. She stated that Carolyn Rapp called to apologize about what happened to her mother the same day of that incident at about 3:00 p.m. The complaints were still made. Appellant stated that she previously worked with the Division of Youth and Family Services (DYFS) for about eighteen months. She had issues with a sheriff's officer who was the sister of the woman who hit her with the car in 2006. The sheriff's officer came to the appellant's desk with a coworker and tried to pull her gun on her. The sheriff's officer was subsequently fired.

Pursuant to union contract the workday ends at 4:00 p.m. Appellant would often stay late without pay due to her caseload. She noted that Sally Heidi had asked her about her disability, and told her that if she could not do the job that she should not work at that location.

One day during lunch break, Ms. Heidi came to her in a rage and said she needed to talk about a case. The case was already on her desk. Appellant responded that she did not appreciate being harassed. She stated that her immediate supervisor was married to Edward Smith.

Williams stated that as a result of her injuries and the car accident she had difficulty multitasking, speaking on the telephone, and performing case management at the same time. She stated that she was threatened to be demoted to human services specialist one. She stated that a coworker called her retarded. People would give her the finger in the hallway. Although she was suffering prejudice, she did not believe it was racial prejudice. She believes that it was religious prejudice noting that she is a Seventh-Day Adventist. Williams noted that overtime was only made available on Saturdays, and that the office was refusing to give her a religious accommodation and she could not work on her Sabbath. On August 13, 2013, there was an incident with her keyboard. It was on a Tuesday as she had been out Monday. She came in and her station was a mess from a state auditor visit the day before. She noted there was something that appeared to be like peanut butter on the keyboard. She wiped the keyboard clean, but noticed that her hand was shaking and so her mother brought her vitamins. She went to get the vitamins from the car and someone was taking pictures of her and was repeatedly threatening to have her fired.

The appellant noted that she was out eight days for a heart issue. She believes that whatever was on the keyboard had given her a reaction. She stated she was sprayed on September 2013 by Deborah Cox. It was tetra hydroxyzine which burned her for five days. She notified the FBI.

She was referred to the EAP. It was recommended that she see a psychologist. The appellant refused to go. She noted that Deborah Cox and Deb McCall were trying to kibosh any transfer to a different department. Appellant stated that she refused a psychological appointment because she believes it was part of the harassment that was directed toward her.

Appellant took the stand for the purpose of cross-examination. After an initial question from the attorney for the County, she responded that for the record that she was a judge and that Mr. Milavsky was not an attorney. She then stated that she is a Supreme

Court justice. She then refused to respond to subsequent questions, stated again that she is a Supreme Court judge, and noted that this current case matter had a Hague docket reference number.

A break was taken at that time so that counsel could speak with his client and affirm the importance of answering the questions of on cross-examination. After the break, the witness was back on the stand. Once the questioning began from the County Counsel the witness began to develop a tick, almost seizure-like, and struggled to answer. This continued for several moments. From the hearing room, 911 was called. Emergency responders arrived, appellant was taken away by ambulance, and the proceedings were adjourned for the day. As discussed in the procedural history, attempts to reschedule and continue appellant's testimony were unsuccessful.

Considering the documentary and testimonial evidence, I **FIND** that on a number of occasions respondent observed or became aware of bizarre and aggressive behavior exhibited by appellant. I further **FIND** that in response to this behavior, and after several attempts to address the matter through progressive discipline, respondent referred appellant to the County's EAP. I further **FIND** that appellant never complied with the EAP and never presented herself for the scheduled appointments.

As to appellant's claims that the referral was merely an act of harassment by the respondent, it is noted that appellant's inability to complete her testimony, specifically to not engage in any substantive testimony on cross examination, constrains this tribunal to not give weight to her testimony. Although fundamental fairness and empathy for appellant's medical situation demanded that she be given opportunity to conclude, several attempts were made to no avail over the course of more than ten months.

Between appellant's mother's testimony, which in large measure was a relating of what she had heard from her daughter, and appellant's incomplete testimony, there is simply insufficient credible, competent evidence upon which to base a finding that the respondent's actions were a form of harassment. It is noted that even though not subject to cross-examination, and therefore not ascribed any weight, appellant's direct testimony did not appear to justify such a finding.

LEGAL ANALYSIS AND CONCLUSIONS

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. N.J.S.A. 11A:-2.21; N.J.A.C. 4A:2-1.4(a). The authority must show 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). 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; Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In the present matter, respondent has charged appellant with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause). Specifically, respondent alleges that appellant refused to comply with a mandatory directive that she enroll in the County EAP after respondent observed what it determined to be bizarre and aggressive behavior exhibited by appellant. The record reflects that appellant did engage in bizarre and aggressive behavior, that the respondent did make a mandatory referral of appellant to the EAP, and that appellant did not comply with the referral. Further, the record reflects that even though such referrals are governed by the collective bargaining agreement, appellant did not grieve the referral. She merely did not comply with it and then challenged the removal for failure to comply. Accordingly, I **CONCLUDE** respondent has demonstrated, by a preponderance of credible evidence, that appellant's conduct constitutes with a violation of N.J.A.C. 4A:2-2.3(a)(12) (Other Sufficient Cause), and that such charge must be **SUSTAINED.**

PENALTY

The Civil Service Commission's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority.

General principles of progressive discipline apply. Town of W. New York v. Bock, 38 N.J. 500, 523 (1962). Typically, the Board considers numerous factors, including the nature

of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463.

"Although we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, 38 N.J. 500, 523 (1962), that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990).

Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

Some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197-98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also, In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980).

The Commission has authority to increase the penalty beyond that established by the appointing authority's Final Notice of Disciplinary Action, but not to removal from suspension. N.J.S.A. 11A:2-19. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, but removal shall not be substituted for a

lesser penalty. See, Sabia v. City of Elizabeth, 132 N.J. Super. 6, 15-16 (App. Div. 1974), certif. denied, Elizabeth v. Sabia, 67 N.J. 97 (1975).

In the present matter, the record reflects that respondent issued appellant a mandatory referral to the EAP. When appellant repeatedly failed to comply with the referral, respondent removed appellant from employment. The record further reflects that the referral was based upon observations and reports of erratic bizarre and aggressive behavior, and that respondent made several attempts to address these behaviors through corrective action and progressive discipline, to no avail. Respondent's actions were motivated by concern for the health and safety of appellant and her coworkers and, as candidly stated in summation, potential liability, and were not arbitrarily pursued. As appellant's repeated refusal to comply leaves the respondent without the benefit of information to address their concerns, I **CONCLUDE** that the penalty of removal was appropriate, and should be **SUSTAINED.**

DECISION AND ORDER

The appointing authority has proven by a preponderance of credible evidence the charges against Williams with a violation of N.J.A.C. 4A:2-2.3(a)(12) other sufficient cause, specifically, failure to comply with referrals to the EAP. I **ORDER** that these charges be and are hereby **SUSTAINED.** Furthermore, I **ORDER** that the penalty of removal is hereby **AFFIRMED.**

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.

December 7, 2017
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: December 8, 2017

Date Mailed to Parties: December 8, 2017
nd

APPENDIX

WITNESSES

For Appellant:

Kenyetta L. Williams (Direct Only)

Barbara J. Williams

For Respondent:

Deborah Cox

Edward Smith

Michelle Pandolfo

EXHIBITS

For Appellant:

A-1 Chronological Record of Customer Contact, by D. McCall, from November 2, 2012 through September 13, 2013

A-2 Not Submitted

A-3 Letter from Maureen Rita Jungkurth to Betty McCall, Gloucester County of Social Services, Regarding Complimenting Appellant's Work, dated December 24, 2011

A-4 Not Submitted

A-5 Letter from Joely P. Esposito, Psy.D., Licensed Psychologist (PA and NJ), Clinical Neuropsychology Associates, to Karen Robinson, Department of Human Resources, Gloucester County Division of Social Services, Regarding Appellant's Motor Vehicle Accident of September 22, 2006 and Her Closed-Head Injury and Subsequent Cognitive Difficulties, dated August 19, 2011 (duplicate letter attached)

A-6 Memo from Debbie McCall to Kennyetta [sic] Williams, Regarding Gloria Costa, Complimenting Appellant's Work, dated October 27, 2011

A-7 Handwritten letter from Edward and Anna Pierson to Gloucester County Division of Social Services, Complimenting Appellant's Work, dated January 26, 2012

A-8 Not Submitted

R-9 Copy of Thank you Card from Anna McPherson, Complimenting Appellant's Work, Received October 31, 2011

R-10 Gloucester County, Employee Performance Evaluation, Kennyetta [sic] Williams, dated June 1, 2011

R-11 Letter from Joely P. Esposito, Psy.D., Licensed Psychologist (PA and NJ), Clinical Neuropsychology Associates, To Whom It May Concern, Regarding Appellant's Consultation Concerning Her Current Symptoms and Advising of Appellant's Inability to Work, dated January 8, 2014

For Respondent:

R-1 New Jersey Civil Service Commission, Job Specification, Human Services Specialist 2

R-2 County of Gloucester, Human Resources Manual, Exhibit U-Disciplinary memorandum to Kennyetta [sic] Williams from Debbie McCall, Supervisor, Department Head, Human Resources Director, dated January 4, 2012; Memo Regarding Conduct Unbecoming from Chad M. Bruner, County Administrator, to Kenyetta Williams, Social Services, dated February 1, 2012

R-3 County of Gloucester, Human Resources Manual, 7.3 Exhibit U – Disciplinary memorandum, Chapter 7 Conduct and Performance Adopted: Section 3 Discipline Revised: Exhibit U Disciplinary Memorandum, dated November 21, 2012; Memo Regarding Insubordination, Conduct Unbecoming from Chad M. Bruner, County Administrator, to Kenyetta Williams, Social Services, dated December 24, 2012; Gloucester County Memo Regarding Step 2 Grievance #12-12-27 (K. Williams) Disciplinary Matter – Infraction Date 11.21.12, from Gerald A. White, Deputy County Administrator, to Jody Sandberg, Social Services, dated February 25, 2013; Memo Regarding Grievance 12-12-27 from Edward Smith to Kennyetta [sic], dated April 11, 2013

R-4 Email from Kathleen McMahon to Edward Smith, Regarding Unsafe Working Conditions, dated September 26, 2013

R-5 Gloucester County Letter from County of Gloucester, Human Resources, to Kenyetta Williams, Regarding Referral to EAP, Quantum Health Solutions, dated September 26, 2013

R-6 Email from Joann Schneider to Michelle Pandolfo Regarding KW, dated October 10, 2013

R-7 Gloucester County Letter from County of Gloucester, Human Resources, to Kenyetta Williams, Regarding Referral to EAP, Quantum Health Solutions, dated October 10, 2013

R-8 Preliminary Notice of Disciplinary Action (31-A), Civil Service Commission, dated October 16, 2013

R-9 Gloucester County Letter from County of Gloucester, Human Resources to Kenyetta Williams, Regarding Referral to EAP, Quantum Health Solutions, dated November 1, 2013

R-10 Letter from Iris Zacker, BA, Intake Coordinator, Quantum Health Solutions, to Ms. Joann Schneider, Human Resources Chief Clerk, Gloucester County, Regarding Kenyetta Williams/Non-Compliant, dated November 14, 2013

R-11 Preliminary Notice of Disciplinary Action (31-A), Civil Service Commission, dated October 16, 2013

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

William A. Nash, Esq.
Nash Law Firm, LLC
1001 Melrose Avenue, Suite A
Blackwood, New Jersey 08012

Jessica M. Saxon, DAG
Department of Law & Public Safety
P.O. Box 112
Trenton, New Jersey 08625

Re: *Quan Stewart v. Department of Human Services* (CSC Docket No. 2017-3256 and OAL Docket No. CSV 9994 -17) - **SETTLEMENT**

Dear Mr. Nash and DAG Saxon:

The appeal of Quan Stewart, a Human Services Technician with Trenton Psychiatric Hospital, Department of Human Services, of his removal effective December 8, 2016, was before Administrative Law Judge Tama B. Hughes (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 8, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 25, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 11, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 12, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Tama B. Hughes, ALJ (w/out attachment)
Kelly Glenn
Records Center

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.

December 8, 2017
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 12/11/17

Date Mailed to Parties: 12/11/17

/vj

LIST OF EXHIBITS

Jointly Submitted:

J-1 Settlement Agreement

OAL DKT. NO. CSV 09994-2017 S
AGENCY DKT. NO. CSC 2017-3256
SETTLEMENT AGREEMENT

J-1

IN THE MATTER OF
QUAN STEWART
AND
TRENTON PSYCHIATRIC HOSPITAL,
DEPARTMENT OF HUMAN SERVICES/
DEPARMENT OF HEALTH

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated March 23, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective

1. N.J.A.C. 4A:2-2.3(a)6 Conduct unbecoming a public employee (1 count) – Removal effective December 8, 2016.
2. N.J.A.C. 4A2-2.3(a)12 Other sufficient cause (4 counts) – Removal effective December 8, 2016.
3. NJ Department of Human Services Disciplinary Action, Administrative Order 4:08: C3-1: Physical or mental abuse of a patient, client, resident or employee;
4. NJ Department of Human Services Disciplinary Action, Administrative Order 4:08: C5-1: Inappropriate physical contact or mistreatment of a patient, client, resident, or employee;
5. NJ Department of Human Services Disciplinary Action, Administrative Order 4:08: C-8: Falsification: Intentional misstatement of material fact in connection with work, employment, application, attendance or in any record, report, investigation or other proceeding;

6. NJ Department of Human Services Disciplinary Action, Administrative Order 4:08: C-10: Divulging confidential information without proper authority.
7. E1-1 Violation of a rule, regulation, policy, procedure, order or administrative decision (1 count) – Removal effective December 8, 2016.

B. The parties have agreed to the following:

1. To date, appellant has served a total of N/A days without pay based upon the above charges.
2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.
3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: N/A.
4. Respondent, Department of Human Services/Department of Health, will accept a General Resignation from Appellant, Quan Stewart, pursuant to N.J.A.C. 4A:2-6.3(b), effective December 8, 2016. Appellant, Quan Stewart, agrees not to seek or accept employment with the Department of Human Services/Department of Health, or any of its subsidiaries, at any time in the future.

C. The Appellant, Quan Stewart, withdraws his appeal and request for a hearing, and the Respondent Appointing Authority Department of Human Services/Department of Health agrees that the following result will occur with regard to each charge: The parties have agreed to a General Resignation as a resolution to the disciplinary appeal, as provided by N.J.A.C. 4A:2-6.3(b).

The parties acknowledge that under N.J.A.C. 17:2-4.5 (b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. The Department of Human Services/Department of Health shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services/Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent, Department of Human Services/Department of Health with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. Any other disciplinary matter pending is considered moot as a result of this settlement agreement.

F. Except for the assessment of Appellant's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services/Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public

Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. The parties waive the right to file exceptions and cross exceptions with regard to this matter.

J. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

11/29/17
DATE

Quan Stewart, Appellant

11/29/19
DATE

William Nash, ON BEHALF OF Appellant

11/29/19
DATE

Jessica Saxon, ON BEHALF OF Respondent,
NJ Department of Human Services/NJ Department of Health

11/29/2019
DATE

NJ Department of Human

Services/NJ Department of Health,
Respondent

CERTIFICATION

I, Quan Stewart, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

[redacted] 11/29/17

DATE

Quan Stewart

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Anthony J. Fusco, Jr., Esq.
Fusco & Macaluso Partners, LLC
P.O. Box 838
Passaic, New Jersey 07055

Joyce Clayborne, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Careem Yarborough v. City of Newark* (CSC Docket Nos. 2016-1237 and 1542; OAL Docket Nos. CSV 19741-15 and 19742-15) – **SETTLEMENTS (consolidated)**

Dear Mr. Fusco and Ms. Clayborne:

The appeals of Careem Yarborough, a Police Officer with the City of Newark Police Department, of his 12 calendar day and 10 working day suspensions, were before Administrative Law Judge Richard McGill (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 8, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 28, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 14, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 15, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Richard McGill, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOs. CSV 19741-15 and CSV 19742-15

AGENCY DKT. NOs. 2016-1237 and 2016-1542

IN THE MATTER OF CAREEM YARBOROUGH,
CITY OF NEWARK POLICE DEPARTMENT.

Anthony J. Fusco, Jr., Esq., for appellant (Fusco & Macaluso, attorneys)

Joyce Clayborne, Assistant Corporation Counsel, for respondent (Kenyatta K. Stewart, Acting Corporation Counsel, attorney)

Record Closed: December 7, 2017 Decided: December 8, 2017

BEFORE **RICHARD McGILL**, ALJ:

Careem Yarborough appeals from a suspension on charges from the position of Police Officer with the City of Newark. The matter was transmitted to the Office of Administrative Law on December 2, 2015, for determination as a contested case.

Prior to the hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that proceedings in this matter be concluded.

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.

Dec. 5, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: DEC 8 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

OAL DOCKET NO. CSV 19741-2015N
CSV 19742-2015N

CAREEM YARBOROUGH,	:	**STATE OF NEW JERSEY**
	:	**OFFICE OF ADMINISTRATIVE LAW**
Appellant,	:	
v.	:	**OAL DOCKET NO. CSV 19741-2015N**
	:	**CSV 19742-2015N**
CITY OF NEWARK,	:	**SETTLEMENT AGREEMENT**
	:	**AND GENERAL RELEASE**
Respondent.	:	

This Settlement Agreement and General Release ("Agreement") is made and entered into by Newark Police Officer Careem Yarborough ("Yarborough" or "Appellant"), Newark Fraternal Order of Police, Lodge 12 ("Union") and the City of Newark ("City "or "Respondent") (collectively referred to hereinafter as the "Parties"). The Parties herein have voluntarily agreed to resolve all disputed matters arising from the disciplinary action taken against Yarborough by the City. This Agreement is made and entered into by the Parties in full settlement of Yarborough's appeal regarding the above matter.

On August 24, 2015, the Newark Department of Public Safety, Police Division ("Department of Public Safety") brought **initial departmental disciplinary charges** and Specifications against Yarborough in the form of a Preliminary Notice of Disciplinary Action ("PNDA")[1] stemming from his actions on August 26, 2015 in handling a prisoner:

- N.J.S.A. 2C:51: Forfeiture of public office, position, or employment.
- Newark Police Department Rules and Regulations Chapter 18:20 violation of Safekeeping of Prisoners.

[1] All PNDA(S) and FNDA(S) are annexed as exhibits to the Stipulation Agreement dated 10/19/17, See, Exhibit B herein.

- Newark Police Department Rules and Regulations Chapters 18:6 violation of Neglect of Duty.
- N.J.A.C. 4A:2-2.3(a) 7, violation of Civil Service Rule- Neglect of Duty. *See, Ex. A (Specifications).*

As a result of the **initial PNDA**, on August 26, 2015, Yarborough was indefinitely suspended without pay on August 26, 2015.

On September, 8, 2015, a ***Limited Purpose Hearing*** was conduct for Yarborough's indefinite suspension and he was ordered to return to work effective immediately. On the same date, a **Final Notice of Disciplinary Action** ("FNDA") and Specifications were issued with disciplinary charges:

- Newark Police Department Rules and Regulations Chapter 18:20 violation of Safekeeping of Prisoners.
- Newark Police Department Rules and Regulations Chapters 18:6 violation of Neglect of Duty.
- N.J.A.C. 4A:2-2.3(a) 7, violation of Civil Service Rule- Neglect of Duty. *See, Ex. A*

On September 8, 2015, Yarborough received a **second PNDA**, for removal. On September 15, 2015, Yarborough pled not guilty, waiving his opportunity before the Trial Board. However, based upon the underlying evidence the Trail Board found Yarborough guilty. On September 15, 2015, **a second FNDA** and Specifications was issued with the following charges:

- Newark Police Department Rules and Regulations Chapter 18:20 violation of Safekeeping of Prisoners.
- Newark Police Department Rules and Regulations Chapters 18:6 violation of Neglect of Duty.
- N.J.A.C. 4A:2-2.3(a) 7, violation of Civil Service Rule- Neglect of Duty. *See, Ex. A.*

Based on these charges, the Department of Public Safety suspended Yarborough for **ten (10) days** pursuant N.J.A.C. 4A:2-2.4 (e), from October 13, 2015 to October 13, 2015, consisting of one (1) day. The Yarborough's disciplinary record is vacant regarding him serving one (1) day suspension from October 13, 2015 to October 13, 2015. His record indicates **nine (9) days** served under indefinite suspension. *See, Exhibit B (Stipulation Agreement).*

After further negotiations, the Parties have agreed to resolve this matter as follows:

1. The charges listed in the FNDA are upheld.
2. Yarborough's suspension is reduced from nine (9) days to eight (8) days. The City will amend his FNDA to reflect an eight (8) day suspension.
3. The City will pay Yarborough one (1) day and make the appropriate adjustments to his pension and seniority.
4. Yarborough waives any and all right or claim which he has or may have to a hearing on the merits of the disciplinary action taken under this Agreement and/ or to challenge the suspension penalty imposed as a result of same, including, but not limited to, any right to a departmental hearing concerning the charges in the FNDA.
5. Yarborough and the Union each agree not to appeal the terms and conditions of this Agreement to any agency or court, including, but not limited to the New Jersey Civil Service Commission and/or to any other New Jersey State Court or agency and/or to any United States Court or agency.
6. Yarborough and the Union each further agree that there is no consideration due Yarborough, his counsel and/or Union, including, but not limited to, any claim for additional back pay and/or counsel fees, arising from his employment and/or the execution of this Agreement, except as otherwise provided herein.
7. Except for the assessment of Yarborough's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this Agreement shall be deemed to be an admission of liability on behalf of either Party.
8. Yarborough and the Union acknowledge that this Agreement precludes them from bringing any type of legal or contractual action in any forum including, but not limited to, filing a Complaint in New Jersey Superior Court or the United States Federal Court,

filing any type of complaint with the City, Essex County, the State of New Jersey or the United States of America, and filing a grievance and/or requesting arbitration, that is in any manner grounded, based upon, or related to the FNDA.

9. Yarborough is bound by this Agreement. Anyone who succeeds to Yarborough's rights and responsibilities, such as heirs or the executor of his estate, shall also be bound.
10. This Agreement shall not constitute a precedent or practice in any matter involving the City or other City employees or the Union.
11. Yarborough and the Union each agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type against or involving the City, except to the extent necessary to enforce the terms of this Agreement, or as required by law.
12. This Agreement contains the sole and entire agreement between Yarborough, the Union and the City, and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Yarborough specifically represents and acknowledges that in executing this Agreement, he has not relied upon any representations, with regard to the subject matter in this Agreement, which are not set forth herein. No other promises or agreements shall be binding unless in writing, signed by all the Parties, and expressly stated to be a modification of the Agreement.
13. Yarborough agrees and acknowledges that he has been fully and fairly represented by his Union and counsel in this matter, and he is satisfied with that representation and with the terms and conditions of this Agreement.
14. Yarborough agrees and acknowledges that he has had a full opportunity to review this Agreement with his counsel and/or union representative and he enters into this Agreement knowingly and voluntarily.
15. The Parties agree that if any portion of this Agreement is deemed unenforceable, the remainder of the Settlement Agreement shall be fully enforceable.
16. This Agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the Civil Service Commission shall not interfere with the rights of either Party to pursue the matter further.
17. By signing this Settlement Agreement, Yarborough states that:

a) He has read it;
b) He understands it and knows that he is giving up important rights, and any and all other federal and state employment causes of any kind, including, but not limited to The New Jersey Law Against Discrimination, The New Jersey Equal Pay Law, Title VII of the Civil Rights Act of 1967, as amended, The Conscientious Employee Protection Act, The Americans With Disabilities Act of 1990, the Fair Labor Standards Act, and any other constitutional, statutory or common law suit, attorney's fees and costs of this proceeding, and any public policy of the United States, the State of New Jersey, or other State;
c) He agrees with everything in it;
d) His representative negotiated this Agreement with his knowledge and consent;
e) He has been advised to consult with his attorney prior to executing this Agreement, and has in fact done so;
f) He has been given at least twenty-one (21) days within which to review and consider this Agreement, although his may choose to sign it sooner, and thereafter, has seven (7) days to revoke that signature;
g) He understands that for a period of seven (7) days following the execution of this Agreement, he may revoke this Agreement; the Agreement shall not become effective or enforceable until the revocation period has expired; and
h) He has signed this Settlement Agreement knowingly and voluntarily.

OAL DOCKET NO. CSV 19741-2015N
CSV 19742-2015N

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

12/6/17
Date

BY: _____
Director Anthony F. Ambrose
City of Newark
Department of Public Safety, Police
Division

11/29/17
Date

BY: _____
Anthony J. Fusco, Esq.
F.O.P. Union Attorney

_____
Date

_____
Careem Yarborough
City of Newark Police Officer

Approved as to Form and Legality:

11/30/17
Date

_____ (A.C.)
Joyce Clayborne, Asst. Corp. Counsel
City of Newark Law Department

OAL DOCKET NO. CSV 19741-2015N
CSV 19742-2015N

IN WITNESS WHEREOF, the Parties have caused this Settlement Agreement to be executed.

_____ BY: _____

Date

Director Anthony F. Ambrose
City of Newark
Department of Public Safety, Police
Division

_____ BY: _____

Date

Anthony J. Fusco, Esq.
F.O.P. Union Attorney

11/29/17

Date

Careem Yarborough
City of Newark Police Officer

Approved as to Form and Legality:

11/30/17

Date

Joyce Claybome, Asst. Corp. Counsel
City of Newark Law Department

OAL DOCKET NO. CSV 19741-2015N
CSV 19742-2015N

CERTIFICATION

I, Careem Yarborough, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and General Release and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement and General Release by signing below. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter this Settlement Agreement and General Release voluntarily.

I also understand that if this Settlement Agreement and General Release are approved by the **CIVIL SERVICE COMMISSION**, then my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11/29/17
DATE

Careem Yarborough

EXHIBIT A

POLICE DEPARTMENT

Newark, N. J., August 26, 2014

To the Honorable, the Police Director,

Sir:

I Hereby Charge POLICE OFFICERS CAREEM YARBOROUGH AND LATOYA YOUNG, SECOND PRECINCT, OFFICE OF THE CHIEF OF POLICE

CAP 2015-108 IOP 2015-440

CHARGES MAY BE ADDED OR AMENDED AT A LATER DATE

CHARGE I: Violation of Newark Police Department Rules and Regulations, Chapter 18:20 – SAFEKEEPING OF PRISONERS – Police Officers shall be responsible for maintaining the safekeeping of any prisoner and preventing his escape. Police Officers shall be responsible for maintaining the safe custody of any prisoner during such time as the prisoner is in their personal charge, whether such prisoner is confined to a cell, hospital room, detention room, court room or building, or whether such person is in transit. The escape of a prisoner from a police officer shall be considered prima facie evidence of gross neglect of duty.

CHARGE II: Violation of Newark Police Department Rules and Regulations, Chapter 18:6 – NEGLECT OF DUTY – Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IIB: Violation of Civil Service Rule: 4A:2-2.3{a} 7.
An employee may be subject to discipline for:
7. Neglect of duty;

SPECIFICATION: On August 26, 2015, at approximately 5:15 a.m., at 150 Bergen Street, Newark, New Jersey, University Hospital, Police Officers Careem Yarborough and Latoya Young, did neglect their duty when they failed to diligently carry out all of the duties, responsibilities and functions of their position and/or employment, in that being responsible for maintaining the safekeeping and custody of a male prisoner, to wit: Michael Majette, who was in their personal charge, did fail to maintain the safe custody of said prisoner and did thereby also neglect their duty when the prisoner managed to escape custody.

CHARGE III: Violation of Newark Police Department Rules and Regulations, Chapter 18:6 – NEGLECT OF DUTY – Department members shall not commit any act nor shall they be guilty of any omission that constitutes neglect of duty.

CHARGE IIIB: Violation of Civil Service Rule: 4A:2-2.3{a} 7.
An employee may be subject to discipline for:
7. Neglect of duty;

POLICE DEPARTMENT

Newark, N. J., August 26, 2014

To the Honorable, the Police Director,

Sir:

I Hereby Charge **POLICE OFFICERS CAREEM YARBOROUGH AND LATOYA YOUNG, SECOND PRECINCT, OFFICE OF THE CHIEF OF POLICE**

CAP 2015-108 **IOP 2015-440**

SPECIFICATION: **On August 26, 2015, at approximately 5:15 a.m., at 150 Bergen Street, Newark, New Jersey, University Hospital, Police Officers Careem Yarborough and Latoya Young, did neglect their duty when they failed to notify Communications that the prisoner: Michael Majette managed to escape custody. Instead Communications Supervisors heard a broadcast via radio on the State Police Emergency Network from Rutgers Police that a prisoner had escaped Newark Police.**

EUGENE VENABLE
POLICE DIRECTOR

EXHIBIT B

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6068
Fax No. (973) 648-2358

Richard McGill
Administrative Law Judge

November 16, 2017

Joyce Clayborne, Esq.
Assistant Corporation Counsel
920 Broad Street, Room 316
Newark, NJ 07102

Anthony J. Fusco, Jr., Esq.
Fusco & Macaluso
P.O. Box 838
150 Passaic Avenue
Passaic, NJ 07055

Re: Careem Yarborough v. City of Newark
OAL Dkt. Nos. CSV 19741-15 and CSV 19742-15
Agency Dkt. Nos. 2016-1237 and 2016-1542

Dear Counsel:

Enclosed please find a signed Statement of Undisputed Facts in regard to the above-mentioned matter.

Very truly yours,

Richard McGill
Administrative Law Judge

Enc.

CAREEM YARBOROUGH, Appellant, v. CITY OF NEWARK, Respondent	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. CVS 19741-2015N CVS 19742-2015N STIPULATION AGREEMENT

STATEMENT OF UNDISPUTED FACTS

1. On or about August 26, 2015, Officer Careem Yarborough, ("Yarborough") badge #9448, was responsible for the escape of a prisoner undergoing medical treatment at University Hospital. The prisoner was in Yarborough's custody when he escaped out of an alternate exit from a men's bathroom at the hospital's radiology department. Yarborough failed to immediately notify Newark Police Department Communication Supervisors of the escape. Instead, the Newark Police Department Communications Supervisors heard a broadcast via radio from the New Jersey State Police Emergency Network, Rutgers University Police Division.
2. Subsequently, a preliminary investigation ensued and the prisoner was later apprehended at his sister's home. As a result, disciplinary charges were initiated against Yarborough.
3. On August 24, 2015, Yarborough received an initial Preliminary Notice of Disciplinary Action ("PNDA") with an indefinite suspension effective August 26, 2015.
4. On September 8, 2015, Yarborough received an initial Final Notice of Disciplinary Action ("FNDA") indicating on September 8, 2015 an Indefinite Suspension Hearing determined he return to duty effective immediately.
5. On September 8, 2015, Yarborough received a second (FNDA) for removal. A departmental hearing was scheduled for September 15, 2015.
6. On September 15, 2015, Yarborough received a second FNDA charging him with the Safekeeping of Prisoners, a violation of Newark Police Department Rules and Regulations Chapter 18:20, Neglect of Duty, (two counts), a violation of Newark Police

Department Rules and Regulations, Chapters 1B:6 and New Jersey violation of Civil Service Rules N.J.A.C. 4A:2-2.3(a) 7 (two counts). He waived his opportunity for hearing before a Trial Board with the intention of filing an Office of Administrative Law appeal. He was found guilty and suspended for ten (10) days. He already served his nine days under his indefinite suspension. However, needed to complete one addition suspension day which was ordered from October 13, 2015 to October 13, 2015.

7. There are no records indicating that Yarborough served October 13, 2015 to October 13, 2015 suspension for one day.
8. All FNDA(s) and FNDA(s) possess identical CAP 2015-108 and IOP 2015-440 numbers. Exhibit A.
9. Yarborough's disciplinary record indicated on September 15, 2015, the Trial Board suspended him for ten (10) days indicating the following: "must serve one day-nine days served under indefinite suspension." Exhibit B
10. According to Newark Request for Personnel Action record, Yarborough was suspended on August 26, 2015 to September 7, 2015. He returned to work effective September 8, 2015. A total of nine (9) days of suspension served. Exhibit C
11. According to City of Newark Police Finance Division, Yarborough's nine (9) day suspension was unpaid. Exhibit D
12. Two separate actions were generated by OAL under: CSV 19741-2015, for a twelve (12) days suspension, which does not exist. It is unknown how the twelve (12) day suspension was generated. The second action being OAL docket CSV 19742-2015N for a ten (10) days suspension existed, however nine (9) days were served rather than ten (10) days.

IT IS HEREBY STIPULATED AND AGREED by the Parties, herein are the Statement of Undisputed Facts for this matter.

DATED: 10/19/17

Joyce Clayborne, Esq.
Assistant Corporation Counsel
Law Department, City of Newark

DATED: 10/19

Anthony J. Fusco, Esq.
Fusco & Macaluso Partners, L.L.C.
Attorney for the Appellant

DATED: 11/16/17
IT IS SO ORDERED:

Honorable Richard McGill
Administrative Law Judge

EXHIBIT A

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five days or less where the aggregate number of days suspended or fined in any one calendar year is fifteen working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; (f) resignation not in good standing. A copy of this notice must be sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM:	Employing Agency Name Newark Police Department-Second Precinct	Address/Phone Number 920 Broad Street Newark, NJ 973-735-6147	DATE 08/24/15
	Attorney representing your agency should this matter be appealed Corporation Counsel-Law Department	Address/Phone Number/Email address 920 Broad Street /973-733-3889/ parkerw@ci.newark.nj.us	

TO:	Employee Name Careem Yarbough	Permanent Civil Service Title Police Officer	Employee Identification Number 104793
	Address/Phone Number 360-362 South 12th Street, Newark, New Jersey 07103 973-573-6932		Pension Number 91606

You are hereby notified that the following charge(s) has been made against you: CAP 2015-108 IOP 2015-449

CHARGE(S):

Note: N.J.S.A. 2C:51 May apply to you. You may choose to consult with an attorney concerning the provisions of that statute.

☑ If checked charges are continued on attached page

SPECIFICATION(S):

ATTACHED HERETO:

☐ If checked, specifications are continued on attached page

☑ You are hereby suspended effective August 26, 2015 Indefinitely Without Pay
(Check box and indicate if employee is suspended pending final disposition of the matter)

IF YOU DESIRE A DEPARTMENTAL HEARING ON THE ABOVE CHARGE(S), NOTIFY IT WITHIN 5 *DAYS OF RECEIPT OF THIS FORM. IF YOU REQUEST A DEPARTMENTAL HEARING IT WILL BE HELD ON:

_____, _____ at (time) _____ at (place of hearing) _____

*MUST BE MINIMUM OF FIVE DAYS

The following disciplinary action may be taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☑ Indefinite suspension pending criminal charges effective (date) August 26, 2015

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____

☐ Fine $ _____ (amount) which is equal to _____ (number) days pay

Appointing authority or authorized agent's signature and title.

SIGNATURE [signature] (Eugene Venable) TITLE POLICE DIRECTOR

This form must be personally served on the employee or sent certified or registered mail.

☑ Certified or Registered Mail ☑ Receipt Number 7015 1520 0003 5444 3802

☑ Signature of Server [signature] ☑ Date of personal service 8/26/15

F-31A Revised 03-24-11 DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission, When using a form download from the internet you still must provide the indicated above number of copies to all parties.

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or certified or registered mail.

FROM:	Employing Agency Name Newark Police Department-Second Precinct	Address/Phone Number 920 Broad Street, Nwk 973-733-6147	Date 09/08/15
	Attorney representing your agency should this matter be appealed Corporation Counsel-Law Department	Address/Phone number/Email address 920 Broad Street973-733-3888/parkersv@cl.newark.nj.u	
TO:	Employee Name Careem Yarborough	Permanent Civil Service Title Police Officer	Social Security Number 154 74 9214
	Address/Phone Number 368-362 So 12th Street, Newark, NJ 07103 973-573-6932		

On 08/26/15 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ You requested a hearing which was held on September 08, 2015 CAP 2015-108 IDP 2015-440

☐ You did not request a hearing.

☐ You requested a hearing and did not appear at the designated time and place.

Sustained Charges: Safekeeping of Prisoners, Neglect of Duty (2 counts)	Incident(s) giving rise to the charge(s) and the date(s) on which it/they occurred:
On September 08, 2015, at a Indefinite Suspension Hearing it was determined that you, Police Officer Yarborough, shall return to duty effective today: September 08, 2015.	
☒ If checked, charges are continued on attached page	☐ If checked, specifications are continued on attached page

The following disciplinary action has been taken against you:

☐ Suspension for _____ days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____

☐ Fine $ _____ (Amount) which is equal to _____ (Number) days pay ☐ other disciplinary action

Appointing authority or authorized agent's signature and title

SIGNATURE Eugene Venable TITLE POLICE DIRECTOR

This form must be personally served on the employee or sent by certified or registered mail.

☒ Certified or Registered Mail ☒ Receipt Number 7015 1520 0003 5144 3796

☒ Signature of Server ☒ Date of Personal Service 9/8/15

APPEAL PROCEDURE TO THE EMPLOYEE: You have a right to appeal Within 20 Days From Receipt of this form. All appeals must include a copy of this form and must be sent to the Civil Service Commission, 44 S. Clinton Avenue, PO Box 312, Trenton, NJ 08625-0312. Your appeal cannot be processed until a copy of this form is received. DO NOT GIVE YOUR APPEAL TO YOUR PERSONNEL OFFICE FOR FORWARDING TO THE CIVIL SERVICE COMMISSION. ANY APPEAL POSTMARKED AFTER THE 20 DAY STATUTORY TIME LIMIT WILL BE DENIED. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at WWW.state.nj.us/csc

DPF-31 B / Revised 07-09-09 Distribution: Employee, Union Representative or Attorney, Management, Civil Service Commission.

Preliminary Notice of Disciplinary Action (31-A)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service against whom one of the following types of disciplinary action is contemplated: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five days or less where the aggregate number of days suspended or fined in any one calendar year is fifteen working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; (f) resignation not in good standing. A copy of this notice must b sent to the Civil Service Commission. Subsequent to the hearing by the appointing authority, the employee and the Civil Service Commission must be served with the Final Notice of Disciplinary Action.

FROM:	Employing Agency Name Newark Police Department-Second Precinct	Address/Phone Number 920 Broad Street Newark, NJ 973-733-6147	DATE 09/08/15
	Attorney representing your agency should this matter be appealed Corporation Counsel-Law Department	Address/Phone Number/Email address 920 Broad Street /973-733-3888/ parkerw@ci.newark.nj.us	

TO:	Employee Name Careem Yarbough	Permanent Civil Service Title Police Officer	Employee Identification Number 104793
	Address/Phone Number 360-362 South 12th Street, Newark, New Jersey 07103 973-573-6933		Pension Number 91696

You are hereby notified that the following charge(s) has been made against you: CAP 2015-108 IOP 2015-140

CHARGE(S):

☒ If checked charges are continued on attached page

SPECIFICATION(S):

ATTACHED HERETO:

☐ If checked, specifications are continued on attached page

☐ You are hereby suspended effective _____

(Check box and indicate if employee is suspended pending final disposition of the matter)

IF YOU DESIRE A DEPARTMENTAL HEARING ON THE ABOVE CHARGE(S), NOTIFY IT WITHIN_____ *DAYS OF RECEIPT OF THIS FORM. IF YOU REQUEST A DEPARTMENTAL HEARING IT WILL BE HELD ON:

September 15, 2015at (time) 9:30am at (place of hearing) 311 Washington Street Newark

*MUST BE MINIMUM OF FIVE DAYS

The following disciplinary action may be taken against you:

☐ Suspension for _____ working days, beginning _____ and ending _____

☐ Indefinite suspension pending criminal charges effective (date) _____

☒ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____

☐ Fine $ _____ (amount) which is equal to _____ (number) days pay

Appointing authority or authorized agent's signature and title.

SIGNATURE Eugene Venable TITLE POLICE DIRECTOR

Eugene Venable

This form must be personally served on the employee or sent certified or registered mail.

☒ Certified or Registered Mail ☒ Receipt Number 7015 1520 0003 5444 3864

☐ Signature of Server _____ ☒ Date of personal service 9/8/15

31A Revised 03-24-11 DISTRIBUTION: Employee, Union Representative or Attorney, Management, Civil Service Commission.

When using a form downloaded from the internet you still must provide the indicated above number of copies to all parties.

Final Notice of Disciplinary Action (31-B)

Civil Service Commission – State of New Jersey

INSTRUCTIONS: This notice must be served on a permanent employee or an employee serving a working test period in the career service after a Departmental hearing (if one is requested) if one of the following types of disciplinary actions is taken: (a) suspension or fine of more than five days at one time; (b) suspensions or fines for five working days less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more; (c) the last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year; (d) disciplinary demotion from a title in which the employee has permanent status or received a regular appointment; (e) removal; or (f) resignation not in good standing. If the employee does not request or does not appear at the hearing, this notice must be served as the final action. A copy of this notice must be sent to the Civil Service Commission and served on the employee by personal service or certified or registered mail.

FROM:	Employing Agency Name Newark Police Department – Second Precinct	Address/Phone Number 920 Broad Street, Nwk 973-733-6147	Date 09/15/15
	Attorney representing your agency should this matter be appealed Corporation Counsel-Law Department	Address/Phone number/Email address 920 Broad Street/973-733-3880/parkersv@ci.newark.nj.u	

TO:	Employee Name Careem Yarborough	Permanent Civil Service Title Police Officer	Social Security Number 154 74 9214
	Address/Phone Number 360-362 S 12th Street, Newark, New Jersey 07103 973-573-6932		

On 09/08/15 you were served with a Preliminary Notice of Disciplinary Action (31A) and notified of the pending disciplinary action.

☐ You requested a hearing which was held on September 15, 2015 CAP 2015-108 IOP 2015-440

☐ You did not request a hearing.

☐ You requested a hearing and did not appear at the designated time and place.

Sustained Charges: Safekeeping of Prisoners, Neglect of Duty (2 counts) Plea: Not Guilty- PO Yarborough waived his opportunity for Hearing before Trial Board. His Attorney, Mr. Fusco advised the Trial Board of Yarborough's intension to file an Appeal from the discipline with the NJ Civil Service Commission (Office of Administrative Law). ☑ Disposition: Guilty If checked, charges are continued on attached page	Incident(s) giving rise to the charge(s) and the date(s) on whi h/they occurred: ☐ If checked, specifications are continued on attached page

The following disciplinary action has been taken against you: Nine (9) work Days suspension served under indefinite suspension.

☑ Suspension for 10 days, beginning October 13, 2015 and ending October 13, 2015

☐ Indefinite suspension pending criminal charges effective (date) _____

☐ Removal, effective (date) _____

☐ Demotion to position of _____ effective (date) _____

☐ Resignation not in good standing, effective (date) _____

☐ Fine $ _____ (Amount) which is equal to _____ (Number) days pay ☐ other disciplinary action:

Appointing authority or authorized agent's signature and title

SIGNATURE Eugene Venable TITLE POLICE DIRECTOR

This form must be personally served on the employee or sent by certified or registered mail.

☑ Certified or Registered Mail ☑ Receipt Number 7015 1520 0003 5444 3840

☑ Signature of Server _____ ☑ Date of Personal Service 10/2/15

APPEAL PROCEDURE TO THE EMPLOYEE: You have a right to appeal Within 20 Days From Receipt of this form. All appeals must include a copy of this form and must be sent to the Civil Service Commission, 44 S. Clinton Avenue, PO Box 312, Trenton, NJ 08625-0312. Your appeal cannot be processed until a copy of this form is received. DO NOT GIVE YOUR APPEAL TO YOUR PERSONNEL OFFICE FOR FORWARDING TO THE CIVIL SERVICE COMMISSION. ANY APPEAL POSTMARKED AFTER THE 20 DAY STATUTORY TIME LIMIT WILL BE DENIED. We recommend sending your appeal by certified mail to prove your filing in the event of lost or misdirected mail.

For more information on the rules that govern Major Discipline and the appeals process, please visit our website at WWW.state.nj.us/csc.

DPF-31 B / Revised 07-09-09 Distribution: Employee, Union Representative or Attorney, Management, Civil Service Commission.

EXHIBIT B

Complete Officer History

P/O Careem T. Yarborough [9448]

Employee ID: 9448 Hire date: Feb 14, 2002
Current assignment(s):
Department: Chief's Office
Bureau: Operations
Division: 4th

Involved Officer: Citizen Complaint IOP No: 2005-0622 Received: Jun 03, 2005

Allegations:

Conduct -
Conduct - Rules And Regulations - Not Sustained - Jul 25, 2005

Involved Officer: Citizen Complaint IOP No: 2006-0097 Received: Jan 24, 2006 09:00

Allegations:

Conduct - Rules And Regulations - Not Sustained - Feb 24, 2006

Involved Officer: Use of force IOP No: Received: Apr 11, 2006 08:15

Involved Officer: Use of force IOP No: Received: Sep 26, 2007

Involved Officer: Departmental Complaint IOP No: 2007-0839 Received: Sep 27, 2007

Allegations:

Threats Against Officer - - exonerated - Sep 28, 2007

Involved Officer: Departmental Complaint IOP No: 2007-0859 Received: Oct 03, 2007

Allegations:

Failure To Appear - Rules And Regulations - Administratively closed - Oct 16, 2007

Involved Officer: Use of force IOP No: Received: Jan 01, 2008

Involved Officer: Citizen Complaint IOP No: 2009-0814 Received: Aug 11, 2009

Role Arresting Officer
Allegations:

Excessive Force - - exonerated - Nov 24, 2009

Involved Officer: Use of force IOP No: Received: Aug 13, 2009 13:37

Involved Officer: Departmental Complaint IOP No: 2009-1067 Received: Oct 15, 2009 14:40
CAP No: 2009-0319

Allegations:

Care of Property - Rules And Regulations - Sustained - Oct 30, 2009

Actions taken:

: Oct 30, 2009 - CAF # DRAFT
: Jan 12, 2010 - Trial Board Days/hrs suspended: 3

Charges:

Care Of Property/Gun 10/30/2009 (Suspended 3 Days) - Guilty Jan 12, 2010

Involved Officer: Departmental Complaint IOP No: 2010-0834 Received: Jun 18, 2010

Allegations:

Disobedience - - warning notice - Jul 29, 2010

Involved Officer: Citizen Complaint IOP No: 2010-1487 Received: Nov 16, 2010

Role Arresting Officer
Allegations:

Improper Arrest - Rules And Regulations - exonerated - May 13, 2011
Excessive Force - Rules And Regulations - exonerated - May 13, 2011

Involved Officer: Use of force IOP No: Received: Jan 17, 2011

Role Arresting Officer

Use(s) of force Effective/Not Effective
Physical Effective

Service being conducted: Arrest Disposition/Finding: Closed Use Of Force

Involved Officer: Departmental Complaint IOP No: 2011-0613 Received: Sep 08, 2011

Allegations:

Disobedience - Rules And Regulations - warning notice - Sep 09, 2011

Involved Officer: Departmental Complaint IOP No: 2012-0590 Received: Oct 16, 2012

Allegations:

Theft - Rules And Regulations - unfounded - Nov 29, 2012

Involved Officer: Citizen Complaint IOP No: 2013-0422 Received: Jul 15, 2013 11:55

Allegations:

Neglect Of Duty - Rules And Regulations - Not Sustained - Mar 27, 2015

Involved Officer: Citizen Complaint IOP No: 2013-0625 Received: Oct 01, 2013 10:52

Allegations:

Neglect Of Duty - - Not Sustained - Feb 14, 2014

Involved Officer: Citizen Complaint IOP No: 2013-0704 Received: Nov 05, 2013 13:03

CAF No: 2013-0160

Allegations:

Neglect Of Duty - Rules And Regulations

Actions taken:

: Mar 04, 2014 - Trial Board Days/hrs suspended: 7

Charges:

Neglect of Duty 12/20/2013 (Suspended 7 Days) - Guilty Mar 04, 2014

Responsibility for Own Actions 12/20/2013 [] - Guilty Mar 04, 2014

Involved Officer: Use of force IOP No: P2014-053 Received: Mar 19, 2014 06:39

Use(s) of force	Effective/Not Effective
Compliance Hold	Effective
Hands/Fists	Effective

Service being conducted: Crime in Progress Disposition/finding: Completed (UOF, Pursuit)

Involved Officer: Vehicle accident IOP No: MVA2015-065 Received: Jun 18, 2015 16:35

Role Driver

Involved Officer: Departmental Complaint IOP No: 2015-0440 Received: Aug 26, 2015 08:22

CAP No: 2015-0108

Allegations:

Safekeeping of Prisoners - Rules And Regulations - Sustained - Aug 28, 2015

Actions taken:

: Sep 15, 2015 - Trial Board Days/hrs suspended: 10

Must serve one day - Nine days served under indefinite suspension.

Charges:

Safekeeping of Prisoners - Neglect of Duty 08/26/2015 [Suspended 10 Days] - Guilty Sep 15, 2015

Involved Officer: Departmental Complaint IOP No: 2015-0441
Received: Aug 26, 2015 15:00

Allegations:

Neglect Of Duty - Rules And Regulations - Exonerated - Sep 28, 2015

Involved Officer: Use of force IOP No: P2016-015
Received: Apr 22, 2016 01:15

Role Assisting Officer

Use(s) of force	Effective/Not Effective
Compliance Hold	Effective
Hands/Fists	Effective
Kicks/Feet	Effective

Service being conducted: Police Action Disposition/finding: Completed (UOF, Pursuit)

Involved Officer: Citizens Complaint IOP No: 2016-0215
Received: Apr 25, 2016

Involved Officer: Citizen Complaint IOP No: 2016-0484
Received: Aug 31, 2016 11:28

Allegations:

Neglect Of Duty - Rules And Regulations - Not Sustained - Nov 30, 2016

Report summary: totals by incident type:

Incident type	Received
Anonymous Complaint	0
Citizen Complaint	9
Compliance Tests	0
Departmental Complaint	8
Discretionary arrest	0
Drug test	0
Field Complaint	0
Firearm discharge	0
Forced entry	0
Integrity test	0
Internal Information	0
Monitored Search Warrants	0
Use of force	7
Vehicle accident	1
Vehicle pursuit	0
Total	35

Printed: Jul 05, 2017 04:37 By: DAT Tonya Goulbourne

EXHIBIT C

Newark Request for Personnal Action For Record Purpose

ENTER TRANSACTION EFFECTIVE DATE HERE: 8/26/2015

A. GENERAL INFORMATION

Title	Title Code	EEO Job Code	Union Code	Fund	Agency	Org.	Object
POLICE OFFICER	0272P			011	060	0801	60010

Name (Last, First, MI)	Personnel ID Number
YARBOROUGH, CAREEM	104793

Agency	Organization
POLICE	DIRECTOR'S OFFICE

Salary Range Yr: (2012)	Salary Step	Salary	Projected Salary
34,469.88 - 89,866.23	SR.	89,866.23	89,521.91

Std. Hours	Total Hours for Salary Base	Hourly Rate	Bi-Weekly Pay Base	Bi-Weekly Pay
40/Wk	2088	43.0394	26.1	3,443.16

☐ No Longevity ☒ Current Your Permanent Title Salary
☐ Pay Your Permanent Title Salary ☐ Current Your Appointed Title Salary

Title	Title Code	Step
POLICE OFFICER	0272P	SR.

Salary	89,866.23	Salary	89,866.23
Longevity	X 6 %		
Long. Amt.	5,391.97	Long. Amt. +	5,391.97
Bi-Weekly Longevity	206.58	Annual Sal	95,258.20

B. TRANSACTION REQUESTED

☐ SALARY CHANGE
☐ PROMOTION
☐ TITLE CHANGE (Give former title) ____________
Former Salary: ________ Former Weekly # of Work Hrs: ________

☐ PERMANENT APPOINTMENT:
- ☐ From Open Competitive Cert. dated ________ / Cert List # ________
- ☐ From Promotional Cert. dated ________ / Cert List # ________
- ☐ From NJAC 4:1-8.5 dated ________
- ☐ To Non-Competitive Division Position
- ☐ From Special Reemployment Cert. dated ________ / Cert List # ________
- ☐ From Regular Reemployment Cert. dated ________ / Cert List # ________
- ☐ Specific Legislation-Chapter ____, PL ____
- ☐ Return to Permanent Title from previous PA, TA, UA Status
- ☐ Lateral Title Change-Retain Permanent Status

☐ PROVISIONAL APPOINTMENT:
- ☐ Pending Open Competitive Examination
- ☐ Pending Promotional Procedures
- ☐ Pending Certification of O/C List
- ☐ Pending Certification of Promotional List
- ☐ Pending Certification of Special Reemployment List
- ☐ Pending Certification of Regular Reemployment List
- ☐ From NJAC 4:1-14.2 Cert. dated ________
- ☐ Pending Prom. Procedures-Employee Not Eligible
- ☐ Lateral Title Change-Pending Qualifying Exam

☐ TEMPORARY/EMERGENCY APPOINTMENT:
- ☐ 6 months or less aggregate
- ☐ 30 work days or less-Emergency
- ☐ Interim Replacing ________
- ☐ 12 months or less-grant program

☐ UNCLASSIFIED APPOINTMENT:
- ☐ (If checked above, give Citation) NJSA ________

☐ LEAVE OF ABSENCE:
- ☐ a. Pay Status ☐ With Pay ☐ Without Pay
- ☐ b. Duration ____ months ____ days
- ☐ c. Leave Expiration Date ________
- ☐ d. Type of Leave:
  - ☐ Regular (give reason below in Explanation)
  - ☐ Sick Leave
  - ☐ From Elective Office
  - ☐ Education Leave
  - ☐ Maternity Leave
  - ☐ Military Leave
  - ☐ Elective Office
  - ☐ Extension of Leave ☐ With Pay ☐ Without Pay

☐ RETURN FROM LEAVE OF ABSENCE:
- ☐ From Regular Leave
- ☐ From Education Leave
- ☐ From Sick Leave
- ☐ From Maternity Leave
- ☐ From Military Leave
- ☐ From Elective Office

☐ CHANGE IN WORK TIME STATUS:
- ☐ FT to PT (Perm. Employee) ☐ FT to PT (Prov. Employee)
- ☐ PT to FT (Perm. Employee) ☐ PT to FT (Prov. Employee)

☒ DISCIPLINARY ACTION:
- ☐ Suspension ____ months ____ days or ☒ Indefinite (From ________ to ________)
- ☐ Fine ☐ Working Time ____ months ____ days (From ________ to ________)
  - ☐ Money $ ________
- ☐ Demotion (if checked, complete Demotion Block below)
- ☐ Removal from employment for disciplinary reasons
- ☐ Removal from employment during working test period
- ☐ Reinstated by Merit System Board Decision dated ________
- ☐ Reinstated to Permanent Title following temporary demotion effective ________

☐ TERMINATION OF EMPLOYEE SERVICES
- ☐ Last Working Date (if other than effective date) ________
- ☐ Terminated (Use for employees without permanent status)
- ☐ Resigned ☐ Not in good standing (31A & B required)
- ☐ Retired
- ☐ Deceased
- ☐ Laid Off
- ☐ Removed at end of working test period
- ☐ Removal resulting from unauthorized absence (31A & B required)
- Is employee being appointed to another position?
  ☐ YES ☐ NO (If yes, give Title and Department in Explanations and Submit Separate Appointment)

☐ DEPARTMENTAL TRANSFER:
- ☐ Individual Transfer - Permanent Employee
- ☐ Individual Transfer - Permanent Employee RAR
- ☐ Organizational Transfer - Provisional Employee
- ☐ Organizational Transfer - Permanent Employee
- ☐ Organizational Transfer - Temporary Employee
- ☐ Organizational Transfer - Unclassified Employee

NOTE: Unless voluntary or an emergency 30 days prior notice to Employee required.

☐ DEMOTION:
- ☐ Result of Layoff
- ☐ Voluntary (Explain below)
- ☐ Demotion result of Disciplinary Action (Check a or b)
  - ☐ a. Temporary ______ months ______ days
  - ☐ b. Permanent Effective ________

EXPLANATIONS (Use separate sheet if more space is required)

SUSPENSION EFFECTIVE 08/26/2015

C. REQUIRED SIGNATURES

EMPLOYEE: I Certify that the action requested (except for disciplinary actions) has my approval. DATE	BUDGET DIRECTOR — DATE 9/18/15
DEPARTMENT DIRECTOR OR APPOINTING AUTHORITY: I certify that the action is consistent with and conformed to pertinent Civil Service Laws, Rules and Regulations, that the appointee has met all the requirements of the position, as specified in the approved job specifications, and that the position has been legally established in accordance with provisions of law. DATE 8/31/15 EUGENE VENABLE, POLICE DIRECTOR	PERSONNEL DIRECTOR — DATE 9-17-15 KECIA DANIELS
	BUSINESS ADMINISTRATOR — DATE JACK KELLY
ASSENTING DEPARTMENT DIRECTOR (for use in Transfers only) DATE	MAYOR — DATE RAS J. BARAKA

Newark Request for Personnel Action Record Purpose Only

ENTER TRANSACTION EFFECTIVE DATE HERE: 9/8/2015

A. GENERAL INFORMATION

Title	Title Code	Exam Code	Unit	Fund	Account	Org.	Object
POLICE OFFICER	0272P			011	080	0801	80010

Name (Last, First, MI)	Personnel ID Number
YARBOROUGH, CAREEM	104793

Agency	Organization	Title	Title Code	Lev
POLICE	DIRECTOR'S OFFICE	POLICE OFFICER	0272P	5F

Salary Range Yr: (2013)	Salary Step	Salary	Salary Longevity	Salary
34,466.68 - 89,866.23	SR.	89,866.23 (Annual Salary) 89,521.91	89,866.23 x6 %	89,866.23

Bus. Hours	Hourly Rate	Salary Basis	Pay Rate	Biweekly Pay	Longevity	Annual Rate
40/Wk	2088	43.0394	28.1	3,443.15	206.58	95,288.70

B. TRANSACTION REQUESTED

- ☐ SALARY CHANGE
- ☐ PROMOTION
- ☐ TITLE CHANGE (Give former title) _____
  Former Salary: _____ Former Weekly # of Work Hrs: _____
- ☐ PERMANENT APPOINTMENT:
  - ☐ From Open Competitive Cert. dated _____ / Cert List # _____
  - ☐ From Promotional Cert. dated _____ / Cert List # _____
  - ☐ From NJAC 4:1-8.3 dated _____
  - ☐ To Non-Competitive Division Position
  - ☐ From Special Reemployment Cert. dated _____ / Cert List # _____
  - ☐ From Regular Reemployment Cert. dated _____ / Cert List # _____
  - ☐ Specific Legislation-Chapter _____, PL _____
  - ☐ Return to Permanent Title from previous PA, TA, LA Status
  - ☐ Lateral Title Change-Retain Permanent Status
- ☐ PROVISIONAL APPOINTMENT:
  - ☐ Pending Open Competitive Examination
  - ☐ Pending Promotional Procedures
  - ☐ Pending Certification of OC List
  - ☐ Pending Certification of Promotional List
  - ☐ Pending Certification of Special Reemployment List
  - ☐ Pending Certification of Regular Reemployment List
  - ☐ From NJAC 4:1-14.2 Cert. dated _____
  - ☐ Pending Prom. Procedures-Employee Not Eligible
  - ☐ Lateral Title Change-Pending Qualifying Exam
- ☐ TEMPORARY/EMERGENCY APPOINTMENT:
  - ☐ 6 months or less aggregate
  - ☐ 22 work days or less-emergency
  - ☐ Interim Replacing _____
  - ☐ 12 months or less-grant programs
- ☐ UNCLASSIFIED APPOINTMENT:
  - ☐ (If checked above, give Citation) NJSA _____
- ☐ LEAVE OF ABSENCE:
  - ☐ a. Pay Status ☐ With Pay ☐ Without Pay
  - ☐ b. Duration ____ months ____ days
  - ☐ c. Leave Expiration Date _____
  - ☐ d. Type of Leave:
    - ☐ Regular (give reason below in Explanation)
    - ☐ Sick Leave
    - ☐ FMLA Elective Office
    - ☐ Education Leave
    - ☐ Maternity Leave
    - ☐ Military Leave
    - Elective Office
- ☐ RETURN FROM LEAVE OF ABSENCE:
  - ☐ From Regular Leave
  - ☐ From Education Leave
  - ☐ From Sick Leave
  - ☐ From Maternity Leave
  - ☐ From Military Leave
  - ☐ From Elective Office
- ☐ CHANGE IN WORK TIME STATUS:
  - ☐ FT to PT (Perm. Employee) ☐ FT to PT (Prov. Employee)
  - ☐ PT to FT (Perm. Employee) ☐ PT to FT (Prov. Employee)
- ☐ DISCIPLINARY ACTION:
  - ☐ Suspension ____ months ____ days or ☐ Indefinite (From _____ to _____)
  - ☐ Fine ☐ Working Time ____ months ____ days. (From _____ to _____)
    - ☐ Money: $ _____
  - ☐ Demotion (If checked complete Demotion Block below)
  - ☐ Removal from employment for disciplinary reasons
  - ☐ Removal from employment during working test period
  - ☐ Reinstated by Merit System Board Decision dated _____
  - ☐ Reinstated to Permanent Title following temporary demotion effective _____
- ☐ TERMINATION OF EMPLOYEE SERVICES:
  - ☐ Last Working Date (if other than effective date) _____
  - ☐ Terminated (Use for employees without permanent status)
  - ☐ Resigned ☐ Not in good standing (NJA & B required)
  - ☐ Retired
  - ☐ Deceased
  - ☐ Laid Off
  - ☐ Removed at end of working test period
  - ☐ Removal resulting from unauthorized absence (NJA & B required) If employee being appointed to another position?
    - ☐ YES ☐ NO (If yes, write Title, Dept., Division and Salary Separate Appointment)
- ☐ DEPARTMENTAL TRANSFER(S):
  - ☐ Individual Transfer - Permanent Employee
  - ☐ Individual Transfer - Permanent Employee - FAIR
  - ☐ Organizational Transfer - Provisional Employee
  - ☐ Organizational Transfer - Part-Time Employee
  - ☐ Organizational Transfer - Temporary Employee
  - ☐ Organizational Transfer - Unclassified Employee

NOTE: Unless voluntary or an emergency 30 days prior notice to Employee required.

- ☐ DEMOTION:
  - ☐ Result of Layoff
  - ☐ Voluntary (Explain below)
  - ☐ Demotion result of Disciplinary Action (Check a or b)
    - ☐ a. Temporary _____ months _____ days

EXPLANATION: (Attach separate sheet if more space is required)

RETURN FROM SUSPENSION EFFECTIVE 09/09/2015

C. REQUIRED SIGNATURES

EMPLOYEE: I certify that the above requested (except for suspension) has my approval. DATE

DEPARTMENT DIRECTOR OR APPOINTING AUTHORITY: I certify that the action is compliant with and conforms to Merit System Laws, Rules and Regulations and the appointee has met the requirements of the position, as classified, in the approved job specifications and that the person has been legally employed in accordance with all civil service regulations.

EUGENE VENABLE, POLICE DIRECTOR — DATE 9/10/15

ASSISTANT DEPARTMENT DIRECTOR (If one is in relevant unit) — DATE

BUDGET DIRECTOR — DATE 9/18/15

PERSONNEL DIRECTOR — DATE 9-17-15

KEISHA DAVIS

BUSINESS ADMINISTRATOR — DATE

JACK KELLY

MAYOR — DATE

RAS J. BARAKA

Form PD-3 Rev 11/08

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EXHIBIT D

Report ID: PIMNPAY

As of Date: 05/11/2015
Department: P10001

Template
City of Newark - Departmental Gross Pay Details

Page No. 173
Run Date 05/28/2015
Run Time 15:36:29

Emplid Name / Account Code	Cont Pact	Hours	Earn Cd	Description	Hrly Rate	Reg Pay	OT Pay	Var Pay	Hol Pay	Misc Pay	Other Pay	Total Gross
								Pay Elements				
0110080001		0.25	335	01 Injury	0.00						275.45	3,946.56
109331 Wright Jr.,Kevin W.	8											
0110080001		80.00	001	Regular	21.38	1,704 41						
0110090001		23.50	031	OT x 1.5	21.30		753 07					
0110080001		6.96	026	Holiday	21.30				191 40			
109331 Wright Jr.,Kevin W.	0											2,349 30
103308 Wright,Aloma E	8											
0110080001		40.00	001	Regular	43.03	1,113 15						
0110090001		11.00	002	OT x 1.5	43.03		944 11					
0110080001		7.00	404	Holiday	43.01				227 16			
0110080001		0.00	335	01 Injury	0.00						275.45	4,121 27
101494 Wright,Brandon	3											
0110080001		59.50	001	Regular	17 41	1,194 67						
0110090001		4.75	001	OT x 1.5	17 41		209 27					1,401 97
100852 Wright,Jamila	3											
0110080001		40 79	001	Regular	21.50	1,778.47						1,778 47
102405 Wright,Keith	8											
0110080001		40.00	001	Regular	33.83	1,441.45						
0110090001		56 90	003	OT x 1.5	43.01		2,376 39					
0110080001		8 00	006	Holiday	43.01				272.19			
0110080001		5 00	435	101 Injury	8 00						114.12	5 341 34
120183 Young Sr.,Darrel L.	8											
0110080001		40 00	001	Regular	14 91	1,143 13						
0110090001		25 50	003	OT x 1.5	43 03		1,291 14					
0110080001		0 00	026	Holiday	43 71				277 16			
0110080001		1 50	335	01 Injury	3 50						45.37	5,117 72
131765 Young,Darlene E												
0110080001		40 00	001	Regular	14 71	1 711 .5						
0110090001		21 50	001	OT x 1.5	14 71		1,017 4					

Yarborough Omitted

Empl ID / Name / Account Code	Empl Rcd	Hours	Earn Cd	Description	Hrly Rate	Reg Pay	OT Pay	Misc Pay	Hol Pay	Sick Pay	Other Pay	Total Gross
0110200201		80.00	001	Regular	35.55	1,568.05						
0110200201		0.80	335	4% Longvty	0.80						62.56	
												1,626.61
389252 Woods,Richard M.	D											
0110600501		80.00	001	Regular	32.20	2,576.66						
												2,576.66
103810 Worrill,David L.	U											
0110600501		80.00	001	Regular	43.03	3,443.15						
0110990201		9.00	003	OT @ 1.5	43.03		581.03					
0110600501		8.00	006	Holiday	43.03				327.36			
0110200201		8.00	335	8% Longvty	0.80						275.45	
												4,327.59
389251 Wright Jr.,Kevin H.	D											
0120200201		80.00	001	Regular	21.20	1,704.61						
0110600501		5.00	003	OT @ 1.5	21.20		287.55					
0110200201		0.00	006	Holiday	21.20				104.30			
												2,096.76
101388 Wright,Alexa K	U											
0110600501		80.00	001	Regular	43.03	3,443.15						
0110990201		0.00	006	Holiday	43.03				327.46			
0110200201		0.00	335	8% Longvty	0.80						275.45	
												3,346 56
101584 Wright,Brandon	U											
0110600501		80.00	001	Regular	17.43	1,394 67						
0110200201		4.50	003	OT @ 1.5	17.43		303 30					
												1,698.47
388853 Wright,Jamila	U											
0110200201		80.00	001	Regular	21.50	1,720.47						
												1,720.47
103185 Wright,Kevin	D											
0110600501		80.00	001	Regular	43.03	3,443.15						
0110990201		75.50	003	OT @ 1.5	43.03		4,874.21					
0110990201		8.00	006	Holiday	43.03				113.18			
0110200201		8.00	335	10% Longvty	0.80						344.33	
												8,855.86
104793 Yarborough,Carson T.	D											
0110600501		80.00	001	Regular	43.03	3,443.15						

Empl ID Name / Account Code	Empl Rcd	Hours	Earn Cd	Description	Hrly Rate	Pay Elements: Reg Pay	OT Pay	Var Pay	Hol Pay	Shft Pay	Ethnic Pay	Total Gross
81100000001		5.00	003	OT @ 1.5	43.03		322.80					
81100000001		8.00	020	Holiday	43.03				333.74			
81100000001		0.00	335	4% Legacy	0.00						206.59	
												4,836.38
106182 Young Sr.,Darrel L.	B											
81100000001		80.00	001	Regular	43.03	3,443.14						
81100000001		29.00	003	OT @ 1.5	43.03		1,271.39					
81100000001		0.00	005	Holiday	43.03				327.36			
81100000001		0.00	335	4% Legacy	0.00						375.45	
												5,237.76
103763 Young,Dorlene E.	B											
81100000001		80.00	001	Regular	43.03	3,443.14						
81100000001		34.00	003	OT @ 1.5	43.03		1,549.08					
81100000001		0.00	005	Holiday	43.03				327.36			
81100000001		0.00	335	4% Legacy	0.00						375.45	
												5,695.03
103628 Young,Latoya D.	C											
81100000001		80.00	001	Regular	34.42	2,753.62						
81100000001		31.00	003	OT @ 1.5	34.42		1,600.95					
81100000001		8.00	005	Holiday	34.42				78.78			
81100000001		0.00	335	4% Legacy	0.00						165.16	
												4,493.51
105678 Tunque,Jose A.	A											
81100000001		80.00	001	Regular	33.81	2,704.96						
81100000001		30.00	003	OT @ 1.5	33.81		993.34					
81100000001		8.00	020	Holiday	33.81				101.90			
												3,793.42
103453 Zeghiani,Maren	C											
81100000001		80.00	001	Regular	43.03	3,443.14						
81100000001		0.00	003	OT @ 1.5	43.03		916.47					
81100000001		0.00	020	Holiday	43.03				327.36			
81100000001		0.00	335	4% Legacy	0.00						376.45	
												4,403.03
104354 Zamora,Octavio	A											
81100000001		80.00	001	Regular	34.42	2,753.62						
81100000001		42.00	003	OT @ 1.5	34.42		2,172.63					
81100000001		0.00	020	Holiday	34.42				275.53			
81100000001		0.00	335	4% Legacy	0.00						310.47	

Emplid Name / Event Code	Empl Rcd	Month	Earn Cd	Description	Hrly Rate	Pay Elements: Reg Pay	OT Pay	Spec Pay	Hol Pay	Sick Pay	Other Pay	Total Gross
1739 Coley,Shallah Annett 10809801	0	0.00	012	REG ANTS	0.00	47,026.45						47,026.45
8388 Daniels,Latoya S. 10800901	0	0.00	012	REG ANTS	0.00	1,758.40						1,758.40
3606 Diaz,Omar Alberto 10800401	0	0.00	013	OT DOLLARS	0.00		34,589.44					34,589.44
1854 Hedley,Joseph 10800601 10800801 10800801 10800801 10800801	0	0.00 0.00 0.00 0.00 0.00	012 013 078 042 047	REG ANTS OT DOLLARS Sic Allow Holiday PP Clothing	0.00 0.00 0.00 0.00 0.00	50,687.31	968.39		880.71		337.40 455.89	53,329.47
9374 Lassiter,Kristen S. 10800801 9374 Lassiter,Kristen S. 10800801	1 1	0.00 -80.00	012 001	REG ANTS Regular	0.00 17.43	557.76 1,124.67-						567.31-
9451 Middlebrooks,Timothy	0											0.00
1853 Odom,Mark Wayne 10800801 10800801 10800801	1	0.00 0.00 0.00	012 042 047	REG ANTS Holiday PP Clothing	0.00 0.00 0.00	50,687.31			803.71		495.89	51,991.83
8178 Williams,Victor P. 10129178	0	0.00	012	REG ANTS	0.00	718.36						718.36
1793 Yarborough,Carcen T. 10800801 10800801 10800801	0	0.00 0.00 0.00	012 013 042	REG ANTS OT DOLLARS Holiday PP	0.00 0.00 0.00	3,819.44	172.89		179.37			

Report ID: PY010PAY

PeopleSoft
City of Newark - Departmental Gross Pay Details

OT Date: 08/29/2015
Instant 0100001

Empl ID / Name / Dept Code	Empl Rcd	Hours	Earn Cd	Description	Hrly Rate	Pay Elements: Reg Pay	OT Pay	Vac Pay	Hol Pay	Pick Pay	Other Pay	Total Gross
1993 Yarbrough,Carmen T.	0											
[illegible]		-80.00	001	Regular	42.03	3,443.15-						
[illegible]		-5.00	003	OT = 1.5	42.03		323.80-					
[illegible]		8.00	006	Holiday	43.01				323.74-			
[illegible]		8.00	335	4% Longvcy	0.00						206.59-	
												774.56-
3428 Young,Lacoya O.	0											
[illegible]		0.00	012	REG ADJS	0.00	1,111 67						
[illegible]		0.00	013	OT DOLLARS	0.00		1,600.33					
[illegible]		0.00	043	Holiday PP	0.00				243.38			
3428 Young,Lacoya O.	1											
[illegible]		-80.00	001	Regular	34.62	2,755 33-						
[illegible]		-31.00	003	OT = 1.5	34.62		1,600.95-					
[illegible]		8.00	006	Holiday	34.62				178.35-			
[illegible]		0.00	335	4% Longvcy	0.00						165.36-	
												619.71-
Department Totals:		276.00-				249,781.57	15,477.03		8.28		937.43	167,669.72

Empid Name / Account Code	Empl Rcd	Hours	Earn Cd	Description	Hrly Rate	Pay Payments: Reg Pay	OT Pay	Vac Pay	Hol Pay	Sick Pay	Other Pay	Total Gross
103308 Wright,Alicia M	0											
81100000101		80.00	001	Regular	43.07	3,445.15			323.96			
81100000101		0.00	006	Holiday	43.03						275.45	
81100000101		0.00	335	8% Longvty	0.00							3,966.56
301684 Wright,Brandon	0											
81100000101		80.00	001	Regular	17.43	1,394.67						1,394.67
160817 Wright,Jamila	0											
81100000101		80.00	001	Regular	21.98	1,758.47						1,758.47
102465 Wright,Kevin	0											
81100000101		80.00	001	Regular	43.03	3,443.15						
81100000101		28.98	003	OT @ 1.5	43.03		1,867.49		333.18			
81100000101		0.00	006	Holiday	43.03						344.33	
81100000101		0.00	335	10% Longvty	0.00							5,827.30
104793 Yarborough,Carmen T.	0											
81100000101		80.00	001	Regular	43.03	3,443.15						
81100000101		7.50	003	OT @ 1.5	43.03		613.31		333.74			
81100000101		0.00	006	Holiday	43.03						306.59	
81100000101		0.00	335	8% Longvty	0.00							4,486.79
104383 Young Sr.,Darnal L.	0											
81100000101		80.00	001	Regular	43.03	3,443.15						
81100000101		8.00	006	Holiday	43.03				327.98			
81100000101		0.00	335	8% Longvty	0.00						275.45	
												3,346.58
103765 Young,Marlene E.	0											
81100000101		89.00	001	Regular	43.03	3,443.15						
81100000101		18.00	003	OT @ 1.5	43.03		1,012.95		337.76			
81100000101		0.00	006	Holiday	43.03						274.45	
81100000101		0.00	335	8% Longvty	0.00							4,975.41
105436 Young,Latoya D.	0											
81100000101		80.00	001	Regular	36.42	2,914.37						
81100000101		6.50	003	OT @ 1.5	36.42		336.64					

12-11-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Heather DiBlasi-Domalewski
24 Nautilus Drive
Leonardo, New Jersey 07737

Kenneth B. Goodman, Esq.
O'Toole Scrivo
14 Village Park Road
Cedar Grove, New Jersey 07009

Re: *Heather DiBlasi-Domalewski v. Middletown Township* (CSC Docket No. 2017-2703 and OAL Docket No. CSV 3373-17) - **SETTLEMENT**

Dear Ms. DiBlasi-Domalewski and Mr. Goodman:

The appeal of Heather DiBlasi-Domalewski, a Social Worker Substance Abuse with Middletown Township, of her removal on charges effective February 9, 2017, was before Administrative Law Judge Carl V. Buck, III (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 11, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 26, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 12, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 13, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Carl V. Buck, III, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 03373-17

AGENCY DKT. NO. 2017-2703

IMO HEATHER DIBLASI-DOMALEWSI,
TOWNSHIP OF MIDDLETOWN,
DEPARTMENT OF HEALTH WELFARE
AND INSPECTIONS.

Heather DiBlasi-Domalewski, appellant, pro se

Kenneth B. Goodman, Esq., for Township of Middletown, Department of Health Welfare and Inspections, respondent (O'Toole Scrivo, attorneys)

Record Closed: December 11, 2017 Decided: December 11, 2017

BEFORE **CARL V. BUCK, III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on March 9, 2017, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

STATEMENT OF THE CASE

This case concerns the appeal of appellant, Heather DiBlasi-Domalewski from the action of the respondent, Township of Middletown, Department of Health Welfare and Inspections. On November 27, 2017, the parties filed a fully executed Settlement Agreement. (J-1).

I have reviewed the record and the terms of settlement and I **FIND**:

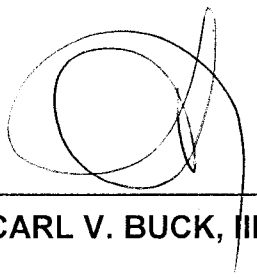
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.



December 11, 2017
DATE

CARL V. BUCK, III ALJ

Date Received at Agency: 12/12/17

Date Mailed to Parties: 12/12/17

/lam

APPENDIX

EXHIBITS

Joint:

J-1 Settlement Agreement

For Petitioner:

None

For Respondent:

None

J-1

SETTLEMENT AGREEMENT, MUTUAL NON-DISPARAGMENT AGREEMENT AND GENERAL RELEASE

THE SETTLEMENT AGREEMENT, MUTUAL NON-DISPARAGEMENT AGREEMENT, AND GENERAL RELEASE ("Agreement") is entered into by and between **HEATHER DIBLASI-DOMALEWSKI** ("DiBlasi-Domalewski"), and **THE TOWNSHIP OF MIDDLETOWN** (the "Township") to settle all claims that DiBlasi-Domalewski may have against the Township, any related entities, and any of its subsidiaries, affiliated companies, benefit plans or their respective predeccessors, successors and assigns, as well as their respective past or present governing bodies, officers, directors, agents, representatives or employees.

Parties

"Heather DiBlasi-Domalewski" or "DiBlasi-Domalewski" as used herein, means her estate, heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest. "The Township of Middletown," or "the Township" as used herein, means the Township of Middletown, its parents, subsidiaries, related, affiliated and predecessor entities, the present and former trustees, present and former committee members, directors, officers, attorneys, employees or agents of all of them, in their official and individual capacities, and any pension, welfare or other benefit plan applicable to the employees or former employees of the Township as defined herein, and the current and former trustees and administrators of any and all such plans. DiBlasi-Domalewski and the Township are collectively referred to herein as the "Parties".

1. **Assignment of Claims**

DiBlasi-Domalewski and the Township hereby warrant that they have not assigned any claims that any of them may have against each other to any other person or entity.

2. Settlement

In full and complete settlement of any claims arising out of DiBlasi-Domalewski's employment with the Township and any other causes of action between the Parties, the Parties agree as follows:

WHEREAS on or about February 1, 2017 the Township served DiBlasi-Domalewski with a Preliminary Notice of Disciplinary Action ("PNDA") charging DiBlasi-Domalewski with improper conduct in connection with the performance of her duties as a Social Worker-Substance Abuse, in her employment with the Township; and

WHEREAS the PNDA sought for DiBlasi-Domalewski to be removed from her employment effective February 8, 2017; and

WHEREAS DiBlasi-Domalewski did not request a hearing in connection with the PNDA; and

WHEREAS on or about February 13, 2017 the Township served DiBlasi-Domalewski with a Final Notice of Disciplinary Action ("FNDA"), removing DiBlasi-Domalewski from her employment effective February 9, 2017;

WHEREAS DiBlasi-Domalewski disputes and denies the charges as specified in the PNDA and FNDA; and

WHEREAS DiBlasi-Domalewski appealed her removal to the Civil Service Commission, which transmitted the matter to the Office of Administrative Law ("OAL"), where the matter was assigned to the Honorable Judge Carl V. Buck III, A.L.J., and captioned, **IMO HEATHER DIBLASI-DOMALEWSKI, TWP. OF MIDDLETOWN, DEPT. OF HEALTH WELFARE AND INSPECTIONS; OAL DOCKET NO.: CSV-03373-17**; and

WHEREAS Judge Buck held a telephone conference with the parties, with said

telephone conference conducted on April 24, 2017 and wherein the parties indicated they sought an amicable resolution to the matter; and

WHEREAS Township conveyed an offer to DiBlasi-Domalewski in which the Township would agree to granting DiBlasi-Domalewski a resignation not in good standing; and

WHEREAS Judge Buck conducted a second telephone conference call on May 22, 2017, wherein DiBlasi-Domalewski accepted the Township's offer to accept a resignation not in good standing and to enter into this Agreement; and

WHEREAS Judge Buck conducted additional telephone conferences to attempt to resolve the outstanding issues;

THE PARTIES THEREFORE AGREE:

(1) DiBlasi-Domalewski shall withdraw her appeal and agree not to pursue any further appeal of the disciplinary action brought against her; and

(2) Upon receipt of the executed Agreement from DiBlasi-Domalewski and following the expiration of DiBlasi-Domalewski's revocation period as described in paragraph 12 of this Agreement, the Township shall withdraw the February 13, 2017 FNDA and file an amended FNDA indicating that DiBlasi-Domalewski resigned not in good standing, effective February 9, 2017.

(3) The Township shall issue a check in the amount of three hundred dollars ($300.00), in full and complete settlement of all claims DiBlasi-Domalewski may have against the Township related to her employment with the Township, including but not limited to her reimbursement for filing cabinets.

3. **Release**

a. In consideration of the mutual promises and other consideration set forth in the

Agreement, DiBlasi-Domalewski waives, releases and gives up any and all claims and rights arising out of DiBlasi-Domalewski's employment relationship with the Township from the commencement of her employment with the Township on June 26, 2015, through the date of execution of this Agreement, which she may have against the Township or its parent and any of its subsidiaries, affiliated companies, benefit plans or their respective predecessors, successors and assigns, as well as their respective past or present committee members, officers, directors agents, representatives or employees (hereinafter referred to as "Releasees") from any and all manner of action and actions, cause and causes of action, suits, claims, grievances, debts, sums of money, wages, compensation, bills, claims for attorneys' fees, interest, expenses and costs, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever known and unknown, suspected or unsuspected, vested or contingent, which DiBlasi-Domalewski ever had or now has against the Releasees arising out of DiBlasi-Domalewski's employment relationship with the Township which were asserted or could have been asserted by DiBlasi-Domalewski under any state or federal statute, Township ordinance, constitution, contract or the common law, including without limitation the following:

i. Any claims of retaliation or harassment based upon any alleged acts of whistle blowing and any claims of retaliation under the New Jersey Conscientious Employee Protection Act ("CEPA");

ii. Any claims of discrimination or harassment based upon race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, medical condition, disability or atypical

hereditary cellular or blood trait, or genetic information and any claims of retaliation under the New Jersey Law Against Discrimination;

iii. Any claims for violation of Title VII of the Civil Rights Act; the Civil Rights Act of 1991; the Americans with Disabilities Act; Sections 1981 through 1988 of Title 42 of the United States Code;

iv. Any claims alleging violations of the First Amendment of the United States Constitution;

v. Any claims alleging violations of the New Jersey Constitution;

vi. The National Labor Relations Act; the Employee Retirement Income Security Act; the Fair Credit Reporting Act; the Immigration Reform Control Act; the Rehabilitation Act; the Age Discrimination in Employment Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Rights Act; the Federal Family Medical Leave Act; Worker Adjustment and Retraining Notification Act; the Employee Polygraph Protection Act; the Ledbetter Fair Pay Act; the Federal and State Equal Pay Acts;

vii. Any and all claims pursuant to the New Jersey Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-1 *et seq.*; New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et seq.*, New Jersey Wage and Hour Laws; New Jersey Equal Pay Act, New Jersey Laws Regarding Political Activities of Employees, Lie Detector Tests, Jury Duty, Employment Protections and Discrimination; any other federal, state or local civil rights law, whistleblower law or any other local, state or federal law, regulation or

ordinance.

viii. DiBlasi-Domalewski expressly understands and acknowledges that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. DiBlasi-Domalewski expressly accepts and assumes the risk of such unknown or underestimated losses or claims and acknowledges and agrees that the benefits to be provided to her pursuant to this Settlement Agreement and General Release fully compensate her for such risks. DiBlasi-Domalewski acknowledges that none of the benefits given to her pursuant to the Settlement Agreement and General Release have been assigned or are subject to alienation (i.e. personal bankruptcy).

b. The Township waives, releases and gives up any and all claims and rights arising out of the following matters;

i. DiBlasi-Domalewski's absence from work during the period 1/26/2017 to 2/7/2017;

ii. Any claims related to the half-day of work Plaintiff worked on 1/27/2017;

iii. Any claims related to Plaintiff working two hours for an outside employer on 2/1/2017 and the Township's allegation that Plaintiff worked for an outside employer after calling in sick on 2/1/2017;

iv. Any claims arising from DiBlasi-Domalewski's telephone contact with the New Jersey Department of Labor and Workforce development on 2/7/2017;

v. Any claims arising from the Township's allegation that DiBlasi-Domalewski worked for an outside employer after her request for approval for outside

employment had been denied;

vi. Any claims arising from the Township's allegation that Plaintiff falsely reported that her Township assigned vehicle would not start on December 16, 2016;

vii. Any claims arising from the Township's allegation that DiBlasi-Domalewski failed to properly administer Township and/or State purchasing requirements during calendar year 2016.

c. The Settlement Agreement and General Release contains a waiver of claims that DiBlasi-Domalewski knows about and claims that she may not know about relating to her employment with the Township up to the date of this Settlement Agreement and General Release.

d. DiBlasi-Domalewski agrees not only to release and discharge the Township from any and all claims to the extent enforceable by law and that DiBlasi-Domalewski could make on her own behalf, but also those that may have been or may be made by any other person, organization or administrative agency on DiBlasi-Domalewski's behalf regarding any acts or events occurring before the execution of the Agreement in related to DiBlasi-Domalewski's employment with the Township. DiBlasi-Domalewski waives any right to become, and promises not to become, a member of any class in a case in which a claim or claims are asserted against the Township involving any act or event occurring before the execution of the Agreement related to her employment with the Township. If any claim is brought on behalf of DiBlasi-Domalewski against the Township involving any events related to her employment with the Township occurring before the execution of the Agreement, or if DiBlasi-Domalewski is named as a member of any class in a case related to her employment

with the Township, which claim or claims are asserted against the Township and that relate to events prior to the execution of the Agreement, DiBlasi-Domalewski agrees that she will immediately notify the Township, in writing, of the same to Juan C. Fernandez, Esq., O'Toole Scrivo Fernandez Weiner Van Lieu, LLC, 14 Village Park Road, Cedar Grove, New Jersey 07009. DiBlasi-Domalewski agrees that if she is compelled to testify through a valid subpoena or order of a court of competent jurisdiction in any pending or future matter filed by anyone other than DiBlasi-Domalewski (or other than any person, organization or administrative agency on behalf of DiBlasi-Domalewski) she will immediately notify the Township, in writing, of the same to Juan C. Fernandez, Esq., O'Toole Scrivo Fernandez Weiner Van Lieu, 614 Village Park Road, Cedar Grove, New Jersey 07009.

4. **Covenant Not to Sue**

a. DiBlasi-Domalewski hereby represents and warrants to the Township that she has not: (A) filed, caused or permitted to be filed any pending proceeding (nor has DiBlasi-Domalewski lodged a complaint with any governmental or quasi-governmental authority) against the Township other than the matter docketed, OAL Docket No.: CSV-03373-17, nor has DiBlasi-Domalewski agreed to do any of the foregoing; (B) assigned, transferred, sold, encumbered, pledged, hypothecated, mortgaged, distributed, or otherwise disposed of or conveyed to any third party any right or Claim against the Township that has been released in this Agreement; or (C) directly or indirectly assisted any third party in filing, causing or assisting to be filed, any Claim against the Township. In addition, DiBlasi-Domalewski represents and warrants that she shall not encourage or solicit or voluntarily assist or participate in any way in

the filing, reporting or prosecution by herself or any third party of a proceeding or Claim against the Township.

b. The Township hereby represents and warrants to DiBlasi-Domalewski that it has not: (A) filed, caused or permitted to be filed any pending proceeding (nor has the Township lodged a complaint with any governmental or quasi-governmental authority) against DiBlasi-Domalewski, nor has the Township agreed to do any of the foregoing; (B) assigned, transferred, sold, encumbered, pledged, hypothecated, mortgaged, distributed, or otherwise disposed of or conveyed to any third party any right or Claim against DiBlsasi-Domalewski that has been released in this Agreement; or (C) directly or indirectly assisted any third party in filing, causing or assisting to be filed, any Claim against DiBlasi-Domalewski.

5. Non-Admission

DiBlasi-Domalewski recognizes that the Township denies any and all claims of retaliation, employment discrimination, harassment, or of any other wrongdoing or acceptance of liability for any alleged damages suffered by DiBlasi-Domalewski of whatever nature with regard to her employment with the Township. DiBlasi-Domalewski expressly agrees that she shall not be considered a prevailing party in this matter.

The Parties are entering into this Agreement solely because they are desirous of avoiding further expense and inconvenience, and putting to rest any matters between the Township and DiBlasi-Domalewski relating directly and/or indirectly to DiBlasi-Domalewski's employment with the Township and/or the termination employment.

6. **Mutual Non-Disparagement**

a. DiBlasi-Domalewski agrees that she will not disparage or encourage or induce others to disparage the Township in any way. For purposes of this Agreement, the term "disparage" includes without limitation, comments or statements to the press and/or media, and/or to any individual, customer, client or entity with whom the Township or DiBlasi-Domalewski have a business, employment or professional relationship, if such statement would adversely affect in any manner the conduct of business of the Township or the reputation of the Township, its officers, employees and/or former employees, as applicable. Nothing in this paragraph is intended to prohibit or restrict DiBlasi-Domalewski from providing truthful information to any government, regulatory or self-regulatory agency or pursuant to a valid subpoena issued by a court of competent jurisdiction.

b. The Township agrees that it will not disparage or encourage or induce others to disparage DiBlasi-Domalewski in any way. For purposes of this Agreement, the term "disparage" includes without limitation, comments or statements to the press and/or media, and/or to any individual, customer, client or entity with whom the Township or DiBlasi-Domalewski have a business, employment or professional relationship, if such statement would adversely affect in any manner DiBlasi-Domalewski's employment, employability, or her reputation. Nothing in this paragraph is intended to prohibit or restrict the Township from providing truthful information to any government, regulatory or self-regulatory agency or pursuant to a valid subpoena issued by a court of competent jurisdiction.

7. **References**

Any inquiries from third parties regarding DiBlasi-Domalewski's employment with the Township will be directed to the appropriate person within the Township responsible for Human Resources. In response to any such inquiry, the Township will provide only a neutral reference to

include DiBlasi-Domalewski's dates of employment, position(s) held, and whether or not she is eligible for re-employment.

8. **Employment Rights**

DiBlasi-Domalewski hereby waives any and all rights to employment with the Township and specifically promises not to knowingly apply for employment or re-employment with the Township or any parent, subsidiary, affiliate or successor of the Township (hereinafter "Related Entities"). DiBlasi-Domalewski agrees that Township and Related Entities have no obligation, contractual or otherwise, to employ or re-employ her, now or in the future, either directly or indirectly, on a full-time, part-time or temporary basis, including but not limited to utilizing DiBlasi-Domalewski's services as a temporary employee, worker or contractor through any temporary service providers, vendors or agencies. DiBlasi-Domalewski agrees that any attempt to obtain employment with Township or any Related Entities will constitute a breach of this Agreement, and that Township or any Related Entities may rely upon the breach in refusing to employ, re-employ or contract with DiBlasi-Domalewski, or in discharging her from employment

9. **Entire Agreement**

The Settlement Agreement, Mutual Non-Disparagement Agreement and General Releases contain the entire agreement between the parties. This document completely and fully supersedes and replaces any and all prior contracts, agreements, discussions, representations, negotiations, understandings and any other communications between the parties pertaining to the subject matter hereof. DiBlasi-Domalewski represents and acknowledges in executing the Agreement that she has not relied upon any representation or statement not set forth in the Agreement made by the Township or their counsel or representatives with regard to the subject matter of the Agreement. No other promises or agreements shall be binding unless in

writing, signed by the parties hereto, and expressly stated to represent an amendment to the Agreement.

10. Successors and Assigns

The Agreement is binding on, and is made for the benefit of, the parties and all who succeed to their rights and responsibilities, such as any successors and/or assigns.

11. Confidentiality/Non-disclosure

The Parties, while acknowledging that this Agreement is a public document, agree that they will not discuss or disclose the facts and terms of this Agreement, except as provided for herein and as provided for by law. The Parties agree not to disclose this document, its contents or subject matter to any person other than their attorneys, accountants or income tax preparers and, where applicable to healthcare providers. This provision shall not prohibit either party from providing information regarding this matter to any person or regulatory body in response to a lawful request for information or government record, or prohibit either party from disclosing such information to the extent required by law.

12. Full Knowledge of Terms and Review Period

The Township advises DiBlasi-Domalewski to consult with an attorney of her choice and her expense prior to executing this Agreement. DiBlasi-Domalewski hereby represents and warrants that, prior to executing this Agreement, she has fully discussed its meaning and effect with an attorney of her choosing, or that she has waived her right to consult with an attorney, and she fully understands its meaning and effect. DiBlasi-Domalewski has twenty-one (21) days from the date it is provided to her to consider it before signing it.

DiBlasi-Domalewski represents and warrants that her attorney has explained to her,

and/or she fully comprehends the meaning of each of the provisions of this Agreement and that she has entered into this Agreement voluntarily. DiBlasi-Domalewski's signature also acknowledges that (1) the Township advised her to consult with an attorney before signing this Agreement; (2) she has up to twenty-one (21) days from the date she receives this Agreement to consider it before signing it; and (3) if DiBlasi-Domalewski signs this Agreement less than twenty-one (21) days after receiving it, she does so knowingly and voluntarily, and waives any right she might have under the Age Discrimination in Employment Act, as amended, to the full twenty-one (21) days to consider this Agreement.

DiBlasi-Domalewski has seven (7) days after signing this Agreement in which to revoke her acceptance by delivering written notice revoking her acceptance to Juan C. Fernandez, Esq., O'Toole Scrivo Fernandez Weiner Van Lieu, 14 Village Park Road, Cedar Grove, New Jersey 07009. Accordingly, this Agreement shall not become effective or enforceable until the expiration of the seven (7) day revocation period. If DiBlasi-Domalewski does not revoke this Agreement during the seven (7) day revocation period, it shall be deemed accepted. DiBlasi-Domalewski agrees that she made an informed and voluntary decision to sign this Agreement on the date she has done so, because she did not need any additional time to decide whether to sign this Agreement.

13. Severability

The parties agree that if any court declares any portion of the Agreement unenforceable, the remaining portions shall be fully enforceable. To the extent permitted and possible, the invalid term shall be deemed replaced by a term that is valid and enforceable and that comes closest to expressing the intention of such unenforceable term.

14. Counterparts and Applicable Law

The Agreement may be executed in counterparts and shall be construed and interpreted in accordance with the laws of the State of New Jersey. The parties agree that any action to enforce or interpret the Agreement shall only be brought in a court of competent jurisdiction of the State of New Jersey.

15. Enforcement

Parties agree that if it is proven in a court of competent jurisdiction by clear and convincing evidence that a party to this Agreement has willfully breached the Agreement, that party will pay any attorneys' fees and costs expended in enforcing the Agreement. This is a material, bargained for provision of the Agreement.

YOU HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO SIGNING THE SETTLEMENT AGREEMENT AND GENERAL RELEASE. BY SIGNING THE SETTLEMENT AGREEMENT AND GENERAL RELEASE YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS.

BY SIGNING THE AGREEMENT, the Parties state that they have carefully read the Agreement, fully understand it and are signing it voluntarily.

THEREFORE, the Parties to this Settlement Agreement, Mutual Non-Disparagement Agreement, and General Release now voluntarily, freely and knowingly execute the Agreement.

Witness: _____

Dated: 11-16-17

Witness: _____

Dated: 12/11/17

HEATHER DIBLASI-DOMALEWSKI

Dated: 11/16/17

By: _____
TOWNSHIP OF MIDDLETOWN

Dated: 12-11-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER-COBB
Acting Chair/Chief Executive Officer

February 26, 2018

Craig S. Gumpel, Esq.
Law Offices of Craig S. Gumpel
1447 Campbell Street
Rahway, New Jersey 07065

Kimberly K. Holmes, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Oswald Robetto v. City of Newark Fire Department* (CSC Docket No. 2014-1089; OAL Docket No. CSV 16483-13)

Dear Mr. Gumpel and Me. Holmes:

The appeal of Oswald Robetto, a Fire Fighter with the City of Newark Fire Department, of his $4,005.86 fine on charges, was before Administrative Law Judge Richard McGill (ALJ), who rendered his initial decision on December 11, 2017, recommending upholding the imposition of the fine. No exceptions were filed on behalf of the parties.

The time frame for the Commission to make its final decision was to initially expire on January 26, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time the Commission secured a 45-day extension of time until March 12, 2018 to render its final decision. However, since the next scheduled meeting is March 21, 2018, it requested consent of the parties, as required, for an additional 45-day extension to render its final decision no later than April 26, 2018. *See N.J.A.C.* 1:1-18.8. However, the appointing authority did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 13, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Richard McGill, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 16438-13
AGENCY REF. NO. 2014-1089

IN THE MATTER OF OSWALD ROBETTO,
CITY OF NEWARK FIRE DEPARTMENT.

Craig S. Gumpel, Esq., for appellant

Kimberly K. Holmes, Assistant Corporation Counsel, for respondent (Kenyatta Stewart, Acting Corporation Counsel, attorney)

Record Closed: October 30, 2017 Decided: December 11, 2017

BEFORE **RICHARD McGILL**, ALJ:

Oswald Robetto ("appellant") appeals from a fine of $4,005.86 imposed by the City of Newark Fire Department ("respondent") in regard to his work as a firefighter. The charges against appellant are as follows: (1) incompetency, inefficiency or failure to perform duties; (2) neglect of duty; and (3) other sufficient cause, referring to violations of respondent's Rules and Regulations and General Orders. The specification states that appellant failed to properly secure and maintain a portable radio assigned to him with the result that it was unaccounted for.

Appellant denies the charges and seeks dismissal thereof. Alternatively, appellant seeks relief from the fine, which he maintains is excessive and otherwise unwarranted.

PROCEDURAL HISTORY

Respondent notified appellant of the charges by Notice of Minor Disciplinary Action dated October 1, 2013. Appellant requested a hearing by letter dated October 25, 2013, and the matter was transmitted to the Office of Administrative Law on November 14, 2013, for determination as a contested case. The hearing was conducted on September 22, 2014, and April 13, 2017, at the Office of Administrative Law in Newark, New Jersey. The record closed on October 30, 2017, upon receipt of appellant's brief.

ISSUES

The issues in this proceeding are whether the charges should be sustained and, if so, whether the disciplinary action imposed by respondent is warranted.

FACTS

There is no real dispute as to the facts in this matter, and I **FIND** as follows. Appellant was employed by respondent as a firefighter. As of August 28, 2013, appellant was an aide to a deputy chief. Appellant's duties included driving an SUV for a deputy chief.

Respondent had a program going back to the 1970's designed to provide firefighters with radios. Older radios cost respondent $1,500 each. Article 40 of respondent's Rules and Regulations provides that a member shall not handle Department property, apparatus, equipment or supplies in a careless, reckless or wasteful manner. At least five firefighters were disciplined for lost, misplaced or

unaccounted for radios. These firefighters were fined $500 each as an estimate of the appropriate restitution for the radios based upon the original cost and the age of the radios from five to ten years.

In or about August 2013, respondent issued new digital radios to firefighters. The cost of the type of radio assigned to appellant was $4,352. When the radios were issued, firefighters were sent a reminder as to the policy with respect to safekeeping of Department equipment.

Appellant would typically be assigned to a twenty-four-hour shift from 8:00 a.m. on one day to 8:00 a.m. the following day. At the beginning of his shift, appellant would check his equipment including the digital radio, which was assigned to the deputy chief's aide. Other firefighters had to sign for a radio at the beginning of their shifts, but the practice with the deputy chief's aides was different in that there was no set procedure for the transfer. The radio could be placed in one of three chargers. Two charges were in the firehouse, and one was in the SUV. Alternatively, the aide on one shift could simply hand the radio to the aide on the next shift. In practice, appellant left the radio in the cupholder in the SUV.

On August 28, 2013, appellant was assigned to a firehouse on Springfield Avenue in Newark. This location was in a high crime area, and property had been stolen from the firehouse and from employee's personal vehicles. In August, the garage door would typically be open, and the doors to the SUV were left unlocked.

On August 28, 2013, appellant responded to several alarms with the last one at 5:00 p.m. There were no alarms through the remainder of appellant's shift. Appellant last saw the deputy chief aide's radio, when he left it in the cupholder in the SUV at approximately 5:00 p.m. Appellant's shift ended the following morning, and he went home.

The deputy chief's aide for the shift beginning at 8:00 a.m. on August 29, 2013, was unable to locate the radio. Appellant received a telephone call at home advising him of the situation, and he returned to the firehouse. Appellant searched for the radio, but he was unable to locate it.

Because the radio was unaccounted for, respondent fined appellant $4,005.86. This amount represented restitution for the cost of the radio less an allowance for the use of the radio for approximately one month.

LAW AND ANALYSIS

An appointing authority may discipline an employee for various causes including incompetency, inefficiency or failure to perform duties; neglect of duty; and other sufficient cause. N.J.A.C. 4A:2-2.3(a). The appointing authority's action is subject to review by the Civil Service Commission, which after a de novo hearing makes an independent determination as to both the charge and the penalty. West New York v. Bock, 38 N.J. 500, 519 (1962). In an appeal concerning a major disciplinary action, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The appointing authority must prove its case by a fair preponderance of the believable evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Darcy, 114 N.J. Super. 454, 458 (App. Div. 1971).

The first charge against appellant is incompetency, inefficiency or failure to perform duties. To the same effect, Article 59 of respondent's Rules and Regulations provides that a member whose performance is demonstrably inadequate or unsuitable and fails to meet, obtain or produce the effects or results mandated shall be in violation of the Department Rules and Regulations.

The second charge against appellant is neglect of duty. Two of respondent's Rules and Regulations are to similar effect. Article 40 provides that a member shall not handle Department property, apparatus, equipment or any supplies in a careless,

reckless or wasteful manner. Article 58 provides that a member shall not commit any act or omission that constitutes neglect of duty.

Here, appellant was responsible for the deputy chief's aide's radio during his shift from 8:00 a.m. on August 28, 2013, to 8:00 a.m. on August 29, 2013. Appellant left the radio in a cupholder in an SUV at approximately 5:00 p.m. on August 28, 2013. The SUV was parked in the garage of the firehouse. The garage door was open, and the doors to the SUV were left unlocked. The firehouse was located in a high crime area, and the risk of theft of the radio is apparent. The fact that it was standard practice to leave the radio in the cupholder of the SUV does not make the risk any less obvious or provide an excuse. Appellant took an undue risk by leaving the radio in the cupholder of the SUV. Under the circumstances, appellant neglected and failed to perform his duty by failing to secure the radio in question. Therefore, I **CONCLUDE** that the following charges must be sustained: (1) failure to perform duties; (2) neglect of duty; and (3) other sufficient cause in the form of violations of Articles 40, 58 and 59 of respondent's Rules and Regulations.

Disciplinary Action

An appointing authority may impose a fine as a form of restitution. N.J.A.C. 4A:2-2.4(c)1. Here, the fine of $4,005.86 represents a reasonable amount of restitution for a radio that had an original cost of $4,352 and was in service for approximately one month. Appellant's reliance on the $500 fines imposed previously is misplaced in that the cost of those radios was only $1,500 and they had been in service for much longer periods of time. Therefore, I **CONCLUDE** that a fine of $4,005.86 is a reasonable disciplinary action under the circumstances of this case.

Accordingly, it is **ORDERED** that:

1. All charges in this matter be sustained.
2. The disciplinary action is a fine of $4,005.86

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.

Dec. 11, 2017
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: DEC 12 2017
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESS LIST

For appellant:

Oswald Robetto

For respondent:

Rufus Jackson

EXHIBIT LIST

J-1 Notice of Minor Disciplinary Action dated October 1, 2013

J-2 Letter dated October 25, 2013, from Craig S. Gumpel, Esq., with attachments

J-3 Notice of Filing dated November 15, 2013

J-4 Notice of Hearing dated February 27, 2014

A-1 Notice No. 2014-009

A-6 Preliminary Notice of Disciplinary Action dated March 25, 2008, with attachment

A-7 Preliminary Notice of Disciplinary Action dated October 2, 2007, with attachment

A-8 Preliminary Notice of Disciplinary Action dated February 7, 2008, with attachment; memorandum dated December 25, 2007; and Final Notice of Disciplinary Action dated April 28, 2008

A-9 Payroll record

R-1 Motorola cost information

R-2 General Order A-3 effective March 1, 1988

R-4 Notice No. 2012-117 dated September 20, 2012

R-5 Memoradum dated September 5, 2013, from Firefighter Oswald F. Robetto to Fire Chief John G. Centanni

R-6 Memoradum dated September 14, 2013, from Firefighter J. Santiago to Fire Chief J.G. Centanni

R-7 Memoradum dated August 29, 2013, from Deputy Chief Michael P. Witte to Fire Chief John G. Centanni

R-8 Newark Police Incident Report dated September 5, 2013

R-10 General Order G-1 effective October 15, 2010

R-13 Memoradum dated November 10, 2009, from Fire Chief Michael J. Lolor to Deputy Chief Edward Rydzewski, et al.

R-14 Memoradum dated January 8, 2010, from Fire Chief Miahcel J. Lalor to Deputy Chief Abdul-Hakim Sadrud-Din, et al.

R-15 Notice No. 2007-088 dated July 23, 2007

12-11-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 2, 2018

Timothy J.P. Quinlan, Esq.
Quinlan & Nigro, LLC
900 Haddon Avenue, Suite 114
Collingswood, New Jersey 08108-2110

Eric J. Riso, Esq.
Platt & Riso, P.C.
40 Berlin Avenue
Stratford, New Jersey 08084

Re: *Vince Saputo v. Voorhees Township Police Department* (CSC Docket No. 2018-431 and OAL Docket No. CSR 11777-17)

Dear Mr. Quinlan and Mr. Riso:

The appeal of Vince Saputo, a Police Officer with Voorhees Township, of his removal on charges, was before Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on December 11, 2017, recommending upholding the removal. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

The time frame for the Commission to make its final decision was to initially expire on January 25, 2018. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that time the Commission secured one 15-day extension of time, and since if does not currently have a quorum, requested consent of the parties, as required, for an additional 15-day extension to render its final decision no later than February 24, 2018. *See N.J.A.C.* 1:1-18.8. However, the appointing authority did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 40A:14-204, effective February 25, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable John S. Kennedy, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 11777-17
AGENCY DKT. NO. N/A

IN THE MATTER OF VINCE SAPUTO,
VOORHEES TOWNSHIP POLICE DEPARTMENT.

Timothy J.P. Quinlan, Esq., for appellant (Quinlan & Nigro, LLC, attorneys)

Eric J. Riso, Esq., for respondent (Platt and Riso, attorneys)

Record Closed: October 30, 2017 Decided: December 11, 2017

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Appellant, Vince Saputo, is a police officer for the Voorhees Township Police Department (Voorhees). On August 4, 2017, after waiving a preliminary hearing, Officer Saputo was served with a final notice of disciplinary action terminating him effective August 5, 2017. He was charged with incompetency, inefficiency for failure to perform duties, insubordination, neglect of duty, and other sufficient cause. He was also charged with violating several department rules. He appealed and on August 8, 2017, the matter was transmitted the Office of Administrative Law (OAL) as a contested case. N.J.S.A.

52:14B-1 to -15 and 14F-1 to -13. The matter was heard on October 16, 2017, and the record closed after submissions by the parties on parties October 30, 2017.

SUMMARY

Appellant has been employed by Voorhees for approximately seven years. He was on duty the evening on January 5, 2017, when he conducted a pedestrian stop on Evesham Avenue at approximately 2:00 a.m. Appellant conducted a pedestrian stop of an African American woman walking on Evesham Avenue. The purported reason for the stop was due to the time of day. He states that there had been some recent motor vehicle burglaries in the area. The women inquired as to why she was being stopped to which Saputo advised that he wanted to know what she was doing walking down the street at that hour. After she declined to provide identification, he advised her that he would arrest her for obstruction if she did not provide identification. Saputo ultimately cuffed and arrested the women and took her down to the station. She fell and was injured while he was cuffing her. Saputo is also recorded on the video at the station calling the victim a "fucking bitch." Saputo concedes that he had no probable cause to stop or arrest this woman. These facts are also corroborated by the video of the stop and at the station. The foregoing facts are undisputed.

TESTIMONY

For appellant:

Vince Saputo concedes that he did not have probable cause to stop, detain or arrest the women on the night in question. He indicated that there had been some car burglaries in the area, and that she looked suspicious. The video of the stop does not demonstrate any suspicious activity or that the victim was in distress. Saputo does not indicate how she looked suspicious, except that she was wearing dark clothes and was walking in the area where there are not normally people walking at that hour of the night. He acknowledged that he had no probable cause and that he was wrong to stop,

interrogate and ultimately arrest her. Saputo attempts to rationalize the stope under the guise of community caretaking. However, the video recording does not indicate and care or concern with the victim, nor did she appear to be in distress. Saputo also conceded his comment to her at the station was inappropriate. He denied that he ever drove by her house or attempted to intimidate her after the incident.

The foregoing facts are undisputed and I **FIND** them as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3. The standard of behavior for police and correction officers is set higher than that of other civil service employees, meaning that infractions will lead to major discipline of officers than otherwise may not have warranted severer discipline for some other position. See Moorestown Township v. Armstrong, 89 N.J. 560, 566 (App. Div. 1965).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking his removal. Specifically, appellant was charged with violation of N.J.S.A. 4A:2-2.3 General Causes, (a) 1 Incompetency,

inefficiency or failure to perform duties, Insubordination, Neglect of Duty and Other Sufficient cause. Appellant is also charged with violating Voorhees Township Police Department Rules: Rule 8: Failure to comply with chief orders, directives, regulation; Rule 31: Neglect of Duty; Rule 36: Using rude or insulting language or conduct offensive to the public; Rule 40: Conduct subversive of good order and discipline of the Department; and Rule 45: Failure to conduct proper, thorough and complete investigations.

Saputo has argued that there was a community caretaking reason for stopping this woman and that the issue of probable cause is not always clear. However, no factual argument was made as to how a woman just walking down the street at night could constitute probable cause, unless there was a suspect fitting that description. Moreover, Saputo has conceded that he had no probable cause to stop and/or arrest this woman. With respect to the community caretaking defense, Saputo never once asked her if she was alright or expressed any concern for her safety. The video of the entire incident was viewed by the undersigned. In addition to the lack of probable cause to stop, detain and arrest this woman, Saputo proceeded to call the women a "fucking bitch" down at the station when she was being processed. The foregoing facts are undisputed and were captioned on the body camera as well as the processing videos which were produced and viewed on the undersigned.

Based upon the testimony and findings, I **CONCLUDE** that the respondent has satisfied its burden of proving that appellant engaged in incompetency, inefficiency, neglect of duty and other sufficient cause under the Civil Services Rules by stopping, interrogating and arresting someone without probable cause and without a proper investigation. I also **CONCLUDE** that respondent has satisfied its burden of proving that appellant violated several department rules by this same conduct. I further **CONCLUDE** that Voorhees did not demonstrate by a preponderance of the credible evidence that the appellant drove by the victim's home and pointed at her house.

The issue then becomes, not whether the charges have been sustained, as appellant has acknowledged his conduct was improper but rather, the level of discipline

to be imposed. Voorhees urges removal and the appellant urges that some level of discipline less than removal is appropriate.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Merit System Board (i.e. now the Civil Service Commission) is required to evaluate the proofs and penalty on appeal, based on the charges. N.J.S.A. 11A:2-19; West New York v. Bock, 38 N.J. 500 (1962). With respect to the discipline, under the precedent established by Town of West New York v. Bock, supra, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, Id. at 523, that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

"[W]here the underlying conduct is of an egregious nature," an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (February 25, 2005), adopted as modified, Merit Sys. Bd. (May 23, 2005), <http://njlaw.rutgers.edu/collections/oal/>; see Henry, supra, 81 N.J. 571. Counseling, warnings, meetings, etc., do not constitute discipline under Civil Service rules. See N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-3.1. The appellant has prior charges of Neglect of Duty and failure to comply with Chief's orders. The respondent urges removal due to egregious nature of the current charges. The petitioner seeks something less than removal.

I **CONCLUDE** that the penalty of removal was appropriate for the egregious conduct of the appellant in stopping this women for no apparent reason. Moreover, he

proceeded to arrest her even after she pointed out that there was no probable cause. I further **CONCLUDE** that there are several aggravating factors as well. One factor is that appellant continued to try to justify detaining and arresting someone for merely walking down the street at night throughout the hearing. Petition has also asserted a community caretaking concern, but never once asked if the women was in distress or needed assistance. Finally, I **FIND** that the conduct and language used toward the victim after her unlawful arrest was also an aggravating factor.

ORDER

The charges of incompetency, inefficiency, insubordination, neglect of duty and violations of the Voorhees rules have been sustained. I therefore, **ORDER** the action taken by the Voorhees in removing appellant from his position as a Voorhees Township Police Officer is **AFFIRMED**.

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. 40A:14-204.

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.

December 11, 2017
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: December 11, 2017 (emailed)

Date Mailed to Parties: December 11, 2017 (emailed)

/mel

APPENDIX

WITNESSES

For Appellant:

Officer Vince Saputo

For Respondent:

None

EXHIBITS

Joint:

J-6 Video dated January 5, 2017, BWC - # 3481, #3496, and #34109

J-7 Video dated January 5, 2017, Processing Video at Voorhees Police Department

J-8 Video dated January 5, 2017, Radio Transmissions Evesham, Atlantic Avenue

For Appellant:

P-1 Google Map of the area where the incident occurred

P-2 Letters in support of Officer Saputo

For Respondent:

R-1 Conduct File

R-2 IA File #2017-C-01

R-3 Training File

R-4 Individual Employee File

R-5 Resume File

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
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DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

John Brannigan, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Angelo Auteri, Esq.
Scarinci Hollenbeck
P.O. Box 790
Lyndhurst, New Jersey 07071

Re: *Peter Zampella v. Hudson County* (CSC Docket No. 2017-3368; OAL Docket No. CSV 6846-17) – **SETTLEMENT**

Dear Mr. Brannigan and Mr. Auteri:

The appeals of Peter Zampella, a Senior Maintenance Repairer with the Hudson County Department of Roads and Public Property, of his removal effective February 14, 2017, was before Administrative Law Judge Julio C. Morejon (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 11, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 28, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 14, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 15, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Julio C. Morejon, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 06846-17
AGENCY DKT. NO.2017-3368

IN THE MATTER OF PETER ZAMPELLA, HUDSON COUNTY, DEPARTMENT OF ROADS AND PUBLIC PROPERTY.

John Brannigan, Esq., (Oxfeld Cohen, attorneys) for Appellant

Angelo Auteri, Esq., (Scarinci Hollenbeck, attorneys) for Respondent

Record Closed: December 5, 2017 Decided: December 11, 2017

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

On May 15, 2017, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. Hearings were scheduled for November 17 & 28, 2017, and before the hearings the parties agreed to settle the matter. An executed copy of the Settlement Agreement indicating the terms of the settlement was forwarded to the OAL on December 5, 2017 and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

December 11, 2017
DATE

JULIO C. MOREJON, ALJ

Date Received at Agency: 12-13-17

Date Mailed to Parties: DEC 13 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

attachment

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 27 day of November, 2017 between the County of Hudson (hereinafter referred to as the "County") and Peter Zampella (hereinafter referred to as "Zampella" or the "Employee").

WHEREAS, the Employee was employed with the County as a Senior Maintenance Repairer; and

WHEREAS, the County instituted a disciplinary action against Zampella in a Preliminary Notice of Disciplinary Action dated August 29, 2016, (hereinafter referred to as the "Disciplinary Action"), charging the following violations: conduct unbecoming a public employee; neglect of duty; insubordination; and other sufficient cause; and

WHEREAS, the Employee requested a departmental hearing on the Disciplinary Action which occurred on September 7, 2016 and October 7, 2016; and

WHEREAS, the charges of conduct unbecoming a public employee; neglect of duty; insubordination; and other sufficient cause were sustained by the Hearing Officer at the conclusion of the departmental hearing; and

WHEREAS, the Hearing Officer set forth a penalty of removal, effective February 14, 2017; and

WHEREAS, a Final Notice of Disciplinary Action dated October 18, 2016 was issued to the Employee following the outcome of the departmental hearing; and

WHEREAS, Zampella filed an appeal of the Hearing Officer's determination to the Office of Administrative Law, Docket No. CSV 06846-17; and

WHEREAS, the County and Zampella desire to resolve all outstanding issues with respect to the Disciplinary Action and the appeal filed in the Office of Administrative Law;

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the County and Zampella agree as follows:

1. **DISCIPLINARY ACTION**

   a. Zampella agrees to a general resignation from his employment with the County, effective February 14, 2017, which the County agrees to accept.

   b. In exchange for his general resignation, the County agrees not to further pursue a termination of Zampella based upon the Disciplinary Action.

   c. Zampella agrees to waive any and all claims to back pay, benefits, and any and all other monetary claims including, but not limited to, attorney's fees with respect to the Disciplinary Action.

   d. Zampella agrees never to seek and/or accept future employment with the County or any of its independent, but related agencies.

2. **COMPLETE RELEASE**

   In further consideration of the settlement herein above, the Employee, his heirs, assigns and agents (hereinafter referred to collectively as "Releasor") voluntarily enter into this Agreement, and certify that Releasor has not been threatened or coerced into signing this Agreement, on the terms which follow:

   a. Releasor hereby releases, waives and discharges the County, its affiliated departments, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint,

or action or writ of any kind, nature, character or description that Releasor had, now has, or may in the future have against the Releasees on account of or arising out of the Disciplinary Action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, claim for damages of any kind, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorney's fees and costs arising from the above acts including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJLAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any federal claim, cause of action demand or complaint arising out of or under the Federal Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as amended, which, among other things, prohibit discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition and any claim, cause of action, demand or complaint arising out of or under the New Jersey Family Leave Act (NJFLA).

vi. Any claim, cause of action demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which among other things, regulates

pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

ix. Any claim, cause of action, demand or complaint arising out of or under the Conscientious Employee Protection Act (CEPA) which, among other things, prohibits retaliatory action by an employer against an employee who objects to practices that he/she reasonably believes are incompatible with a clear mandate of law or public policy concerning public health, safety or welfare.

The aforesaid list shall not be deemed exhaustive but by way of example and the recitation of a release of all claims as set forth in 2a. shall not be diminished thereby.

b. Releasor has not and shall not hereafter seek money damages against the County or the Releasees in any matter lodged within the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC) or with any Federal, State or local court or agency which has been settled herein. Nothing herein shall be construed as limiting any individual's right to file a charge of discrimination should s/he feel that s/he was a victim of unlawful discrimination.

c. If Releasor violates this Complete Release by filing any claim, charge or complaint as prohibited above, Releasor agrees to pay all costs and expenses of defending against the suit incurred by County and/or the Releasees, including reasonable attorney's fees.

3. NON ADMISSION OF LIABILITY.

This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the County, by whom any such obligation or liability is expressly denied.

4. CONSULTATION WITH ATTORNEY.

Employee has consulted with an attorney and/or Union Representative with respect to this Agreement and to review with his Union Representative and/or attorney all of the terms and conditions of this Agreement prior to executing this Agreement.

5. REASONABLE PERIOD OF TIME.

Employee agrees that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but that Employee may waive this twenty-one (21) day period by signing in the space provided at the end of this Agreement.

6. COMPLETE AGREEMENT.

This Agreement contains the entire agreement between the Employee and the County, and each of them, with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the County to do anything other than as is expressly stated

in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

7. **MODIFICATION**.

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

8. **SEVERABILITY**.

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby.

9. **EMPLOYEE ATTESTS**

Employee represents and warrants that he has carefully read each and every provision of this Agreement and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Employee represents and warrants that he enters into this Agreement voluntarily, of his own will, without any pressure or coercion from any person or entity including, but not limited to, the County and/or Releasees.

10. **REVOCATION**

Employee may revoke this Agreement within seven (7) days after the date this Agreement is executed by Employee. This revocation must take the form of written notice by Employee that Employee intends to revoke this Agreement. This revocation must be provided directly to Director Denise Dalessandro of the Department of Roads and Public Property located at Hudson County Plaza, 257

Cornelison Avenue Jersey City, New Jersey 07302. This seven (7) day revocation period may not be waived by the Employee.

IN WITNESS WHEREOF, and intending to be legally bound hereby I, Peter Zampella, executed the foregoing Agreement this 27 day of October 2017.

PETER ZAMPELLA

Sworn and Subscribed to before me
this 27th day of November, 2017.

Esther Jones
Notary Public
State of New Jersey

ESTHER LOLETA JONES
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 3/4/2018

EMPLOYEE'S COUNSEL

Dated: 11/27/17

BY:

COUNTY OF HUDSON

Dated: 12/5/17

BY:

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 day period referred to in the 5th recital on page 6 of this Agreement.

PETER ZAMPELLA

12-12-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Robert Little
AFSCME Council 1
2653A Whitehorse-Hamilton Square Road
Hamilton, New Jersey 08690

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *Loretta Ogle v. Department of Human Services* (CSC Docket No. 2018-1030 and OAL Docket No. CSV 15803 -17) - **SETTLEMENT**

Dear Mr. Little and Director Pinkas:

The appeal of Loretta Ogle, a Human Services Assistant with Ancora Psychiatric Hospital, Department of Human Services, of her 30 working day suspension, was before Administrative Law Judge Lisa James-Beavers (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 12, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 29, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 15, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 16, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15803-17

AGENCY DKT. NO. 2018-1030

IN THE MATTER OF LORETTA OGLE,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: November 30, 2017 Decided: December 12, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Loretta Ogle from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 24, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 12, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 15802-17 15803-2017.
AGENCY DKT. NO. 20 – 2018 - #1030+1031

SETTLEMENT AGREEMENT

IN THE MATTER OF

Loretta Ogle

AND

Ancora Psychiatric Hospital
DEPARTMENT OF HEALTH

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Action dated 9/18/2017(2) contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	E.1.6 - Violation of Rule Conduct, other than	Removal	9/27/17
2.			
3.	A.2.6; A.4.3; E.1.7	30 days susp.	Not Served
4.			
5.			

B. The Appellant Loretta Ogle withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	E.1.6; Conduct unbecoming, other	Modified	35 days susp
2.	A.2.6; A.4.3; E.1.7	withdrawn and a written	
3.	warning will be issued for Conduct unbecoming a public employee for failing to timely renew FMLA which had lapsed.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of none days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: leave of absence without pay.

For Removals, Complete the Following

1. To date, appellant has served a total of since 9/27/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Loretta Ogle 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. In addition to recording the suspension of 35 days beginning 9/27/2017, following, an additional 21 days suspension will be recorded consecutively. These 21 days satisfy suspension time for 3 disciplines that were settled between Appellant, her representative, and Ancora at Ancora, prior to her termination but before she could be scheduled to serve. These 3 disciplines were reduced from 25 days to 12 days, involving attendance, 15 days to 7 days and 7 days to 2 days. The 21 days are to be served and the remaining 21 days are recorded as record suspension.

J. Appellant acknowledges she must report to work as scheduled which is paramount to her continued employment. Any breach will be cause for further discipline.

K. Appellant acknowledges she MUST FOllow all policies and procedures regarding emergency exists and security of the work unit and buildi

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

11/30/2017
DATE

Loretta Ogle
Appellant

11/30/17
DATE

Dawn Brown
Respondent

11-30-17
DATE

ON BEHALF OF APPELLANT

11-30-17
DATE

ON BEHALF OF - Ancora

11-30-17

Department of Human Services

OAL DKT. NO. CSV 15802, 15803-2017

CERTIFICATION

I, Loretta Ogle, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11/30/2017
DATE

Loretta Ogle
NAME

12-12-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Robert Little
AFSCME Council 1
2653A Whitehorse-Hamilton Square Road
Hamilton, New Jersey 08690

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *Loretta Ogle v. Department of Human Services* (CSC Docket No. 2018-1031 and OAL Docket No. CSV 15802 -17) - **SETTLEMENT**

Dear Mr. Little and Director Pinkas:

The appeal of Loretta Ogle, a Human Services Assistant with Ancora Psychiatric Hospital, Department of Human Services, of her removal effective September 17, 2017, was before Administrative Law Judge Lisa James-Beavers (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 12, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 29, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 15, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 16, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15802-17

AGENCY DKT. NO. 2018-1031

IN THE MATTER OF LORETTA OGLE,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Robert E. Little, Assistant to the Director, AFSCME, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: November 30, 2017 Decided: December 12, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Loretta Ogle from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 24, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

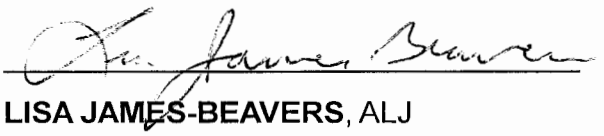
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 12, 2017 — 

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 15802-15803-2017.
AGENCY DKT. NO. 20 – 2018 - #1030+1031

SETTLEMENT AGREEMENT

IN THE MATTER OF

Loretta Ogle

AND

Ancora Psychiatric Hospital
DEPARTMENT OF HEALTH

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Action dated 9/18/2017(2) contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	E.1.6 - Violation of Rule Conduct, other cause	Removal	9/27/17
2.			
3.	A.2.6; A.4.3; E.1.7	30 days susp.	Not Served
4.			
5.			

B. The Appellant Loretta Ogle withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	E.1.6; Conduct unbecoming, other	Modified	35 days susp
2.	A.2.6; A.4.3; E.1.7	Withdrawn and a written	
3.	warning will be issued for Conduct unbecoming a public employee for failing to timely renew FMLA which had lapsed.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

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2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: leave of absence without pay.

For Removals, Complete the Following

1. To date, appellant has served a total of since 9/27/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

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The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Loretta Ogle's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. In addition to recording the suspension of 35 days beginning 9/27/2017, following, an additional 21 days suspension will be recorded consecutively. These 21 days satisfy suspension time for 3 disciplines that were settled between Appellant, her representative, and Ancora at the oral prior to her termination but before she could be scheduled to serve. These 3 disciplines were reduced from 25 days to 12 days, involving attendance. The 15 days to 7 days and 7 days to 2 days. 21 days are to be served and the remaining 21 days are recorded as record suspension.

J. Appellant acknowledges she must report to work as scheduled which is paramount to her continued employment. Any breach will be cause for further discipline.

K. Appellant acknowledges she MUST follow all policies and procedures regarding emergency exists and security of the work unit and buildi

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

11/30/2017
DATE

Loretta Ogle
Appellant

11/30/17
DATE

Dawn Brown
Respondent

11-30-17
DATE

ON BEHALF OF APPELLANT

11-30-17
DATE

ON BEHALF OF - Amcara

11-30-17

Department of Human Services

OAL DKT. NO. CSV 15802, 15803-2017

CERTIFICATION

I, Loretta Ogle, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

11/30/2017
DATE

Loretta Ogle
NAME

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE WEBSTER-COBB
Acting Chair/Chief Executive Officer

February 26, 2018

Samuel Wenocur, Esq.
Oxfeld Cohen
60 Park Place, Suite 600
Newark, New Jersey 07102

Joyce Clayborne, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Evan Scott v. City of Newark, Department of Neighborhood and Recreational Services* (CSC Docket No. 2016-3893 and OAL Docket No. CSV 8923-16)

Dear Mr. Wenocur and Ms. Clayborne:

The appeal of Evan Scott, a Laborer 1 with the City of Newark, Department of Neighborhood and Recreational Services, of his removal effective September 11, 2015 on charges, was before Administrative Law Judge Ellen S. Bass (ALJ), who rendered her initial decision on December 12, 2017, recommending modifying the removal to a 30 working day suspension. Exceptions were filed on behalf of the appointing authority and exceptions and a reply to exceptions was filed on behalf of the appellant.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on January 27, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that time, the Commission secured one 45-day extension of time to render its final decision no later than March 13, 2018. Subsequently, it requested consent of the parties, as required, for an additional 45-day extension of time. *See N.J.A.C.* 1:1-18.8. However, the appellant did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 14, 2018.

Since the appellant's removal has been modified, he is entitled to be reinstated with back pay, benefits and seniority for the period 30 working days after the onset of his separation until he is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's

reinstatement be delayed based on any pending back pay dispute. Proof of income earned and an affidavit of mitigation should be submitted to the appointing authority within 30 days of said reinstatement. Additionally, pursuant to *N.J.A.C.* 4A:2-2.12, as charges have been upheld and major discipline imposed, the appellant is not entitled to counsel fees.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Ellen S. Bass, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08923-16
AGENCY DKT. NO. 2016-3893

IN THE MATTER OF EVAN SCOTT, CITY OF NEWARK, DEPARTMENT OF NEIGHBORHOOD AND RECREATIONAL SERVICES.

Samuel Wenocur, Esq., for appellant, Evan Scott (Oxfeld Cohen, attorneys)

Joyce Clayborne, Esq., for respondent, City of Newark (Newark Corporation Counsel, attorneys)

Record Closed: November 14, 2017 Decided: December 12, 2017

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

The City of Newark, Department of Neighborhood and Recreational Services, (Newark) seeks to terminate Evan Scott, who was employed as a sanitation worker. It contends that Scott engaged in conduct unbecoming a public employee when he accepted a gift of alcohol from a local citizen, and thereafter provoked a physical altercation with a coworker while on the job. N.J.A.C. 4A:2-2.3(a). Scott admits receiving a six-pack of beer from a resident on his trash-collection route, but denies that

he instigated a fight with his coworker. He urges that the penalty sought by Newark is excessive.

PROCEDURAL HISTORY

Newark issued a Preliminary Notice of Disciplinary Action (PNDA) on September 11, 2015, and a Final Notice of Disciplinary Action (FNDA) on March 15, 2016. Scott appealed to the Civil Service Commission on March 21, 2016, and the matter was transmitted to the Office of Administrative Law (OAL) on June 14, 2016. A hearing was conducted at the OAL on October 11, 2017.[1] Post-hearing submissions were filed on November 14, 2017, at which time the record closed.

FINDINGS OF FACT

This case concerns the events of September 11, 2015. Scott was working the 6:00-a.m.-to-2:00-p.m. shift with a driver, Nyreek Ali-Uthmar, and another sanitation worker, Tony Edwards. Scott admitted, and I **FIND**, that during the route a resident handed him a black bag, which he initially thought was garbage. But it jingled in a way that made Scott realize that the bag contained bottles; the bottles contained alcohol. The workers continued on their route uneventfully until its end; indeed, a supervisor, Amani Shukar, encountered them at some point later, and all seemed cordial between them.

From here, the story diverges. Edwards, who was the senior sanitation worker on the route, urged that when he discovered Scott had accepted a gift, he told him that doing so was highly improper, and could cause all of them to lose their jobs. In fact, according to Edwards, he would remind coworkers of the rule prohibiting gifts at the start of each and every route. Edwards testified that Scott became belligerent, and told Edwards he would "knock him out." According to Edwards, it was only the second time the two had worked together, so he did not know Scott well. Scott was a large man,

[1] The hearing was adjourned several times to allow a related criminal proceeding to run its course, and due to several changes in counsel for Newark.

and had some experience as a professional boxer, so Edwards felt intimidated and frightened. He called a supervisor, and reported that Scott was becoming aggressive.

But a fight ensued, with Scott hitting him in the face, and the two men scuffling on the ground. Edwards stated that he had no weapons of any kind. After approximately thirty minutes Edwards returned to his car so that he could flee the scene, because Scott was still approaching him, threatening to kill him, and shouting obscenities and racial slurs. Eventually, Edwards did drive away, although, curiously, not until he took five to ten minutes to open his trunk and change clothes. According to Edwards, he suffered a broken ankle in the scuffle with Scott. But he admitted that this was a self-diagnosis; that his ankle was not x-rayed; and that he did not receive any formal medical treatment.

The altercation resulted in the filing of criminal charges; the parties stipulated and I **FIND** that Edwards was acquitted of aggravated assault and other criminal charges arising out of the incident after a trial. Charges against Scott apparently are still pending; Edwards seemed unclear about the status of these charges, which were filed by him.

Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Edwards' testimony was inconsistent with that of other witnesses, or simply did not ring true. He stated that he had only worked with Scott one other time. Scott indicated that they had shared a route together many prior times. Their supervisor, Shakur, agreed with Scott, and, indeed, seemed a bit surprised when told that Edwards had testified otherwise. Edwards testified quite firmly that he broke his ankle during the altercation; he then admitted that no physician had rendered this diagnosis. Edwards testified both on direct and cross-examination that he called his supervisor to the scene, but Shakur was

quite clear that it was not Edwards who summoned him, rather, it was the driver of the garbage truck, Ali-Uthmar. And Edwards did not quickly flee a situation that he contended frightened him, rather, he took time to change his clothes. I thus am unable to credit Edwards' version of the altercation, which portrays him as an innocent victim, and Scott as a belligerent aggressor.

Conversely, Scott's testimony was consistent, forthright, and believable. Indeed, he admitted that he accepted a gift of beer from a resident, notwithstanding his duty not to do so. And the injuries he sustained, which were verified by medical documentation, support Scott's contention that Edwards was the aggressor, and used a bat as a weapon during their fight. I **FIND** that Scott gave the beer to Edwards because, as he put it, "I don't drink." But at the end of the route, Edwards told Scott that since he was the more senior employee, he was entitled to keep any gifts of alcohol received on the route. An argument ensued, because, as Scott put it, this seemed unfair, as, indeed, although he himself was a teetotaler, he might want to share such gifts with family members who do consume alcohol.

I **FIND** that Edwards tried to cut Scott with a razor, and then went to the trunk of his car, where he retrieved a bat. Edwards struck Scott's right side with the bat, and then threatened to hit him in the head. Scott blocked his head with his left arm; as a result, the arm received the blows. Scott was able to grab the bat from Edwards, but his arm felt numb, and he could not hold on to it. The two men scuffled for a bit on the ground. Edwards threatened to kill Scott, and left. Scott went to a nearby firehouse to seek help. He never struck Edwards, noting that he did not have a chance to, and could not do so once his arm was injured.

Both Shakur and a police officer who was summoned to the scene, detective Stacey Pickett, shared that by the time they had arrived, Edwards was gone. Pickett did not recall that Scott was terribly bloodied, or that he complained about pain in his arm. She described him as coherent. Shakur remembered Scott as being "out of it," and Shakur remained on the scene to ensure Scott received appropriate medical attention. Scott was transported by ambulance first to University Hospital in Newark.

When he did not receive timely attention in the emergency room, his sister transported him to Saint Barnabas Medical Center in Livingston. Hospital records support Scott's claims that he was injured, and confirm that the arm Scott used to block Edwards' blows with the bat was fractured. Although he had been struck as well on the right side, x-rays revealed no rib fractures.

Newark produced no formal policy prohibiting receipt of gifts. But Shakur confirmed, and I **FIND**, that this is standard City policy, and that employees are well aware of the policy.[2] While he used the phrase "zero tolerance," both in regard to gifts and fighting on the job, Shakur indicated that he is not responsible for disciplinary determinations, and could offer no clarification as to what that term meant relative to the measure of discipline to be imposed in the event of an infraction.

CONCLUSIONS OF LAW

A Civil Service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

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[2] Scott urges that absent production of a written policy prohibiting receipt of gifts, Newark has failed to meet its burden of demonstrating that such conduct is prohibited. I disagree, because, indeed, such a prohibition is quite usual for public servants. Scott's argument is persuasive, however, relative to the penalty to be imposed; absent a formal policy, or some competent testimonial explanation of the phrase "zero tolerance" as it is intended by Newark policy, traditional concepts of progressive discipline must govern my determination of the penalty, if any, to be imposed.

Newark contends that Scott is guilty of "[c]onduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that Newark has met its burden of demonstrating that Scott was guilty of conduct unbecoming a public employee. By Scott's own admission, he accepted a gift of beer from a resident and then argued with a coworker about who would be able to enjoy the gift. The rationale behind the policy against accepting gifts is obvious; taxpaying members of the public should feel confident that City employees will provide garbage-collection services equally for every citizen, and not differently, or better, for those who sweeten the workers' compensation with gifts. A violation of the gift policy thus clearly negatively implicates the public's trust in governmental services.

But the escalation of the argument between Scott and Edwards was not Scott's fault. The credible testimony makes it plain that Edwards was the aggressor who escalated the dispute to a physical level, and that he left the scene without alerting a supervisor, the police, or medical help, leaving a bloodied, injured coworker behind. Scott simply tried to defend himself. I **CONCLUDE** that Newark did not meet its burden of demonstrating that Scott engaged in conduct unbecoming a public employee relative to the physical altercation that took place on September 11, 2015.

PENALTY

In this de novo review of the County's disciplinary action I am required to reevaluate the penalty on appeal. N.J.S.A. 11A:2-19; Henry, supra, 81 N.J. 571; Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, supra, 38 N.J. at 522–24. Major discipline may include removal, disciplinary demotion, or suspension or fine of no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is not "a fixed and immutable rule to be followed without question." Carter v. Bordentown, 191 N.J. 474, 484 (2007). The question to be answered is "whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness.'" Ibid. (quoting Polk, supra, 90 N.J. at 578).

I **CONCLUDE** that the penalty imposed here was excessive. The parties stipulated that although employed by Newark as a sanitation worker since 2010, Scott has no prior disciplinary record. Removal is thus too harsh a penalty for this first infraction, and is inconsistent with the concept of progressive discipline. Considering all the circumstances, removal is shocking to my sense of fairness. In so determining, I reiterate that Newark supplied no written document that explained the parameters of its "zero-tolerance" policy, nor did it offer a witness who was able to clarify the penalty envisioned by that policy. Nor would I be bound, in this de novo review, by any such policy. In re Columbo, CSV 1324-11, Final Decision (September 23, 2011), <http://njlaw.rutgers.edu/collections/oal/>. Scott should not have accepted a gift from a member of the public, but I **CONCLUDE** that an appropriate penalty for this first offense is a thirty-day suspension.

ORDER

It is **ORDERED** that the charges against Scott relative to accepting gifts on the job are **AFFIRMED**. It is further **ORDERED** that the charges against Scott relative to fighting on the job are **DISMISSED**. It is further **ORDERED** that the penalty of removal is **REDUCED** to a thirty-day suspension. The amount of back pay shall be mitigated in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

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, P.O. 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.

December 12, 2107

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 12, 2017

DEC 13 2017

Date Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

APPENDIX

WITNESSES

For Appellant:

Evan G. Scott

For Respondent:

Tony Edwards
Stacey Pickett
Amani Shakur

EXHIBITS

For Appellant:

A-1 Not admitted
A-2 Medical records
A-3 Photographs
A-4 Incident report

For Respondent:

R-1 FNDA
R-2 PNDA
R-3 Letter dated September 11, 2015
R-4 Incident Report
R-5 Disciplinary record
R-6 Not admitted
R-7 Not admitted
R-8 Request for Personnel Action
R-9 Edwards statement

R-10 Not admitted

R-11 Not admitted

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Brett Richter
CWA Local 1039
13 West Front Street
Trenton, New Jersey 08608

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *Judith Coles v. Department of Human Services* (CSC Docket No. 2018-1266 and OAL Docket No. CSV 16997-17) - **SETTLEMENT**

Dear Mr. Richter and Director Pinkas:

The appeal of Judith Coles, a Senior Income Maintenance Worker with the Department of Human Services, of her release at the end of her working test period effective October 23, 2017, was before Administrative Law Judge Lisa James-Beavers (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 13, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 29, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 15, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 16, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16997-17

AGENCY DKT. NO. 2018-1266

IN THE MATTER OF JUDITH COLES,
DEPARTMENT OF HUMAN SERVICES,
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES.

Brett Richter, Staff Representative, CWA Local 1039, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 12, 2017 Decided: December 13, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Judith Coles from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on November 15, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 13, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS,** ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 16997-2017

AGENCY DKT. NO. 20 – 2018-1266

SETTLEMENT AGREEMENT

IN THE MATTER OF

Judith Coles

AND

Division of Medical Assistance and Health Services
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The ~~Final Notice of Disciplinary Action dated~~ Notice of Termination at the end of the working test period dated 10/13/17 was issued to Appellant. ~~contained the following charges and proposed discipline:~~

~~Charge~~	~~Discipline~~	~~Dates Effective~~
1. Appellant was released from the title Senior		
2. Income Maintenance Technician effective		
3. 10/23/17 due to failure at the end of the		
4. working test period.		
5.		

B. The Appellant Judith Coles withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services agrees that the following result will occur with regard to each charge:

~~Charge~~	~~Disposition~~	~~New Penalty~~
1. Appellant shall be given a new working test		
2. period in the title Senior Income Maintenance		
3. Technician. Upon approval of the Civil Service Commission		
Appellant shall return to work into the working test period.		

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following: N/A

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following N/A

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Svs. (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Svs. will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Judith Coles 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/12/2017
DATE

Appellant

12/12/2017
DATE

Respondent

Dec. 12, 2017
DATE

Brett Richter
ON BEHALF OF Brett Richter

12/12/17
DATE

ON BEHALF OF

OAL DKT. NO. CSV 16997-2017

CERTIFICATION

Juanita Cole, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/12/2017
DATE

Juanita Cole
NAME

12-13-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
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ROBERT M. CZECH
Chair/Chief Executive Officer

December 27, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Nonee Lee Wagner, DAG
Department of Law & Public Safety
P.O. Box 114
Trenton, New Jersey 08625-0114

Re: *Robert Laracuente v. Department of Transportation* (CSC Docket No. 2018-1136 and OAL Docket No. CSV 16000-17) - **SETTLEMENT**

Dear Mr. Scorzetti and DAG Wagner:

The appeal of Robert Laracuente, a Highway Operations Technician 2 with the Department of Transportation, of his 15 working day suspension on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on December 13, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 15, 2017. Accordingly, the time frame for the Commission to make its final decision expires on January 30, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 31, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16000-17

AGENCY DKT. NO. 2018-1136

IN THE MATTER OF ROBERT LARACUENTE,

DEPARTMENT OF TRANSPORTATION.

Michael Scorzetti, Staff Representative, IFPTE Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Nonee Lee Wagner, Deputy Attorney General, for respondent (Christopher S. Porrino, Attorney General of New Jersey, attorney)

Dianne Barretts, Manager 2, Human Resources, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 12, 2017 Decided: December 13, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Robert Laracuente from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 27, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 13, 2017 _____ _____

DATE **LISA JAMES-BEAVERS,** ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV **16000-2017S**

AGENCY DKT. NO. **2018-1136**

SETTLEMENT AGREEMENT

IN THE MATTER OF

Robert Laracuente

AND

Dept. of Transportation

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated October 2, 2017 contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. Conduct Unbecoming a Public Emp.	15 Day Susp.	10/18/17 to 11/7/17
2.		
3.		
4.		
5.		

B. The Appellant Robert Laracuente withdraws his/her appeal and request for a hearing, and the Respondent Department of Transportation agrees that the following result will occur with regard to each charge:

Charge	Disposition	New Penalty
1. Conduct Unbecoming	15 day suspension	12 served
2.		3 on the record

4. (Strike if not applicable) The Appellant agrees to a

_____ resignation in good standing

_____ general resignation

which shall be effective _____ [date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under *N.J.A.C.* 17:1-2.18(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Transportation (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Transportation will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees' Retirement System pursuant to *N.J.S.A.* 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Robert Laracuente's (Appellant's) disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Transportation, their employees, agents, or assigns, including but not limited to those which have been or could have been made or

CERTIFICATION

I, Robert Laracuente, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12-12-17
DATE

Robert Laracuente
NAME

12-13-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

December 27, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Danna Brown, Director
Department of Health
P.O. Box 360
Trenton, New Jersey 08625-0360

Re: *Martha Mendoza v. Ancora Psychiatric Hospital, Department of Health* (CSC Docket No. 2018-1207 and OAL Docket No. CSV 16369-17) - **SETTLEMENT**

Dear Mr. Scorzetti and Ms. Brown:

The appeal of Martha Mendoza, a Senior Building Maintenance Worker at Ancora Psychiatric Hospital, Department of Health, of her removal, effective October 23, 2017, on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on December 13, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 15, 2017. Accordingly, the time frame for the Commission to make its final decision expires on January 30, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 31, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Anita Pinkas (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16369-17

AGENCY DKT. NO. 2018-1207

IN THE MATTER OF MARTHA MENDOZA,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Michael Scorzetti, Staff Representative, IFPTE Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 12, 2017 Decided: December 13, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Martha Mendoza from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on November 2, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 13, 2017
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 16369-2017

AGENCY DKT. NO. 20 –

SETTLEMENT AGREEMENT

IN THE MATTER OF

MARTHA MENDOZA

AND

Ancora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 10/20/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	A.2.3/A.4.2/A.8.1/E.1.4	Removal	10/23/17
2.	NJAC 4A:2-2.3(a)4, 6, 12		
3.			
4.			
5.			

B. The Appellant MARTHA MENDOZA withdraws his/her appeal and request for a hearing, and the Respondent Department of Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	As above	Suspended	60 days susp
2.			
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 10/23/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence from work without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DEPARTMENT OF HEALTH (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of MARTHA MENDOZA 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of HEALTH, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant understands the importance of reporting to work as scheduled.

J. This is a LAST CHANCE agreement. Any further chronic or excessive absenteeism or unauthorized absence by Appellant shall result in Appellant's Removal.

K. Appellant shall not appeal the departmental level hearing officer's determination for PNDA dated 8/4/17, a suspension of 20 days for attendance infractions. This decision is due out shortly

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12-12-17
DATE

Martha Mendoza
Appellant

12/12/17
DATE

Dana Brown
Respondent DOH

12/12/17
DATE

ON BEHALF OF Local 1035

DATE

ON BEHALF OF

OAL DKT. NO. CSV 16369-2017

CERTIFICATION

I, MARTHA MENDOZA, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12-12-17
DATE

Martha Mendoza.
NAME

12-13-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

December 27, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Danna Brown, Director
Department of Health
P.O. Box 360
Trenton, New Jersey 08625-0360

Re: *Veronica Nock v. Ancora Psychiatric Hospital, Department of Health* (CSC Docket No. 2018-1066 and OAL Docket No. CSV 15829-17) - **SETTLEMENT**

Dear Mr. Scorzetti and Ms. Brown:

The appeal of Veronica Nock, a Senior Building Maintenance Worker at Ancora Psychiatric Hospital, Department of Health, of her removal, effective September 27, 2017, on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on December 13, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 15, 2017. Accordingly, the time frame for the Commission to make its final decision expires on January 30, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 31, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Anita Pinkas (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 15829-17

AGENCY DKT. NO. 2018-1066

IN THE MATTER OF VERONICA NOCK,
DEPARTMENT OF HUMAN SERVICES,
ANCORA PSYCHIATRIC HOSPITAL.

Michael Scorzetti, Staff Representative, IFPTE Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 12, 2017 Decided: December 13, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Veronica Nock from the action of the respondent/ appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 25, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 13, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS,** ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 15829-2017

AGENCY DKT. NO. 20 – 2018-1066

SETTLEMENT AGREEMENT

IN THE MATTER OF

Veronica Nock

AND

Ancora Psychiatric Hospital
Department of Health

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The, three **Final** Notice of Disciplinary Action dated 9/26/2017 contained the following charges and proposed discipline: * Only one FNDA was appealed & correlated to PNDA 8/3/2017, the other two FNDAs were also dated 9/26/2017

	Charge	Discipline	Dates Effective
(A)	1. A.1.1/A.4.3/A.84/E.14	Removal	9/27/2017
(B)*	2. A.2.5/A.4.4/A.5.4/A.8.5/E.15	Removal	9/27/2017
(C)	3. A.2.6./A.4.5/A.5.5/A.8.6/E.16.	Removal	9/27/2017
	4.		
	5.		

B. The Appellant Veronica Nock withdraws his/her appeal and request for a hearing, and the Respondent Department of Human Services Health agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	(A)	Sustained	15 days susp
2.	(B)	Sustained	30 days susp.
3.	(C)	Sustained	45 days susp

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of since 9/27/2017 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Health (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Health will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Veronica Nock 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Health, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges it is imperative to report to work as scheduled.

J. THIS IS A LAST CHANCE AGREEMENT. Any further Attendance related infractions by Appellant will result in her termination from employment.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/12/17
DATE

Veronica Nick
Appellant

12/12/17
DATE

Donna Brown
Respondent DOH

12/12/17
DATE

ON BEHALF OF Local 1915

DATE

ON BEHALF OF

CERTIFICATION

I, VERONICA NOCK, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/12/17
DATE

Veronica Nock
NAME

12-13-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

December 27, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *Donald Robinson v. Vineland Developmental Center, Department of Human Services* (CSC Docket No. 2018-970 and OAL Docket No. CSV 16978-17) - **SETTLEMENT**

Dear Mr. Scorzetti and Ms. Pinkas:

The appeal of Donald Robinson, a Residential Services Worker at Vineland Developmental Center, Department of Human Services, of his removal, effective May 10, 2017, on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on December 13, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 15, 2017. Accordingly, the time frame for the Commission to make its final decision expires on January 30, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 31, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16978-17

AGENCY DKT. NO. 2018-970

IN THE MATTER OF DONALD ROBINSON,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Michael Scorzetti, Staff Representative, IFPTE Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 12, 2017 Decided: December 13, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Donald Robinson, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case November 15, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

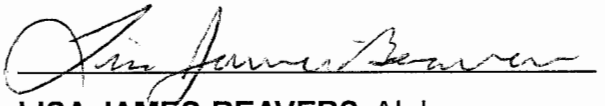
2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 13, 2017
DATE



LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 16981-2017 CSV 16978-17
AGENCY DKT. NO. 20 – 2018-971 2018-971

SETTLEMENT AGREEMENT

IN THE MATTER OF

Donald Robinson

AND

Vineland Developmental Center
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Actions dated 9/5/17 contained the following charges and proposed discipline:

CSV 16981-17 (A) CSV 16978-17 (B)

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2C:3.5-10.A	Indefinite Suspension	5/10/17
2.	E.1.2/NJAC 4A:2-2.3(a)6,12	Removal	5/10/17
3.			
4.			
5.			

B. The Appellant Donald Robinson withdraws his/her appeal and request for a hearing, and the Respondent Department of _____ agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	(A)	Moot	
2.	(B)	Sustained	90 days suspension
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 5/10/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Donald Robinson 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges Vineland Developmental Center is a drug free workplace. It is expected Appellant not use drugs and it is acknowledged Appellant is subject to random drug testing.

J. Appellant shall be scheduled for counseling at the Employee Advisory Service and shall follow all requirements. This referral is mandatory.

K. Any further incidents of a similar nature shall result in Appellant's removal.

L. Appellant acknowledges his failure to provide medical verification as required on 3/9/17, 3/15/17, 3/23/17, 3/27/17, 3/28/17 and 5/7/17. Any further incidents of this nature will result in disciplinary action up to and including removal.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/12/17
DATE

Appellant

12/12/17
DATE

Respondent

12/12/17
DATE

ON BEHALF OF LOCAL 195

12/12/17
DATE

Bernadette M. Mushaway, ERC
ON BEHALF OF

CERTIFICATION

I, D. Robinson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/12/17
DATE

NAME

12-13-17

CHRIS CHRISTIE
Governor
Kim Guadagno
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

ROBERT M. CZECH
Chair/Chief Executive Officer

December 27, 2017

Michael Scorzetti
IFPTE Local 195
186 North Main Street
Milltown, New Jersey 08850

Anita Pinkas, Director
Department of Human Services
P.O. Box 700
Trenton, New Jersey 08625-0700

Re: *Donald Robinson v. Vineland Developmental Center, Department of Human Services* (CSC Docket No. 2018-971 and OAL Docket No. CSV 16981-17) - **SETTLEMENT**

Dear Mr. Scorzetti and Ms. Pinkas:

The appeal of Donald Robinson, a Residential Services Worker at Vineland Developmental Center, Department of Human Services, of his indefinite suspension, on charges, was before Administrative Law Judge Lisa James-Beavers (ALJ), who issued her initial decision on December 13, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 15, 2017. Accordingly, the time frame for the Commission to make its final decision expires on January 30, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally secure an initial 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this particular matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that the matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition in this matter. Thus, the Commission has determined not to seek any extensions on

this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective January 31, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Lisa James-Beavers, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. CSV 16981-17

AGENCY DKT. NO. 2018-971

IN THE MATTER OF DONALD ROBINSON,
DEPARTMENT OF HUMAN SERVICES,
VINELAND DEVELOPMENTAL CENTER.

Michael Scorzetti, Staff Representative, IFPTE Local 195, for appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Anita Pinkas, Director of Employee Relations, for respondent pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 12, 2017 Decided: December 13, 2017

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter concerns the appeal of Donald Robinson, from the action of the respondent/appointing authority. Upon receipt of the appellant's hearing request, the matter was transmitted to the Office of Administrative Law for determination as a contested case November 15, 2017, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

As a result of a settlement conference, the parties agreed to a settlement of all issues in dispute and have prepared a settlement agreement, which is attached and fully incorporated herein.

I have reviewed the record and terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the settlement agreement.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **ORDERED** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

December 13, 2017 — Lisa James-Beavers

DATE — **LISA JAMES-BEAVERS**, ALJ

Date Received at Agency: 12/15/17

Date Mailed to Parties: 12/15/17

/nd

OAL DKT. NO. CSV 16981-2017 CSV 16478-
AGENCY DKT. NO. 20 – 2018 - 97 / 2018-97

SETTLEMENT AGREEMENT

IN THE MATTER OF

Donald Robinson

AND

Vineland Developmental Center
DEPARTMENT OF HUMAN SERVICES

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The two **Final** Notice of Disciplinary Actions dated 9/5/17 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
CSV 16981-17 (A) 1.	~~NJAC~~ 2C:35-10A	Indefinite Suspension	5/10/17
CSV 16478-17 (B) 2.	E.1.2/NJAC 4A:2-2.3(a)6,12	Removal	5/10/17
3.			
4.			
5.			

B. The Appellant Donald Robinson withdraws his/her appeal and request for a hearing, and the Respondent Department of _____ agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	(A)	MOOT	
2.	(B)	Sustained	90 days suspension
3.			

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of _____ days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: _____.

For Removals, Complete the Following

1. To date, appellant has served a total of Since 5/10/17 days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: None.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: leave of absence without pay.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

_____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. Department of Human Services (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of Human Services will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of Donald Robinson 's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Human Services, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. Appellant acknowledges Vineland Developmental Center is a drug free workplace. It is expected Appellant not use drugs and it is acknowledged Appellant is subject to random drug testing.

J. Appellant shall be scheduled for counselling at the Employee Advisory Service and shall follow all requirements. This referral is mandatory.

K. Any further incidents of a similar nature shall result in Appellants removal.

L. Appellant acknowledges his failure to provide medical verification as required on 3/9/17, 3/15/17, 3/23/17, 3/27/17, 3/28/17 and 5/7/17. Any further incidents of this nature will result in disciplinary action up to and including removal.

I. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/12/17
DATE

Appellant

12/12/17
DATE

Respondent

12/12/17
DATE

ON BEHALF OF LOCAL 195

12/12/17
DATE

Bernadette M. Mulvaney, ERC
ON BEHALF OF

CERTIFICATION

I, D. Robinson, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/12/17
DATE

NAME

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

February 28, 2018

Eugene G. Liss, Esq.
92 Main Street – 1ST Floor
Little Falls, New Jersey 07424

Bernard Mercado, Esq.
Newark Public Schools
2 Cedar Street
Newark, New Jersey 07102

Re: *Debra Irving v. Newark Public School District* (CSC Docket No. 2017-3595 and OAL Docket No. CSV 7192-17) - **SETTLEMENT**

Dear Mr. Liss and Mr. Mercado:

The appeal of Debra Irving, a Teacher Aide with the Newark Public School District, of her removal effective March 24, 2017, was before Administrative Law Judge Michael Antoniewicz (ALJ), who returned the matter to the Civil Service Commission (Commission) on December 14, 2017 indicating that the parties had reached a settlement.

The time frame for the Commission to make its final decision was to initially expire on January 29, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date, the Commission secured a 45-day extension of time to render its final decision no later than March 15, 2018. *See N.J.A.C.* 1:1-18.8. While this matter is now ready for presentation to the Commission, its next scheduled meeting is March 21, 2018. In this regard, the Commission has determined that, since the settlement complies with Civil Service law and rules, it finds no reason to delay the final disposition of this matter further. Thus, it will not request consent from the parties, as required, for an additional extension of time. Under these circumstances, the ALJ's recommended decision will be deemed adopted, effective March 16, 2018, as the final decision in this matter per *N.J.S.A.* 52:14B-10(c).

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Michael Antoniewicz, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 07192-17
AGENCY DKT. NO. 2017-3595

IN THE MATTER OF DEBRA IRVING,
NEWARK PUBLIC SCHOOL DISTRICT.

Eugene G. Liss, Esq., for appellant Debra Irving

Bernard Mercado, Esq., for respondent Newark Public School District

Record Closed: December 11, 2017 Decided: December 14, 2017

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

Appellant Debra Irving filed an appeal from a Final Notice of Disciplinary Action dated May 5, 2017, issued by respondent Newark Public School District (District). The Civil Service Commission transmitted the matter to the Office of Administrative Law, where it was filed on May 22, 2017, for determination as a contested case. A hearing was held on October 30, 2017. Subsequently, under cover letter dated December 1, 2017, counsel for the District submitted the attached Settlement Agreement, indicating the terms of agreement between the parties.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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.

12/14/17
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: December 15, 2017

Date Mailed to Parties: December 15, 2017

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

NEWARK PUBLIC SCHOOL DISTRICT
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139; Fax (973) 733-8771
Attorneys for Respondent State-operated
School District of the City of Newark

DEBRA IRVING, Appellant, vs. NEWARK PUBLIC SCHOOL DISTRICT, Respondent.	:	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. CSV: 07192-2017N AGENCY REF. NO.: 2017-3595 SETTLEMENT AGREEMENT

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following Settlement Agreement that fully disposes of all issues and claims in controversy between Appellant Debra Irving ("Appellant" or "Irving") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District"), and Appellant and Respondent intending to be legally bound, mutually agree as follows:

1. Appellant will withdraw, with prejudice, her appeal and request for a hearing filed under OAL Docket No. CSV 07192-2017N, Agency Ref. No.: 2017-3595 including all claims which were raised or which could have been raised in relation thereto.

2. Appellant also agrees to withdraw, with prejudice, any and all other suits or claims that she may have previously filed against the District that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all of Appellant's outstanding claims against the District related to her employment. It is understood by the parties that this Settlement Agreement will serve as a formal letter of withdrawal for any other suits or claims, except for workers compensation claims, should Appellant fail to submit a formal letter of withdrawal for each suit or claim.

3. In exchange, and for good consideration as hereby acknowledged by the the parties, the District will permit Appellant to resign her former position with the District in good standing so that Appellant's separation from employment effective March 24, 2017 will be converted to and deemed to be a voluntary and permanent "Resignation in Good Standing" Appellant's personnel records will be amended to conform to the terms of the settlement.

4. Other than permitting Appellant to resign her former position, Appellant will not receive any monies or emoluments from the District as part of this Settlement Agreement.

5. Appellant agrees that she will not apply for reemployment with the District at any time. If Appellant does apply for reemployment with the District and is approved for employment, the terms of this Settlement Agreement will control and shall be grounds for immediate termination of Appellant's employment.

6. As of the date of her resignation, all of Appellant's employment rights, including, but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

7. Appellant waives all claims of any nature, either known or unknown, against Respondent with regard to this matter including all fees, back pay, front pay or any other monetary relief, except for workers compensation claims.

8. In exchange for the good consideration set forth in Paragraph 3 above, the sufficiency of which is hereby acknowledged by the parties, Appellant releases and discharges the District, its Advisory Board of Education and its Advisory Board Members, State District Superintendent and any and all other officers, employees, agents, representatives, successors and assigns of the District (the "Released Parties") with respect to all claims or rights that she may have against the District and the Released Parties relating to her employment with the District and/or separation from the District. This includes, without limitation the waiver of any and all claims, charges, or demands, known or unknown, that have arisen or that may arise relating to Appellant's employment with and separation from the District, including but not limited to any and all rights or claims she may have regarding discrimination on any basis, or any federal or state civil rights law, or any alleged violation under Title VII of the Civil Rights Act of 1964, as amended; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act; the Americans with Disabilities Act; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Employment Retirement Income Security Act of 1974, as amended; the New Jersey Law Against Discrimination; the Conscientious Employee Protection Act; the Fair Labor Standards Act; the National Labor Relations Act; the Family Leave Act or Family Medical Leave Act; the New Jersey Wage and Hour Law; the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other federal, state, or local statute or common law relating to employment, wages, hours, or any other terms and conditions of employment and/or termination of employment as well as any other alleged violations of any federal, state or local law, regulation or

ordinance, and/or contract or implied contract or collective bargaining/contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment with and separation from the District, including but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys' fees, costs and/or future wage loss, except for workers compensation claims. Appellant agrees to hold harmless and indemnify the District and the Released Parties for any costs or expenses associated with the enforcement of this Settlement Agreement and the covenants and representations contained therein should enforcement of this agreement become necessary.

9. Notwithstanding Paragraph 8 of this Settlement Agreement, it is understood by the parties that Appellant is not waiving her rights to workers compensation claims. Further, it is also understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commissioner, or any other federal, state or local law agency. Should any entity, agency commission or person file a charge, action, complaint or lawsuit against the District based upon any of the above-released claims in Paragraph 8, Appellant agrees not to seek or accept any resulting relief whatsoever.

10. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Appellant of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Appellant acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives his right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient and adequate time within which to consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Appellant understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the seven-day period.

11. Nothing in this Settlement Agreement shall be deemed to be an admission of liability on behalf of either party. This Settlement Agreement shall not constitute a precedent in any matters involving other employees.

12. Appellant understands, agrees to and acknowledges that she is bound by this Release. Anyone who succeeds to Appellant's rights and responsibilities, such as Appellant's heirs or the executors of Appellant's estate, are also bound. This Settlement Agreement is made for the benefit of the Appellant and the District and all who succeed to their rights and responsibilities.

13. If any provision or portion of a provision of this Settlement Agreement is held by the Civil Service Commission or a court of competent jurisdiction or determined under applicable federal or state law to be invalid, void, or unenforceable, the remaining provisions or portions of the affected provision will remain and continue in full force and effect.

14. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Settlement Agreement freely and voluntarily, without duress, coercion, or pressure from the other party.

15. This Settlement Agreement constitutes the full agreement among the parties and shall be construed and enforced pursuant to New Jersey Law.

16. This Settlement Agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark and will only become effective on the District upon the approval of the State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

17. This Settlement Agreement is subject to final approval by the Civil Service Commission and will only become final and binding on Appellant and Respondent upon the approval of the Civil Service Commission. Any disapproval by the Civil Service Commission shall not interfere with the rights of either party to pursue the matter further.

Dated: Oct 30, 2017

DEBRA IRVING
Appellant

Dated: Oct 30 2017

EUGENE LISS, ESQ.
Attorney for Appellant

Dated: 11/20/17

CHRISTOPHER CERF
State District Superintendent

Dated: 11/2/17

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, DEBRA IRVING, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney/representative questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: Oct 30 2017

DEBRA IRVING

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

VACANT
Chair/Chief Executive Officer

February 2, 2018

Christopher A. Gray, Esq.
Sciarra & Catrambone, LLC
1130 Clifton Avenue
Clifton, New Jersey 07013

Steven S. Glickman, Esq.
570 Broad Street, Suite 1201
Newark, New Jersey 07102

Re: *Bijoy Rodriguez v. City of Paterson* (CSC Docket No. 2018-248 and OAL Docket No. CSR 11238-17)

Dear Mr. Gray and Mr. Glickman:

The appeal of Bijoy Rodriguez, a Police Officer with the City of Paterson, of his removal on charges, was before Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on December 14, 2017, recommending reversing the removal. Exceptions were filed on behalf of both parties.

The time frame for the Commission to make its final decision was to initially expire on January 29, 2018. *See N.J.S.A.* 40A:14-204 and *N.J.A.C.* 1:4B-1.1(d). Prior to that time the Commission secured one 15-day extension of time, and since it does not currently have a quorum, requested consent of the parties, as required, for an additional 15-day extension to render its final decision no later than February 28, 2018. *See N.J.A.C.* 1:1-18.8. However, the appellant did not provide consent for a further extension. Under these circumstances, the ALJ's recommended decision will be deemed adopted as the final decision in this matter per *N.J.S.A.* 40A:14-204, effective March 1, 2018.

Since the appellant's removal has been reversed, he is entitled to be reinstated with back pay, benefits and seniority for the period from the onset of his separation until he is actually reinstated. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. In this regard, the appellant **is not** entitled to any back pay for any period of time he was disabled from working as a Police Officer. *See N.J.A.C.* 4A:2-2.10(d)9. Additionally, the appellant is entitled to reasonable counsel fees. Proof of income earned and an affidavit in support of reasonable counsel fees should be submitted to the appointing authority within 30 days of this determination. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12,

the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Kimberly A. Moss, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSR 11238-17
AGENCY DKT. NO. N/A

IN THE MATTER OF BIJOY RODRIGUEZ,
CITY OF PATERSON.

Christopher A. Gray, Esq., and **Frank C. Cioffi**, Esq., for appellant (Sciarra & Catrambone, attorneys)

Steven S. Glickman, Esq., and **Gregory S. Glickman**, Esq., for respondent, (Steven S. Glickman, attorney)

Record Closed: December 1, 2017 Decided: December 14, 2017

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE

Appellant, Bijoy Rodriguez (Rodriguez or appellant), appeals his removal by respondent, City of Paterson (Paterson or respondent), on charges of conduct unbecoming a public employee; incompetency, inefficiency, or failure to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and other sufficient cause, relating to not returning to work on June 5, 2017, and the accuracy of the doctor's note and report. At issue is whether Rodriguez engaged in the alleged conduct, and, if so, whether it constitutes conduct unbecoming a public employee;

incompetency, inefficiency, or failure to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and other sufficient cause that warrants removal.

PROCEDURAL HISTORY

On June 12, 2017, Paterson served Rodriguez with a Preliminary Notice of Disciplinary Action. A departmental hearing was held on June 27, 2017. Paterson served Rodriguez with a Final Notice of Disciplinary Action on July 14, 2017, sustaining charges of incompetency, inefficiency, or failure to perform duties, chronic or excessive absenteeism or lateness, neglect of duty, conduct unbecoming a public employee and other sufficient cause. Rodriguez requested a hearing and forwarded simultaneous appeals to the Civil Service Commission and the Office of Administrative Law (OAL). The appeal was filed with the OAL on July 28, 2017. Appellant agreed to waive back pay for the period October 5, 2017, to October 19, 2017. The hearing was held on November 20, 2017, and November 22, 2017. Closing briefs were submitted on December 1, 2017, after which I closed the record.

FACTUAL DISCUSSION

Testimony

Gustave Seden

Gustave Seden (Seden) is the commander in charge of the Paterson Police Department Internal Affairs (IA) unit. Rodriguez was on suspension in the beginning of 2017. The suspension was to end in June 2017. On June 5, 2017, Rodriguez gave Seden a note from Dr. Gazzillo which stated that Rodriguez was disabled and could not work. Seden contacted the officer in charge that day, Deputy Chief Troy Oswald (Oswald), and Director Jerry Speziale (Speziale) and gave them a copy of the note. He did not know that the note came from Rodriguez's workers' compensation doctor. IA sent a letter to Dr. Gazzillo on June 6, 2017. Dr. Gazzillo responded to the letter the next day. A few days later Seden told Rodriguez to come in regarding Dr. Gazzillo's

note. Seden had not received Rodriguez's medical files before requesting that he come in. IA attempted to contact the risk manager, Samir Goow (Goow), but had difficulty reaching him. Rodriguez came into headquarters to write the report. He was using a cane, but did not appear to be in pain.

Once Rodriguez provided his report on June 12, 2017, he was suspended. He was advised to contact counsel and draft charges for the suspension of Rodriguez. At the meeting, there was no discussion of Rodriguez's medical condition or if he was taking prescription opioid medication.

Seden was not part of the surveillance of Rodriguez. At that time IA was processing an upcoming academy class. Oswald and Speziale conducted the surveillance. He does not know why they conducted the surveillance and does not know of any other case where Oswald and Speziale conducted a surveillance.

Seden was never directed to do an investigation of Rodriguez or get his medical records. He did not write a report regarding Rodriguez.

Jerry Speziale

Speziale is the police director of Paterson. The deputy police chiefs are responsible for the day-to-day operations of the police department. In June 2017 he was informed by Oswald that Rodriguez had returned to work for one day after a suspension and stated that he was completely disabled. Speziale does not know what Rodriguez's injuries are. He saw a note stating that Rodriguez was disabled. He does not know how or when Rodriguez was injured. He does not know what medications Rodriguez was taking. He did not speak to appellant's doctor and never saw any of his medical records. He does not recall if he saw the questionnaire filed out by Dr. Gazzillo.

It was decided that based on Rodriguez's prior discipline, the claim needed to be investigated. Internal Affairs could not do the surveillance because of a recruit class. Speziale cannot direct Internal Affairs to investigate. Speziale contacted Goow about getting an investigator for the surveillance. It was decided by Speziale, Oswald, and

Deputy Chief Rodriguez that Oswald and Speziale would conduct the surveillance ofaAppellant Rodriguez. The surveillance took place on June 11 and 12, 2017, using a high-speed camera with a zoom lens. Photos of the surveillance show Rodriguez at his home, opening the garage door and entering his jeep, backing the jeep out of the garage, walking around the front of the vehicle, closing the garage door, loading the rear of the jeep, and leaning into the jeep. While he was doing this, he had complete mobility. He did not use a cane or other aides to assist him with walking. His movements were fluid and he used both hands. Rodriguez was not in visible pain. Speziale was fifteen to twenty feet away from Rodriguez when he took the pictures.

Speziale next took pictures of Rodriguez picking his daughter up from school. These photos show Rodriguez opening the vehicle door with both feet on the curb, grabbing his daughter's hand, squatting to assist his daughter into the car, and picking up his daughter to put her in the car. Rodriguez did not use a cane or any other devise to assist him with walking.

Speziale then took pictures of Rodriguez when he returned home. Rodriguez exited the vehicle carrying two water bottles in his arm that was in a sling and his daughter's backpack in his other hand. Rodriguez then entered the house. He did not use a cane or any other device to assist him with walking. Speziale does not know how old Rodriguez's daughter is or what was in her backpack.

Speziale took pictures of Rodriguez as he was entering police headquarters on June 12, 2017. At that time the photos show Rodriguez's wife assisting him out of the car; Rodriguez is limping and using a cane. Speziale does not know why Rodriguez's arm was in a sling.

Someone is placed on modified duty who is recovering from an injury or surgery—an officer who cannot be on the street. Modified duty includes answering phones or watching cameras, working in the radio and records room. Speziale testified that Rodriguez could have done modified duty. There have been officers on modified duty who were taking painkillers. Rodriguez was previously terminated for fraud but he was given a second chance.

Dr. David Weiss

Dr. David Weiss is board certified in orthopedics. He evaluated Rodriguez on September 15, 2017. As part of the evaluation, he reviewed Rodriguez's medical records. The MRI revealed a disc herniation at C5/C6 and C6/C7, protruding type. This type of herniation causes pain going down the body, a pins-and-needles feeling, and weakness in the arm. The EMG revealed that Rodriguez had radiculopathy, a pins-and-needles feeling, and pain going down his arm.

Rodriguez could no longer preform as a police officer. As of September 2017 he could only do sedentary work. The use of his weapon is curtailed in his left arm. Rodriguez has a permanent nerve injury, as per the EMG.

In a June 19, 2017 letter, Dr. Gazzillo stated that Rodriguez had started to drive short distances. Rodriguez had to be careful when driving because he was taking Vicodin.

Troy Oswald

Oswald is the deputy police chief of Paterson and the chief of detectives. On June 5, 2017, he became aware that appellant was not returning to work. He spoke to Deputy Chief Rodriguez, Speziale, and Seden regarding appellant. It was decided that there would be an investigation due to appellant's prior discipline. Oswald was involved in appellant's prior investigation. Oswald did not talk to Risk Management. He did not know appellant's diagnosis or what medications he was taking. There was no discussion of speaking with the doctor. He did not review medical records and did not know that Rodriguez had been receiving treatment since October 2016. Oswald and Speziale did the surveillance. They parked down the street from Rodriguez's house. Oswald did not see Rodriguez use any walking aides during the surveillance. He did not notice any problem with Rodriguez's neck or torso. Rodriguez's left arm was in a sling, but he was using it. Rodriguez showed no signs of pain or discomfort.

Once the surveillance concluded, Oswald met with Deputy Chief Rodriguez and Seden to discuss the pictures that were taken and what Oswald had observed. It was decided to call Rodriguez to headquarters. When Rodriguez arrived at headquarters he was hobbling, walking gingerly, and using a cane. Rodriguez was not hobbling, walking gingerly, or using a cane when the surveillance pictures were taken.

Modified duty or light duty consists of working in the communication room entering information into the computer, which Rodriguez would be able to do. Oswald did not draft the preliminary charges or discuss what charges would be filed against Rodriguez.

Bijoy Rodriguez

Rodriguez became a Paterson Police patrolman on October 24, 2003. He was assigned to the cellblock on October 24, 2016. At that time, he was advised that there was a combative prisoner. The prisoner's behavior escalated and Rodriguez and another officer were assigned to do a cell extraction. Rodriguez grabbed the prisoner's arm. The prisoner resisted, sweeping Rodriguez off his feet. This caused Rodriguez to strike his neck and arm on the end of the steel bunk in the cell, and then fall to the floor.

Rodriguez felt like his arm blew up when it hit the steel bunk. He felt pain in his back and lost feeling in his left arm. He reported the injury to the sergeant. He was sent to ImmediCenter for medical treatment. Rodriguez did not return to work after the injury. Appellant testified that if he sits too long or walks long distances his legs feel numb. He uses a cane for support.

On December 16, 2016, Rodriguez was terminated from Paterson Police Department for a previous incident. The termination was changed to a six-month suspension. From October 24, 2016, to December 16, 2016, Rodriguez was not required to come in on modified duty. Dr. Gazzillo was his Paterson-assigned workers' compensation doctor. Rodriguez began treating with Dr. Gazzillo one week after the incident in lockup. In May 2017 he discussed with Dr. Gazzillo that his suspension was ending and he had to return to work on June 5, 2017. Dr. Gazzillo told him that he

could not return to work on full or modified duty. He gave Rodriguez a letter to this effect, which Rodriguez gave to Seden. Rodriguez was told by Seden to go to IA on June 12, 2017. He reported to IA as requested. His wife came with him. He brought the cane to the meeting because he knows that the elevator does not work and he would have to use the stairs.

Rodriguez agreed with Dr. Gazzillo's responses on the questionnaire. He was asked to write a report regarding his agreement with the questionnaire. Dr. Gazzillo told him that he would never go back to full-duty work. IA never requested his medical records. He applied for disability retirement on June 15, 2017. Rodriguez is still being treated by Dr. Gazzillo, through Paterson's workers' compensation insurance. He has completed physical therapy. He is still taking medication. Rodriguez told Dr. Gazzillo about his right arm going numb and pain in his neck while driving. Dr. Gazzillo told him that he should only occasionally drive short distances. Rodriguez last saw Dr. Gazzillo on October 16, 2017.

FINDINGS OF FACT

In light of the contradictory testimony presented by respondent's witnesses and appellant and his witness, the resolution of the charges against appellant requires that I make credibility determinations with regard to the critical facts. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 60 N.J. 546 (1974); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). A fact finder "is free to weigh the evidence and to reject the testimony of a witness even though not contradicted when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances

in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521–22 (1950); see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to observe the demeanor of the witnesses, I **FIND** Dr. Weiss and Rodriguez to be credible. Rodriguez described his injury and was told by Dr. Gazzillo, a Paterson workers' compensation doctor, that he could not return to work. This was confirmed by a letter and questionnaire filed out by Dr. Gazzillo. Dr. Weiss agreed with the medical questionnaire and letter of Dr. Gazzillo. I **FIND** Oswald and Speziale less credible. Their testimony as to what they saw was credible, but the determinations that they made that Rodriguez could return to work did not consider Dr. Gazzillo's opinion, Rodriguez's medical records, or the medication that Rodriguez was prescribed.

Having reviewed the testimony and evidence and the credibility of the witnesses, I make the following **FINDINGS** of **FACT**.

Rodriguez became a Paterson police officer in 2003. There was an incident in 2016 that resulted in his termination. Rodriguez and Paterson entered into an agreement on or about March 20, 2017, reducing the termination to a six-month suspension.

On October 24, 2016, prior to the termination, Rodriguez was injured during a cell extraction of a prisoner. He struck his neck and arm on the steel cell bunk. Upon impact, he felt like his arm blew up and had pain in his neck and arm. He began treatment with ImmediCenter, where he was treated by Dr. Gazzillo. Dr. Gazzillo is his workers' compensation doctor provided by Paterson. To date, Rodriguez is still being treated by Dr. Gazzillo.

In May 2017, Rodriguez told Dr. Gazzillo that his suspension would end on June 5, 2017, and he was scheduled to return to work. He was given a note by Dr. Gazzillo stating that he was disabled and was not able to function on full duty or light duty. Rodriguez provided this note to Seden on June 5, 2017. Dr. Gazzillo sent a letter to the workers' compensation claims resolution department dated June 5, 2017, stating that

Rodriguez was still taking Vicodin and that he was unable to work full time or light duty. Dr. Gazzillo completed a questionnaire from Paterson regarding whether Rodriguez would be able to return to work in various capacities. Dr. Gazzillo answered that Rodriguez could not do the work in any of the capacities.

Speziale, Oswald, Seden, and Deputy Chief Rodriguez met regarding appellant not returning to work in June 2017. It was decided that there would be an investigation as to whether Rodriguez could return to work. The surveillance was conducted by Oswald, who was a deputy chief, and Speziale, who was the police director. The surveillance took place on June 11, 2017, and June 12, 2017. Speziale took photos with a high-power camera with a zoom lens. Photos of the surveillance show Rodriguez at his home, opening the garage door and entering his jeep, backing the jeep out of the garage, walking around the front of the vehicle, closing the garage door, loading a skateboard into the rear of the jeep, and leaning into the jeep. He did not use a cane or other aides to assist him with walking. His movements were fluid. Speziale was fifteen to twenty feet away from Rodriguez when he took the pictures.

Speziale next took pictures of Rodriguez picking his daughter up from school. These photos show Rodriguez opening the vehicle door with both feet on the curb, grabbing his three-year-old daughter's hand, squatting to assist his daughter into the car, and picking up his daughter to put her in the car. Rodriguez did not use a cane or any other device to assist him with walking.

Speziale next took pictures of Rodriguez when he returned home. Rodriguez exited the vehicle carrying two water bottles in his arm that was in a sling and his daughter's backpack in his other hand. Rodriguez then entered the house. He did not use a cane or any other device to assist him with walking. Rodriguez was not doing any strenuous activity in the surveillance photos. Speziale took pictures of Rodriguez as he was entering police headquarters. At that time the photos show Rodriguez's wife assisting him out of the car; Rodriguez is limping and using a cane.

Speziale and Oswald never contacted Dr. Gazzillo regarding Rodriguez's medical condition. They did not review the medical records of Rodriguez. There was

no testimony that Paterson had a doctor review Rodriguez's medical records or Dr. Gazzillo's reports. Speziale did not know what Rodriguez's injuries were or what medication he was on.

Rodriguez has herniated discs at C5/C6 and C6/C7, protruding type, which caused pain radiating down his body, a pins-and-needles feeling, and weakness in his arm. An EMG confirmed radiculopathy. Rodriguez was prescribed Vicodin, which is a class-two opioid. The sides effects include: dizziness, nausea, impairment of judgment, and passing out. Rodriguez's gait is wider than it should be. His gate function is not normal. He had spasms in his neck and restricted motion. An adequate grip-strength test could not be done on Rodriguez's left side. He had sensory deficit in his left upper extremities. Rodriguez has chronic cervical sprain and strain and two cervical herniated discs with a radicular component confirmed by an EMG.

If Rodriguez sits too long or walks too long his legs feel numb. He uses a cane for support. Rodriguez told Dr. Gazzillo that his right arm goes numb and he has pain when he drives. Dr. Gazzillo told him to only drive occasionally and only short distances. Rodriguez is still treating with Gazzillo. As of June 2017, Rodriguez was taking Vicodin as prescribed by Dr. Gazzillo.

In a workers' compensation context, treating physicians generally determine when an employee should return to work and whether the employee should return to full duty, part-time duty, or modified duty. The type of medication that the employee is taking can determine if he can go back to work.

Rodriguez applied for disability retirement on June 15, 2017. Dr. Weiss is an expert in orthopedics, impairment disability, and workers' compensation disability.

LEGAL ANALYSIS AND CONCLUSION

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the charges of conduct unbecoming a public employee; incompetency, inefficiency or failure

to perform duties; chronic or excessive absenteeism or lateness; neglect of duty; and other sufficient cause are not sustained.

The purpose of the Civil Service Act is to remove public employment from political control, partisanship, and personal favoritism, as well as to maintain stability and continuity. Connors v. Bayonne, 36 N.J. Super. 390 (App. Div.), certif. denied, 19 N.J. 362 (1955). The appointing authority has the burden of proof in major disciplinary actions. N.J.A.C. 4A:2-1.4. The standard is by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). Major discipline includes removal or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would apply. W. New York v. Bock, 38 N.J. 500 (1962).

Hearings at the OAL are de novo. Ensslin v. Twp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995).

Under N.J.A.C. 4A:2-2.3(a)(1), an employee may be subjected to major discipline for "incompetency, inefficiency, or failure to perform duties."

Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007) (DYFS worker who waved a lit cigarette lighter in a five-year-old's face was terminated, despite lack of any prior discipline). "There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "In addition, there is no right or reason for a government to continue employing an incompetent and inefficient individual after a showing of inability to change." Klusaritz v. Cape May County, 387 N.J. Super. 305, 317 (App. Div. 2006) (termination was the proper remedy for a County treasurer who couldn't balance the books, after the auditors tried three times to show him how).

> In reversing the MSB's insistence on progressive discipline, contrary to the wishes of the appointing authority, the Klusaritz panel stated that "[t]he [MSB's] application of progressive discipline in this context is misplaced and contrary to the public interest." The court determined that Klusaritz's prior record is "of no moment" because his lack of competence to perform the job rendered him unsuitable for the job and subject to termination by the county.
>
> [In re Herrmann, 192 N.J. 19, 35-36 (2007) (citations omitted).]

There is no definition in the administrative code of the term "inefficiency," and therefore, it has been left to interpretation. In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980).

The fundamental concept that one should be able to perform the duties of the position is stated in Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960), which happens to be a probationary-period case involving a nurse:

> Manifestly, the purpose of the probationary period is to further test a probationer's qualifications. Neither the Legislature nor the Commission has given the courts any guidance in determining the extent of assistance or orientation which a probationer must receive. Undoubtedly her duties must be explained to her and she must be given reasonable opportunity to perform the duties expected of her. But this does not mean she is entitled to on-the-job training in the manner of performing her duties. This is what she must be qualified for—the proper performance of her duties as outlined by the appointing authority.

Conduct that occurs over a period of time, or frequently recurs, is considered "chronic," and may be the basis of discipline or dismissal. N.J.A.C. 4A:2-2.3(a)(4). "Just cause for dismissal can be found in habitual tardiness or similar chronic conduct." W. New York v. Bock, 38 N.J. 500, 522 (1962). While a single instance may not be sufficient, "numerous occurrences over a reasonably short space of time, even though sporadic, may evidence an attitude of indifference amounting to neglect of duty." Ibid.

However, approval of an absence shall not be unreasonably denied. N.J.A.C. 4A:2-6.2(b).

In Cumberland County Welfare Board v. Jordan, 81 N.J. Super. 406 (App. Div. 1963), a classified employee who was granted a leave of absence was improperly denied an extension of that leave because of the appointing authority's failure to provide proper notice of the denial; the appointing authority knew she was absent, was aware that she was confined to a hospital, and had previously granted the leave.

"Unbecoming conduct" is broadly defined as any conduct which adversely affects the morale or efficiency of the governmental unit or which has a tendency to destroy public respect and confidences in the delivery of governmental services. The conduct need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior, which devolves upon one who stands in the public eye. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Neglect of duty can arise from an omission or failure to perform a duty as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" signifies conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957). Neglect of duty can arise from omission to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Although the term "neglect of duty" is not defined in the New Jersey Administrative Code, the charge has been interpreted to mean that an employee has neglected to perform and act as required by his or her job title or was negligent in its discharge. Avanti v. Dep't of Military and Veterans Affairs, 97 N.J.A.R.2d (CSV) 564; Ruggiero v. Jackson Twp. Dep't of Law and Safety, 92 N.J.A.R.2d (CSV) 214.

In this matter Rodriguez was injured at work on October 24, 2016. He is still being treated by Dr. Gazzillo, his workers' compensation doctor provided by Paterson. Dr. Gazzillo wrote a note and filed out a questionnaire stating that Rodriguez could not

return to full or light duty on June 5, 2015. At that time Rodriguez was taking the opioid medication Vicodin. The surveillance showed Rodriguez getting into a vehicle, leaning into a vehicle, walking around a vehicle, putting a skateboard into the vehicle, lifting his three-year-old daughter into the vehicle, putting her backpack into the vehicle, and holding bottles of water with the sling on his arm. He was not using a cane during the time these photos were taken. The surveillance did not show any strenuous activity that was undertaken by Rodriguez.

Paterson attempts to substitute the observations of Speziale and Oswald for medical documentation that Rodriguez can return to work. Dr. Gazzillo wrote that Rodriguez was unable to return to full or light-duty work on June 5, 2017. This was also the opinion of Dr. Weiss. Paterson has provided no medical testimony to refute Dr. Gazzillo or Dr. Weiss. There was no indication that Paterson ever asked what medication Rodriguez was taking.

I **CONCLUDE** that appellant's conduct by following the instructions of his Paterson provided workers' compensation doctor, Dr. Gazzillo, did not constitute conduct unbecoming a public employee, incompetency, inefficiency or failure to perform duties; chronic or excessive absenteeism or lateness, neglect of duty and, other sufficient cause.

In his closing brief Rodriguez submitted a motion to dismiss the charges pursuant to N.J.S.A. 52:17B-243. N.J.S.A. 52:17B-243 provides:

> a. A State, county, or municipal law enforcement officer who has been injured in the performance of the officer's duties shall not be discharged from employment as a result of a determination, based upon a medical examination by a physician designated by the employer of the officer, that the officer is physically incapacitated, due to the injuries, for the performance of the officer's usual duties or any other available duties in the department which the employer is willing to assign to the officer.
>
> b. Pending retirement, the employer of the law enforcement officer shall maintain health insurance for the

> officer at the level that coverage was provided prior to the injury.
>
> c. The provisions of this section shall apply only when the law enforcement officer has filed an application for retirement with the Police and Firemen's Retirement System, the State Police Retirement System, or the Public Employees' Retirement System and the officer has sick leave or workers' compensation time available.
>
> d. The provisions of this section shall apply to both civil service and non-civil service jurisdictions.

In this matter, Rodriguez was not terminated because of a determination based upon a medical examination by a workers' compensation physician that he is physically incapacitated due to the injuries for the performance of the officer's usual duties or any other available duties in the department which the employer is willing to assign to the officer. It is not a case that Paterson, believing Rodriguez was disabled, terminated him. Paterson did not believe that he was disabled from performing other available duties. Paterson believed that Rodriguez could work on modified duty. In addition, Rodriguez received his Preliminary Notice of Disciplinary Action on June 12, 2015, prior to his application for disability retirement.

I **CONCLUDE** that Rodriguez was not terminated as a result of a determination, based upon a medical examination by a physician designated by the employer of the officer, that the officer is physically incapacitated due to the injuries for the performance of the officer's usual duties or any other available duties in the department which the employer is willing to assign to the officer.

ORDER

Based on the foregoing findings of fact and applicable law, it is hereby **ORDERED** that the determination of respondent that appellant, Bijoy Rodriguez, be removed from employment is **REVERSED**.

I further **ORDER** that appellant be reinstated to his position as a police officer and that back pay and other benefits be issued to appellant as may be dictated by 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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. 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.

12-14-17
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: Dec 14, 2017

Date Mailed to Parties:

ljb

WITNESSES

For Appellant:

Dr. David Weiss

For Respondent:

Gustave Seden

Jerry Speziale

Troy Oswald

EXHIBITS

For Appellant:

A-1 Not in Evidence

A-2 Not in Evidence

A-3 Preliminary Notice of Disciplinary Action dated June 12, 2017

A-4 Letter from Dr. Gazzillo dated May 31, 2017

A-5 Medical Note of Dr. Gazzillo dated May 31, 2017

A-6 Paterson Police Department Questionnaire Answered by Dr. Gazzillo

A-7 Not in Evidence

A-8 Certification of Jerry Speziale dated August 15, 2017

A-9 Paterson Police Report of Bijoy Rodriguez dated October 24, 2016

A-10 Report of Injury on Duty dated October 24, 2017

A-11 Workers' Compensation Treatment Authorization dated October 24, 2016

A-12 Examination of Dr. Gazzillo dated June 5, 2017

A-13 Letter from Dr. Gazzillo to Claims Representative dated June 5, 2017

A-14 Letter from Dr. Gazzillo dated June 19, 2017

A-15 Letter from Dr. Gazzillo to Claims Representative dated August 31, 2017

A-16 Letter from Dr. Gazzillo to Claims Representative dated October 16, 2017

A-17 Independent Medical Evaluation of Dr. David Weiss dated September 25, 2017

A-18 Functional Capacity Evaluation dated September 28, 2017

A-19 Supplemental report of Dr. David Weiss dated November 16, 2017

A-20 Curriculum Vitae of Dr. David Weiss

A-21 Not in Evidence

For Respondent:

R-1 Final Notice of Disciplinary Action dated June 12, 2017

R-2 Preliminary Notice of Disciplinary Action dated June 12, 2017

R-3 Note in Evidence

R-4 Questionnaire completed by Dr. Gazzillo dated June 7, 2017

R-5 Report of Bijoy Rodriguez dated June 12, 2017

R-6 Surveillance photographs

R-7 Report of Deputy Chief Troy Oswald

R-8 Preliminary Notice of Disciplinary Action of Bijoy Rodriguez dated September 12, 2016

R-9 Not in Evidence

R-10 Not in Evidence

R-11 Not in Evidence

R-12 Not in Evidence

R-13 Final Notice of Disciplinary Action of Bijoy Rodriguez dated December 6, 2016

R-14 Memorandum of Agreement dated March 2017

10 19-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chairperson

March 29, 2018

Raymond Montgomery
AFSCME Council 1
2930 South Broad Street
Trenton, New Jersey 08610

Susan C. Sweeney, Esq.
Dept. of Military & Veterans Affairs
P.O. Box 340
Trenton, New Jersey 08625-0340

Re: *Margarette Jean-Baptiste v. Department of Military and Veterans Affairs* (CSC Docket No. 2017-193; OAL Docket No. CSV 11504-16) - **SETTLEMENT**

Dear Mr. Montgomery and Ms. Sweeney:

The appeal of Margarette Jean-Baptiste, a Recreation Assistant with the New Jersey Veterans Memorial Home at Menlo Park, Department of Military and Veterans Affairs, of her 117 working day suspension, on charges, was before Administrative Law Judge Danielle Pasquale (ALJ), who issued her initial decision on December 19, 2017 indicating that the parties had reached a settlement.

The Civil Service Commission (Commission) received this matter on December 27, 2017 and received one 45-day extension of time, as required, to make its final decision no later than March 27, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. In this regard, if the Commission could not decide the matter by that date, it would normally request consent from the parties for a second 45-day extension of time to render its final decision. *See N.J.A.C.* 1:1-18.8. However, currently one of the three Commission members must be recused from participating on this matter, thus, there is not a quorum of members available to vote. Until such a quorum is secured, or, in other words, until an ***additional*** Commission member is seated, this matter ***cannot*** be decided by the Commission. We have no timeframe as to when that may occur. Based on this information, and given the fact that this matter was settled by the parties and a review of the settlement by staff indicates that it is in compliance with Civil Service law and rules, there does not appear to be a basis to further delay a final disposition. Thus, the Commission has determined not to seek any further extensions on this matter and, per *N.J.S.A.* 52:14B-10(c), it is to be considered deemed adopted, effective March 28, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Danielle Pasquale, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. CSV 11504-16
AGENCY DKT. NO.2017-193

IN THE MATTER OF MARGARETTE JEAN-BAPTISTE,
NJ VETERANS MEMORIAL HOME - MENLO PARK,
DEPARTMENT OF MILITARY & VETERANS AFFAIRS.

Raymond Montgomery, Staff Representative, AFSCME, for Appellant, Margarette Jean-Baptiste, pursuant to N.J.A.C. 1:1-5.4(a)6

Susan Sautner-Sweeney, Esq, for Respondent, NJ Department of Military & Veterans Affairs

Record Closed: December 5, 2017 Decided: December 19, 2017

BEFORE **DANIELLE PASQUALE**, ALJ:

On August 1, 2016, the above referenced matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. An In-Person Conference was held for December 13, 2017 and the parties agreed to settle the matter. An executed copy of the Settlement Agreement indicating the terms of the settlement was signed on said date and is attached hereto.

I have reviewed the record and terms of the settlement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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.

December 19, 2017
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: December 21, 2017

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: December 21, 2017
lr

attachment

STATE

OAL DKT. NO. CSV 11504-16
AGENCY DKT. NO. 20 – 2017-173
SETTLEMENT AGREEMENT

IN THE MATTER OF

Margarette Jean-Baptiste

AND

NJDMAVA-NJ Veterans Home @ Menlo Park

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Final** Notice of Disciplinary Action dated 6/24/16 contained the following charges and proposed discipline:

	Charge	Discipline	Dates Effective
1.	NJAC 4A:2-2.3(a)6	117 DAY Suspension	1/14/16 - 6/26/16
2.			
3.			
4.			
5.			

B. The Appellant Margarette Jean-Baptiste withdraws his/her appeal and request for a hearing, and the Respondent Department of DMAVA agrees that the following result will occur with regard to each charge:

	Charge	Disposition	New Penalty
1.	NJAC 4A:2-2.3(a)6	20 DAY Suspension	
2.		remainder of time to be Credited @ Leave of	
3.		absence without pay for personal reasons (approved)	

4. _____

5. _____

C. The parties have agreed to the following:

For Suspensions, Complete the Following:

1. To date, appellant has been suspended for a total of 117 days based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: N/A.

3. Any other days from the time of last suspension day until return to work shall be treated as follows: Approved LOA without pay, personal reasons.

For Removals, Complete the Following

1. To date, appellant has served a total of _____ days without pay based upon the above charges.

2. The total number of days of back pay, if any, to be paid by the appointing authority to the Appellant is as follows: _____.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: _____.

4. (Strike if not applicable) The appellant agrees to a

_____resignation in good standing

____ general resignation

which shall be effective _____[date]. Any days from the effective date of removal to the effective date of resignation shall be treated as follows:

_____

_____.

The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. DMAVA (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of M. Jean-Baptiste will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Department with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of M. Jean-Baptiste's disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of DMAVA, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee

Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers' compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

OAL DKT. NO. CSV 11504-16

1. This agreement will become effective only if approved by the **CIVIL SERVICE COMMISSION**. Any disapproval by the **CIVIL SERVICE COMMISSION** shall not interfere with the rights of either party to pursue the matter further.

12/13/17
DATE

Margaret Bofilsk
Appellant

12/13/17
DATE

Respondent NJDMAVA
NJ Veterans Home @ Menlo Park

12/13/17
DATE

ON BEHALF OF

DATE

ON BEHALF OF

OAL DKT. NO. CSV 11504-16

CERTIFICATION

I, Margarette Jean-Baptiste, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **CIVIL SERVICE COMMISSION**, my claim against the Respondent will terminate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

12/13/17
DATE

Margarette Jean-Baptiste
NAME

12-19-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
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DEIRDRE L. WEBSTER COBB
Acting Chair

March 22, 2018

Patrick P. Toscano, Jr., Esq.
The Toscano Law Firm
80 Bloomfield Avenue – Suite 101
Caldwell, New Jersey 07006

France Casseus, Esq.
City of Newark Law Department
920 Broad Street, Room 316
Newark, New Jersey 07102

Re: *Joseph Sanger v. City of Newark Police Department* (CSC Docket No. 2015-242; OAL Docket No. CSV 9287-14)

Dear Mr. Toscano and Ms. Casseus:

The appeal of Joseph Sanger, a Police Officer with the City of Newark Police Department, of his 10 working day suspension on charges, was before Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on December 19, 2017, recommending upholding the suspension. No exceptions were filed on behalf of the parties.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on February 2, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date the Commission secured a 45-day extension of time until March 19, 2018 to render its final decision. Since the next scheduled meeting was March 21, 2018 (rescheduled to March 27, 2018), it requested consent of the parties, as required, for an additional 45-day extension to render its final decision no later than May 3, 2018. *See N.J.A.C.* 1:1-18.8. However, neither party provided consent for a further extension. Under these circumstances, the ALJ's recommended decision is deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 20, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Thomas R. Betancourt, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. CSV 09287-14
AGENCY DKT. NO.: CSC 2015-242

JOSEPH SANGER,
Petitioner,

vs.

CITY OF NEWARK POLICE DEPARTMENT,
Respondent.

Patrick P. Toscano, Esq., for Appellant (Toscano Law Firm, LLC, attorneys)

France Casseus, Assistant Corporation Counsel, for Respondent

Record Closed: December 18, 2017 Decided: December 19, 2017

BEFORE **THOMAS R. BETANCOURT,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Joseph Sanger, appeals a Final Notices of Disciplinary Action, dated June 17, 2014, providing a penalty of ten days suspension.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on July 24, 2014.

A prehearing conference was held on December 8, 2014, with the Honorable Joan Bedrin-Miurray, ALJ, and a prehearing Order, dated December 12, 2014, was entered by Judge Bedrin-Murray.

Appellant filed a motion for summary decision on May 4, 2015 (dated April 30, 2015). Respondent filed a responsive brief on May 27, 2015 (dated May 21, 2015). Respondent in its brief asserts that there are no disputed facts, which is correct, and that the matter is ripe for summary decision. While Respondent does not specifically ask for summary decision, I am treating the responsive brief as a cross motion for summary decision.

The matter was transferred to the undersigned on December 18, 2017, as Judge Bedrin-Murray was confirmed by the New Jersey Senate to be a Judge of the Tax Court.

There does not appear to have been a request for an extension of time within which to render a decision on the motion for summary decision.

FINDINGS OF FACT

The following facts are undisputed:

1. Appellant, Joseph Sanger, was placed on Medical Certification on September 19, 2013. (Toscano certification, Exhibit D)

2. Medical Certification is set forth in Newark Police Department General Order No. 94-4. (Exhibit A, Respondent's brief)

3. After being placed on Medical Certification Appellant booked off work ten (10) days within a six month period from September 19, 2013 to March 19, 2014.

4. Each time Appellant took off work for a medical reason he provided medical documentation for each day.

5. Based upon the ten sick days aforesaid, Respondent filed a Preliminary Notice of Disciplinary Action (PNDA), dated March 24, 2014, containing three

charges: Charge A, Chapter 18:29.1 – Official Inefficiency or Incompetency; Charge B, Chapter Violation of Civil Service Rule 4A:2-2.3(a)1, Incompetency or Inefficiency. (Toscano Certification, Exhibit A)

6. The specification for the two charges in the PNDA were as follows: "On September 19, 2013, Police Officer Joseph Sanger, was placed on the Medical Certification List. Since being placed on Medical Certification, he has been out sick a total of ten (10) days, thus, failing to show any significant improvement during the six month period. Though (through?) his excessive six leave, he demonstrates an unwillingness and/or inability to meet, obtain or produce results necessary for a satisfactory performance." (Toscano certification, Exhibit A)

7. An Investigative Submission was prepared by Lieutenant Eugene M. Ballard which found that Appellant failed to show improvement in his sick time usage, after being placed on Medical Certification, in violation of Newark Police Rules and Regulations – Sick Leave Policy and Procedures, and Civil Service Rule 4A:2-2.3(a)4, chronic absenteeism. (Toscano certification, Exhibit C)

8. The charges set forth in the PNDA were sustained by Final Notice of Disciplinary Action (FNDA), dated June 17, 2014, which provided a penalty of a ten day suspension. (Toscano certification, Exhibit B).

9. Appellant has received the following discipline while a Newark Police Officer:

a. Disobedience of Orders – found guilty and served a three day suspension.

LEGAL ANALYSIS AND CONCLUSION

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such

an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

Having read the briefs and certification, and having reviewed the exhibits attached thereto, it is clear that there are no issues as to material fact and that the matter is ripe for summary decision.

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the

competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Newark Police Department General Order No. 94-4, at section IX, sets forth the procedures for Medical Certification. Section IX(E)(1)(a) provides, "If, after a three month period, the sick record of a member on Medical Certification has not significantly improved, the individual shall be considered for disciplinary charges under Chapter 6, of Rules and Regulations, Section 6:29-2, Official Inefficiency or Incompetency and/or Civil Service Rules 4A:2-2.3, Section (a) 4, Chronic Absenteeism."

N.J.A.C. 4A:2-2.3(a)4 sets forth that an employee may be disciplined for excessive absenteeism. This is the "Civil Service Rules" which Section IX of the Newark Police Department General Order No. 94-4 refers. However, The PNDA, in Charge B, alleges a violation of N.J.A.C. 4A:2-2.3(a)1, Incompetency, inefficiency or failure to perform duties. The PNDA does not allege a violation of N.J.A.C. 4A:2-2.3(a)4, excessive absenteeism. As Newark Police Department General Order No. 94-4, Section IX, does not authorize a charge of violation of N.J.A.C. 4A:2-2.3(a)1, Incompetency, inefficiency or failure to perform duties, the same cannot be sustained as it is not a permissible charge under this section. Only charges under Chapter 6, of Rules and Regulations, Section 6:29-2, Official Inefficiency or Incompetency and/or Civil Service Rules 4A:2-2.3, Section (a) 4, Chronic Absenteeism.

The PNDA does charge Appellant with a violation of Newark Police Department Rules and Regulations, Section 18:29.1, which states: "Official inefficiency or incompetence. Department members whose performance is demonstrably inadequate or fails to meet, obtain or produce the effects or results mandated by Department orders and procedures shall be deemed in violation of this Rule and Regulation and shall be charged accordingly."

It is clear from the undisputed facts herein that Appellant showed little, if any, improvement in his use of sick time by booking out ten days in a six month period after being placed on Medical Certification. The fact that the Appellant provided medical documentation each time does not negate his non improvement. Newark Police Department General Order No. 94-4, at section IX clearly anticipates improvement in use of sick time. This simply did not occur during the relevant period. Clearly the evidence preponderates in favor of Respondent as the first charge in the PNDA.

Having determined that Appellant is guilty of the first charge in the PNDA it become necessary to determine if the ten day suspension called for in the FNDA is appropriate.

Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div.

1950). Appellant's entire record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock,supra, 38 N.J. 500.

Appellant has one minor disciplinary action in his record, having served a three day suspension in 2013 for Disobedience of Orders. I do not consider a ten day suspension in the present matter to be unreasonable, arbitrary or offensively excessive, and therefore the same should stand. See Ducher, supra.

Based on the foregoing, I **CONCLUDE** that Appellant's motion for summary decision should be **DENIED**; and that Respondent's cross motion for summary decision should be sustained as to the first charge in the PNDA, and denied as to Charge B in the PNDA, and that the ten day suspension set forth in the FNDA should be sustained.

ORDER

It is **ORDERED** that Respondent's motion for summary decision is **GRANTED** in part and **DENIED** in part, as follows:

1. The first charge in the PNDA is dismissed; and,
2. Charge B in the PNDA is sustained; and
3. The ten day suspension is sustained.

It is further **ORDERED** that Appellant's motion for summary decision is **DENIED**, and Appellant's appeal is dismissed with prejudice.

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.

12/19/17
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: December 19, 2017

Date Mailed to Parties: December 19, 2017

db

APPENDIX

List of Moving Papers and Pleadings

For Appellant:

Motion for summary decision and brief filed Ma, with Exhibit 4, 2015 Certification of Certification of Patrick P. Toscano, Esq., with Exhibits A through E.

For Respondent:

Brief in opposition to motion for summary decision with Exhibits A through E

D 21-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chair

March 22, 2018

Mark Catanzaro, Esq.
21 Grant Street
Mount Holly, New Jersey 08060

Stephanie Ruggieri-D'Amico, Esq.
Mercer County
P.O. Box 8068
Trenton, New Jersey 08650-0068

Re: *Kile Johnson v. Mercer County Correction Center (CSC* Docket No. 2017-2480 and OAL Docket No. CSV 2550-17)

Dear Mr. Catanzaro and Ms. Ruggieri-D'Amico:

The appeal of Kile Johnson, a County Correction Officer with the Mercer County Department of Public Safety, of his 25 working day suspension, on charges, was before Administrative Law Judge Mary Ann Bogan (ALJ), who rendered her initial decision on December 21, 2017, recommending modifying the 25 working day suspension to a 15 calendar day suspension. No exceptions were filed on behalf of the parties.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on February 4, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date the Commission secured a 45-day extension of time until March 21, 2018 to render its final decision. This matter was to be heard at the scheduled March 21, 2018 Commission meeting. However, that meeting was cancelled due to the closing of State officers. Under these circumstances, the ALJ's recommended decision is deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 22, 2018.

Since the appellant's suspension has been modified, he is entitled to back pay, benefits and seniority. The amount of back pay awarded is to be reduced by any amounts earned by the appellant during that time. *See N.J.A.C.* 4A:2-2.10. Proof of

income earned should be submitted to the appointing authority within 30 days of receipt of this letter.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Mary Ann Bogan, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 2550-17
AGENCY DKT. NO. 2017-2480

IN THE MATTER OF KILE JOHNSON, MERCER COUNTY CORRECTION CENTER.

Mark W. Catanzaro, Esq., for appellant (Law Offices of Mark W. Catanzaro)

Stephanie R. D'Amico, Assistant County Counsel, for respondent (Arthur R. Sypek, Jr., County Counsel)

Record Closed: November 8, 2017 Decided: December 21, 2017

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Respondent, Mercer County Correction Center, (MCCC) suspended appellant Kile Johnson for twenty-five working days. MCCC alleges that appellant, a corrections officer, was verbally and mentally abusive to an inmate on July 26, 2016, and that a suspension for a period of twenty-five working days was the appropriate penalty.

Appellant was charged for this offense with violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient

cause; C3- Physical or mental abuse of a patient, client, resident or employee; C4- Verbal abuse of patient, client, resident or employee; D6- Violation of administrative procedures and/or regulations those involving safety and security (Step 3); SOP 004 Employee Handbook; SOP 238 Post Orders Corrections Officer (general); and D-16 Intentional abuse or misuse of authority. Appellant maintains that he did nothing wrong and submitted that he acted appropriately when he used profanity to control the inmate who he was escorting.

PROCEDURAL HISTORY

On August 1, 2016, the MCCC issued a Preliminary Notice of Disciplinary Action charging the appellant. (R-4.) After a departmental hearing on December 16, 2016, MCCC issued a Final Notice of Disciplinary Action on January 24, 2017, sustaining the charges in the Preliminary Notice, except for the Mercer County Public Safety Table of Offense C8-Falsification, intentional misstatement of material fact in connection with work, employment, application, attendance or in any record. The appellant was suspended from employment for twenty-five working days. (R-5.) Appellant appealed on February 3, 2017, and on February 22, 2017, the matter was filed at the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. The matter was heard on October 24, 2017. The parties filed post-hearing briefs and the record closed on November 8, 2017.

FACTUAL DISCUSSION AND FINDINGS

Deidre Burgess (Burgess) is a corrections officer at MCCC. Burgess works in the 106-room, and is responsible for overseeing inmates while they wait to meet with the doctor who is located in that office. The Office of Internal Affairs is also located in the 106-room and is used to interview cooperating inmates when they have useful information for a case.

On July 26, 2016, Burgess called for an inmate to be transported to the mental health office because the inmate threatened to kill himself. Appellant was the escort officer assigned to bring the inmate to the 106-room. When they arrived at the 106-

room, Burgess heard the inmate complaining that his handcuffs were too tight. She heard the appellant respond to the inmate by saying, "sit your bitch ass back down". The inmate sat down, and did not use profanity.

Phyllis Oliver came out from the Captain's office, which is also located in the 106-room, stepped in between the inmate and the appellant, and told the appellant to step back. Then Burgess heard the inmate threaten to spit on the appellant, and use profanity for the first time.

Burgess prepared an incident report on the same day of the incident. She acknowledged that she documented that "upon them entering the door, profanity was being exchanged." Burgess urged that the exchange between the appellant and the inmate was the appellant using profanity, and the inmate complaining about the handcuffs being too tight. (R-1.)

Tangela Wright (Wright) has been employed by the Appointing Authority for twelve years as a senior clerk. She was working in the 106-room with the Deputy Warden when she heard the inmate complain that his cuffs were too tight, and she heard the appellant respond by saying to the inmate "shut the fuck up and sit down." She then heard the inmate respond by saying to the appellant, "pussy ass cop." Wright submitted an incident report to Oliver on the same day. (R-2.)

Phyllis Oliver (Oliver) has worked at the Correction Center for thirty years, and has served as Deputy Warden since January 2015. Oliver was working in the Captain's office, next to the mental health office, when she heard someone enter the 106-room saying, "shut the fuck up" and "sit your bitch ass back down." She exited the Captain's office, and saw the appellant standing in front of the inmate. Oliver went in between the appellant and the inmate, and directed the appellant to leave. Appellant left the room. Oliver called the appellant back and told him to write an incident report. At that point, the inmate started yelling profanities at the appellant. When Oliver checked the inmate's handcuffs, she noticed marks on the inmate's wrist, and adjusted the handcuffs because they were too tight.

Oliver prepared an incident report on the same day as the incident. (R-3.) Oliver also drafted the preliminary notice of disciplinary action recommending that appellant be suspended for forty-five days. (R-4.) After a departmental hearing, a final notice of discipline was issued suspending appellant for twenty-five days. (R-5.)

Oliver found the twenty-five day suspension appropriate since this is a Step 3 discipline. Appellant has previously been issued a Step 2 D6 safety violation, and served a six-day suspension. (R-10.)

Kile Johnson, appellant, testified that he has been a corrections officer for more than sixteen years. He was assigned to escort the inmate to the 106-room. This was the first time that appellant met and escorted this inmate. This inmate was confined to the area of the prison for inmates who require complete lockup because they committed infractions while in prison. When Johnson arrived at the transport area, the inmate was arguing with an officer about wearing handcuffs. The inmate was not on suicide watch, and appellant was not informed that the inmate was a mental health inmate.

Appellant handcuffed and shackled the inmate according to policy. The inmate complained the handcuffs were too tight. Appellant checked the inmate's handcuffs and determined the fit was appropriate. Appellant used profanity in a verbal "exchange" with the inmate because the inmate continued to curse at the appellant as they exited his cell area. Appellant reasoned that officers engage in verbal exchanges using profanity because the inmate only knows the "language of the street", and the use of profanity helps to control the inmate.

The inmate and the appellant continued their verbal exchange using profanity, when they entered the 106-room. When the appellant told the inmate to sit down, the inmate continued to curse at him. When the inmate began to stand back up, the inmate said he would spit on the appellant. The appellant put his hand on the inmate's shoulder, and responded with profanity.

Oliver came between them, and directed the appellant to leave. After the appellant exited, he received a radio message, and returned. Oliver directed him to prepare an incident report. He "assumed" she was asking for a report about the inmate's conduct because she said, "write an incident report." His omission of his own use of profanity was not intentional, and he did not think the language he used was abusive. Rather he used profanity to control the inmate without force, and its use continued in the 106-room because the inmate threatened him, and spit on him.

After carefully reviewing the documentary evidence presented, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

Appellant has been a corrections officer at the Mercer County Correction Center for more than sixteen years. On July 26, 2016, appellant was the escort officer assigned to escort a mental health inmate to the 106-room to be evaluated by a mental health professional because the inmate threatened suicide. Appellant used profanity while speaking to the inmate, as he transported the inmate to the 106-room. Appellant continued to use profanity towards the inmate in the 106-room. The inmate also used profanity towards the appellant in the 106-room. Oliver, Burgess and Wright heard the appellant and inmate use profanity. Appellant admits that he used profanity while escorting the inmate to the 106-room, and while in the 106-room. Appellant was directed to complete an incident report. Appellant reported the inmate's use of profanity but he did not report his own use of profanity when reporting the incident.

I **FIND** that the appellant's use of profanity while speaking to the inmate, as he escorted him, and in the 106-room, was not in accord with the Standing Operating Procedures, and the use of profanity by a corrections officer is misconduct. I further **FIND** as **FACT** that appellant did not fully and accurately report his own use of profanity while speaking to the inmate, and I **FIND** that the incident report prepared by him was not accurate and complete.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554–55 (1954). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

As a corrections officer, appellant is held to a higher standard of conduct than ordinary public employees. In re Phillips, 117 N.J. 567, 576-77 (1990). They represent "law and order to the citizenry and must present an image of personal integrity and dependability in order to have the respect of the public." Township of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). Maintenance of strict discipline is important in military-like settings such as police departments, prisons and correctional facilities. Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 50 N.J. 269 (1971); City of Newark v. Massey, 93 N.J. Super. 317 (App. Div. 1967). Refusal to obey orders and disrespect of authority cannot be tolerated. Cosme v. Borough of E. Newark Twp. Comm., 304 N.J. Super. 191, 199 (App. Div. 1997).

> The need for proper control over the conduct of inmates in a correctional facility and the part played by proper relationships between those who are required to maintain order and enforce discipline and the inmates cannot be doubted. We can take judicial notice that such facilities, if not properly operated, have a capacity to become "tinderboxes."

[Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305-06 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).]

Based on the specifications in the charges, appellant was charged with conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6); and other sufficient cause, in violation of N.J.A.C. 4A:2-2.3(a)(12). In addition, appellant was charged with violations of the Mercer County Public Safety Table of Offenses, C3 physical or mental abuse of patient, client, resident or employee; C4 verbal abuse of a patient, client, resident or employee; D6 Violation of Administrative procedures and/or regulations those involving safety and security (Step 3), and D16 Intentional abuse or misuse of authority. Appellant was also charged with violating the following Standing Operating Procedures; SOP-004 Employee Handbook; SOP238 Post Orders Correction Officer (general).

N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee is often described as an elastic phrase that includes any conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for governmental employees and confidence in public entities. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). A finding or conclusion that a public employee engaged in unbecoming conduct need not be based upon the violation of a particular rule or regulation, and may be based upon the violation of the implicit standard of good behavior governing public employees consistent with public policy. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419,429 (1955); Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

I **CONCLUDE** that appellant's use of profanity with the inmate did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was the verbally abusive manner in which the appellant spoke to the inmate. Appellant's conduct was such that it could adversely affect the morale or efficiency of a governmental unit or destroy public respect in the delivery of governmental services. Such behavior does not reflect the implicit standard of good behavior governing public employees consistent with public policy. Therefore, as to this charge, respondent has met its burden of proof that appellant did commit an act of unbecoming conduct.

Appellant has also been charged with violating SOP 238 and SOP 004. (R-7,6.) SOP 238 provides in relevant part as follows:

> Correction officers are required to submit accurate and complete written reports as directed, and to immediately report, both orally and in writing, all incidents of an unusual nature.

In addition, SOP 004 provides in relevant part as follows:

> 1.03.1 Officers/Correctional Employees have the right to be treated with respect by their Superior Officers, as well as by their peers, inmates, subordinates, and the public. Although it is recognized that respect cannot be mandated by rules or regulations, nevertheless, it is required that Officers/Correctional Employees show proper courtesy, attention, and consideration in their interactions with respect to Superior Officers, other employees, inmates, and with people in the community.
>
> ********
>
> 1.03.5 Officers/Correctional employees shall not mistreat persons who are in their custody, but shall handle such persons in accordance with the law and departmental procedures. Inmates shall be protected by adult county correctional facility staff from personal abuse, corporal punishment, personal injury, disease, property damage and harassment. In accordance with the Federal Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C., et. seq., zero tolerance for the incidence of sexual assault shall be

> maintained at adult county correctional facilities. Appropriate disciplinary action shall be taken against facility staff who engages in abusive behavior and, when necessary, these cases will be referred to the county prosecutor.

I **CONCLUDE** that appellant's conduct violated SOP 238 as he did not fully and accurately report his own use of profanity during the incident with the inmate, and that the incident report was not accurate and complete. I also **CONCLUDE** that appellant's conduct violated SOP 004 as he did not show proper courtesy, attention, and consideration in their interactions with respect to . . . inmates, as outlined in 1.03.1. I also **CONCLUDE** that appellant conducted himself in a manner that rises to the level of verbal abuse when he used profanity when speaking with the inmate as outlined in 1.03.5.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a) (12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. As to the charge of other sufficient cause, appellant conducted himself in a manner that violated standards of good behavior. As such, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Appellant has been charged with violations of C3 physical or mental abuse of patient, client, resident or employee. As to this charge, the appellant's use of profanity was serious, offensive, and inappropriate, however the respondent did not demonstrate that the appellant's use of profanity, both in content and manner, rose to the level of mental abuse. Furthermore, SOP 004 and SOP 238 provide insufficient guidelines of the kinds of conduct that are considered mentally abusive. The respondent did not meet its burden of proof that appellant's use of profanity while speaking to a mental health inmate rose to the level of an act of mental abuse of an inmate. Accordingly, I **CONCLUDE** that the respondent has not met its burden of proof on this issue.

Appellant has been charged with violations of C4 verbal abuse of a patient, client, resident or employee. As to this charge, respondent has met its burden of proof

that appellant used profanity while speaking to a mental health inmate thereby committing an act of verbal abuse. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Appellant has been charged with D6 Violation of Administrative procedures and/or regulations involving safety and security (Step 3) for creating a safety and security risk by using profanity while speaking to the inmate. While the use of profanity in a closed office environment, such as the 106-room, may less likely create a safety risk in the correction center, the appellant used profanity while escorting the inmate from his cell to the 106-room, and therefore created a risk of inciting prisoners, and created a safety risk. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

Appellant has been charged with D16 Intentional abuse or misuse of authority by his conduct. Appellant, who was in a position of authority, used profanity when speaking to and directing the inmate while he escorted him shackled and handcuffed. This is clearly an abuse of his authority. Accordingly, I **CONCLUDE** that the respondent has met its burden of proof on this issue.

PENALTY

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

In his sixteen-year history at Mercer County Correction Center, appellant has been issued multiple corrective actions for lateness beginning in 2005, and unsatisfactory attendance and chronic and excessive absenteeism beginning in 2003. He has also been issued four major suspensions beginning with a seven-day suspension in November 2011, for conduct unbecoming, lateness and chronic absenteeism; a five-day and a ten-day suspension for insubordination in June 2012, and December 2013, respectively; and similar to the charges in this case, a six-day suspension for violating administrative procedures, those involving safety and security, in June 2015.

For his actions arising out of this incident, appellant has been found to have violated N.J.A.C. 4A:2-2.3(a)(6), "Conduct unbecoming a public employee" and N.J.A.C. 4A:2-2.3(a)(11), "Other sufficient cause." In addition, appellant has been found guilty of violations of SOP 004 Employee Handbook and SOP 238 Post Orders for failing to submit an accurate and complete written report. Appellant was given a twenty-five day suspension.

This suspension is not consistent with the disciplinary process outlined in MCCC's table of offenses. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significant enough to warrant a penalty, which, in part, is meant to impress upon him, the seriousness of the use of profanity and any further infractions by him in that regard, and it is of no consequence whether or not the inmate used profanity. Appellant's history of major discipline includes a six-day suspension penalty relating to the safety of the institution, in addition to three previous major disciplines. Furthermore, I do not find that he mentally abused a mental health inmate by using profanity. A reasonable calculation of progressive discipline in the presence of the prior disciplinary actions, the conduct of the appellant, and the current violation is a fifteen-day suspension.

I **CONCLUDE** that a fifteen-day suspension is appropriate and consistent with progressive discipline.

ORDER

It is **ORDERED** that the charges against the appellant for violations of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause; C4- Verbal abuse of patient, client, resident or employee; D6- Violation of administrative procedures and/or regulations those involving safety and security (Step 3); SOP 004 Employee Handbook; SOP 238 Post Orders Corrections Officer (general); and D-16 Intentional abuse or misuse of authority are **AFFIRMED**. The charge of C3 physical or mental abuse has not been sustained and is **REVERSED**. Accordingly, I **ORDER** that the action of the Appointing Authority is **MODIFIED**. Appellant will receive a fifteen-calendar day suspension.

Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated for that period of time when back pay was waived. However, the appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See Johnny Walcott v. City of Plainfield, 282 N.J. Super, 121, 128 (App. Div. 1995); James L. Smith v. Department of Personnel, Docket No. A-1489-02T2 (App. Div. March 18, 2004); In the Matter of Robert Dean (MSB, September 21, 1989). In the case at hand, while the penalty was modified and one of the charges was dismissed, the Commission has sustained the remaining charges and imposed major discipline. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also, In the Matter of Kathleen Rhoads (MSB, decided September 10, 2002) (Counsel fees denied where removal on charges of

insubordination, inability to perform duties, conduct unbecoming a public employee and neglect of duty was modified to a 15-day suspension on the charge of neglect of duty).

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.

December 21, 2017
DATE

Mary Ann Bogan
MARY ANN BOGAN, ALJ

Date Received at Agency: December 21, 2017

Date Mailed to Parties: December 21, 2017

MAB/cb

APPENDIX

WITNESSES

For Appellant:

Kile Johnson, Appellant

For Respondent:

Corrections Officer Deidre Burgess

Tangela Wright

Deputy Warden Phyllis Oliver

EXHIBITS

For Appellant:

P-1 Testimony Statement Summary

For Respondent:

R-1 Deidre Burgess Incident Report, dated July 26, 2016

R-2 Tangela Wright Incident Report, dated July 26, 2016

R-3 Phyllis Oliver Incident Report, dated July 26, 2016

R-4 Preliminary Notice of Disciplinary Action, dated August 1, 2016

R-5 Final Notice of Disciplinary Action, dated January 24, 2017

R-6 Standards and Operating Procedures Section 004

R-7 Standards and Operating Procedures Section 238

R-8 Kile Johnson Incident Report, dated July 26, 2016

R-9 Mercer County Public Safety Table of Offenses and Penalties – Correction Center

R-10 Disciplinary History – Kile Johnson

2-22-17

PHIL MURPHY
Governor
Sheila Oliver
Lt. Governor

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION
Division of Appeals and Regulatory Affairs
P.O. Box 312
Trenton, New Jersey 08625-0312
Telephone: (609) 984-7140 Fax: (609) 984-0442

DEIRDRE L. WEBSTER COBB
Acting Chair

March 23, 2018

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Lyndhurst, New Jersey 07071

David F. Corrigan, Esq.
The Corrigan Law Firm
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Re: *Harold Kewer, Jr. v. Township of West Milford, Department of Public Works* (*CSC* Docket No. 2016-977 and OAL Docket No. CSV 15155-15)

Dear Mr. Gollin and Mr. Corrigan:

The appeal of Harold Kewer, Jr., Laborer 1, Township of West Milford, Department of Public Works, of his removal effective August 6, 2015 on charges, was before Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on December 22, 2017, recommending upholding the removal. No exceptions were filed on behalf of the parties.

The time frame for the Civil Service Commission (Commission) to make its final decision was to initially expire on February 5, 2018. *See N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.6. Prior to that date the Commission secured a 45-day extension of time until March 22, 2018 to render its final decision. This matter was to be heard at the scheduled March 21, 2018 Commission meeting. However, that meeting was cancelled due to the closing of State officers. Under these circumstances, the ALJ's recommended decision is deemed adopted as the final decision in this matter per *N.J.S.A.* 52:14B-10(c), effective March 23, 2018.

Sincerely,

Nicholas F. Angiulo
Deputy Director

Attachment

c: The Honorable Thomas R. Betancourt, ALJ (w/out attachment)
Kelly Glenn
Records Center

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 15155-15
AGENCY DKT. NO. CSC 2016-977

HAROLD KEWER, JR.,
Petitioner,

vs.

TOWNSHIP OF WEST MILFORD,
DEPARTMENT OF PUBLIC WORKS,
Respondent.

Kathleen F. Mazzouccolo, Esq., AFSCME NJ OC 963, and **Seth Gollin**, Union Representative, AFSCME NJ, appearing for Appellant

David F. Corrigan, Esq., appearing for Respondent

Hearing Date: October 20, 2017 Decided: December 22, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Harold Kewer, Jr., appeals a Final Notice of Disciplinary Action (FNDA), dated August 6, 2015, providing a penalty of removal effective the same date.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on September 28, 2015.

The Honorable Joan Bedrin-Murray, ALJ, conducted a prehearing conference on December 15, 2015, and issued a prehearing order dated December 21, 2015.

A hearing was held on August 4, 2016. The record remained open for submission of post hearing briefs. Several extensions were granted for the filing of post hearing briefs. Respondent filed its brief on December 21, 2016. The post hearing brief for Appellant was not filed until April 2, 2017. The file indicates that the record was closed on October 20, 2017.

The matter was transferred from Judge Bedrin-Murray to the undersigned on December 18, 2017, as Judge Bedrin-Murray was confirmed by the New Jersey Senate to be a Judge of the Tax Court.

The undersigned conducted a telephone conference with Respondent's counsel and Seth Gollin of AFSCME NJ, (Appellant's previous counsel, Ms. Mazzouccolo retired) on December 20, 2017. Both consented to the undersigned issuing this Initial Decision without need to request an extension of time to do the same.

The undersigned reviewed the file, the transcript of proceedings, all exhibits, Respondent's and Appellant's post hearing briefs, and listened to the recording of the hearing prior to issuing this Initial Decision.

ISSUE

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Appellant's Case

Steve Vizzi, testified as follows:

He is employed by the Township of West Milford (Township), and has been for twenty-nine years. His title is sewer repairman, but he performs other tasks such as driving trucks and operating equipment. He holds a commercial driver's license (CDL) and has since 1991.

He failed a drug test last year and he had a Driver While Intoxicated (DWI) conviction in November 2009.

For the DWI the Township did not discipline him. He lost his CDL for one year and his driving privileges for seven months as a penalty for the DWI. The Township placed him in Borough Hall to do maintenance and then in the garage to assist with mechanic work. When his driving privileges were restored he was then able to drive cars and pick-up trucks as part of his duties. The DWI occurred in a private vehicle and not while working for the Township.

The drug test he failed was in July 2015. For this he received a sixty day suspension, which was a negotiated settlement of disciplinary charges. As part of the disciplinary settlement he signed a last chance agreement where he would be terminated in the event of a subsequent failed drug test. He was also required to see David Peterson, the Township's substance abuse professional. Mr. Peterson recommended he attend a thirty day outpatient rehabilitation program. The fee was $550.

Harold Kewer, Jr., Appellant testified as follows:

Mr. Kewer worked for the Township's Department of Public Works (DPW) for approximately eight years. He stated he never received a memo from Joanne Fantry regarding when his health insurance would end.

He never contacted Mr. Peterson for counseling. He stated the reason was he thought he had no health insurance and could not afford to pay Mr. Peterson's fee. He signed the letter of referral on July 30, 2015 and was terminated on August 6, 2015. During his previous suspension he had not contacted Mr. Peterson until after a month went by. After being terminated he no longer felt there was a need to contact Mr. Peterson.

He did not request a departmental hearing as the PNDA had a 180 day suspension set forth. He thought by not requesting a hearing he was accepting the suspension. No one from the Township contacted him to advise him to the contrary. He would have accepted a 180 day suspension. He would have attended substance abuse counselling and agree to additional testing.

When questioned about the PNDA and that the document also read that removal was also a disciplinary option, Mr. Kewer stated he thought that meant the removal was the immediate removal from the job leading to the suspension.

He understood from the referral letter that he was required to contact Mr. Peterson. He did not receive the FNDA until at least two weeks after it was issued. During that time he did not contact Mr. Peterson.

The first time he tested positive he did not contact Mr. Peterson for a month. He knew there was a fee from that experience.

He knew he had health insurance during the two weeks from the date of the FNDA until he received notice. He did not contact anyone at the Township to inquire as to health insurance. He assumed it ended with his termination. He never received the

letter from Ms. Fantry advising him health benefits would expire on September 30, 2015. He stated he did not know who to contact to inquire about health insurance.

He did speak with Ms. Fantry regarding a paycheck he thought he was due, but was not told about the health insurance expiration date.

When he was advised from the testing agent he had tested positive for cocaine he did not inform the Township. He was under the assumption the testing agent would do so.

He did attend some type of substance abuse program through his father's church. He denies a substance abuse problem, but admits to alcohol consumption.

Respondent's Case

Catherine Shanahan testified as follows:

She is employed by the Township and has been for eighteen years. Her present position is administrative secretary. Her duties include designated employer representative which is the contact person for drug testing. She receives drug test results. When there is a positive result the employee must be immediately removed from the position.

When Mr. Kewer first tested positive for marijuana in 2012 Ms. Shanahan, after receiving the results of the drug test, contacted Mr. Kewer's supervisor to remove Mr. Kewer from his position. As a result of the failed drug test Mr. Kewer was required to attend substance abuse program. While in the program Mr. Kewer was required to abstain from alcohol. He was found to be positive for alcohol during the program. As a result of the positive alcohol finding Ms. Shanahan prepared a memorandum wherein she indicated she received a call from the nurse with the results; and, that she then contacted Mr. Peterson who recommended Mr. Kewer complete an additional two weeks in the program.

Mr. Kewer again tested positive, this time for cocaine in 2015. The results of the test were first told to Mr. Kewer by Valley Health, the drug test provider for the Township. Afterward Ms. Shanahan was notified by Valley Health. Mr. Kewer did not inform Ms. Shanahan of the positive test.

A Preliminary Notice of Disciplinary Action (PNDA) was prepared and mailed to an incorrect address. This address was the address on file with the personnel department and the address provided by Mr. Kewer. The mail was returned undelivered. The personnel department then ascertained Mr. Kewer's correct address through DMV and mailed the PDNA to that address. Mr. Kewer received the PDNA as the Township received a return receipt from the postal service.

Mr. Kewer signed a letter of referral. This document is required for anyone who has a positive drug test. Ms. Shanahan personally witnessed Mr. Kewer sign the letter as he came to borough hall to do so. Mr. Kewer was referred to Mr. Peterson. Mr. Kewer never contacted Mr. Peterson.

Mr. Kewer never requested a hearing after receiving the PNDA. Thereafter a Final Notice of Disciplinary Action (FNDA) was issued.

Mr. Kewer was sent a letter from Joanne Fantry, the Township's then personnel clerk, which advised Mr. Kewer his health insurance through the Township would end on September 30, 2015.

Ms. Shanahan prepared a time line of Mr. Kewer's history as an employee of the Township. The time line was prepared from records maintained by her.

Mr. Kewer is the only employee that has tested positive more than once.

Ms. Shanahan is familiar with the Township's alcohol and drug policy.

STIPULATED FACTS

1. On January 1, 2008, the Township of West Milford (Township) hired Harold Scott Kewer (Kewer) in the Department of Public Works.

2. In his position, he was required to possess a Commercial Driver's License (CDL). As a result, Kewer was subject to random drug testing.

3. On October 16, 2012, Kewer tested positive for marijuana (J-1). He was immediately suspended without pay. Ultimately he was suspended for 43 working days without pay (J-2). As a result of the positive drug test, he was subject to mandatory counseling and treatment. On December 27, 2012, Kewer returned to work. On January 2, 2013, in violation of his treatment program, Kewer tested positive for alcohol (J-3). Nevertheless, Kewer was permitted to continue working for the Township.

4. On June 29, 2015, Kewer tested positive for cocaine (J-4). Accordingly, on July 15, 2015 a Preliminary Notice of Disciplinary Action (PNDA) was issued and he was suspended without pay pending a hearing (J-5). This PNDA was sent to 100 Ridge Road, the address Kewer had on file in the Personnel Department. On July 21, 2015, the PNDA was re-sent to Mr. Kewer's correct address, 644 Warwick Turnpike, which the Personnel Department had tracked down through the DMV site. It was signed on July 29, 2015 after two attempts (J-5a). Again, Mr. Kewer neglected to notify his supervisor or Administration of his positive drug test even though he had been advised of same on June 29, 2015. He instead submitted a doctor's note to be excused from work from July 13, 2015 to July 17, 2015, and continued to call in sick (J-6).

5. On July 30, 2015, Kewer came to the Administrator's office and signed the "Substance Abuse Professional Letter of Referral" stating that he would call Mr. Peterson, the Township's substance abuse professional (J-7). However, Kewer did not contact Mr. Peterson

6. Kewer did not request a departmental hearing. Therefore, on August 6, 2015, the Final Notice of Disciplinary Action (FNDA) was issued (J-9). Kewer signed for the FNDA on August 17, 2015.

7. Kewer has the following history of accidents: Mr. Kewer had one accident in March 2013; two in December 2013; and, one in January of 2014, as follows:

Scott Kewer/History of Accidents

March 8, 2013 – hit truck while plowing. Claimant: Joseph Ragonese, $4,599.62

December 12, 2013 – overturned salt truck - $38,821.33

December 13, 2013 – truck slid and hit claimant's vehicle. Claimant: Kevin Vriesma, $7,972.34

January 21, 2014 – Backed up with salt spreader, hit boulder approximate $3,000 in damage. It was repaired in house.

Total: $54,353.29

However, Kewer was not disciplined for any of these accidents.

8. Township records show Kewer remained on Health Insurance until September 30, 2015 (J-8). Kewer states he was unaware of continuation of benefits and therefore did not attend substance abuse counselling due to lack of ability to pay.

9. PNDA set forth 180 days suspension without pay as options and /or removal. Kewer would have accepted the 180 day penalty.

LEGAL ANALAYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The sustained charges in the Final Notice of Disciplinary Action (R-2) are set forth as: inability to perform duties; conduct unbecoming a public employee; violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder; and, other sufficient cause – violation of West Milford Rules and Regulations. These charges are set forth in N.J.A.C. 4A:2.3(a) (3), (6), (10) and (12) respectively.[1]

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

Use of illegal drugs clearly encompasses conduct unbecoming. See Ronald Stuiso v. Borough of Rutherford, CSV 11869-04 (Initial Decision) June 7, 2006, http://njlaw.rutgers.edu/collections/oal/html/initial/csv11869-04_1.html; Shannon v. City of Newark, CS 05034-05 (Initial Decision) April 4, 2006, http://njlaw.rutgers.edu/collections/oal/html/initial/csv05034-05_1.html. In the instant matter Petitioner does not contest that he tested positive for illegal drugs twice (marijuana in 2009 and cocaine in 2015). Petitioner also does not contest that he tested positive for alcohol in 2012 in violation of his treatment program.

[1] The charge of "violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder "is incorrectly cited as N.J.A.C. 4A:2.3(a)(11) in the FNDA.

Appellant also does not contest that he violated federal regulations concerning drug and alcohol use or that he violated the Township's rules and regulations.

It is without question that the Township has carried its burden by a preponderance of the credible evidence. Most of the facts relating to this matter have been stipulated.

The only issue needed to be decided is whether the penalty of removal is warranted herein.

Appellant has three violations during his tenure as an employee of the West Milford DPW, as follows:

1. Positive test for marijuana in 2012 and was ultimately suspended for 43 days. He was also required to undergo mandatory counseling and treatment;
2. During the course of this mandatory treatment Petitioner tested positive for alcohol, a violation of his treatment program; and,
3. Positive test for cocaine in 2015.

Appellant also has a history of vehicle accidents while working, the damages from which total in excess of $50,000.

Appellant argues that he should be given a second chance and be suspended for 180 days and be allowed to return to employment, undergo the necessary treatment and ultimately be returned to his job. He bases this argument on a nonsensical position that he failed to contact Mr. Peterson initially after the positive cocaine result as he thought he no longer had health insurance and could not afford. He was previously suspended and underwent treatment for a positive marijuana test. Further, he made no effort to contact Mr. Peterson, or to ascertain whether or not health insurance coverage was still in effect. It seems clearly a self-serving position.

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the

purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, 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." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

As the Supreme Court explained in In re Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct. . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .

> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, supra, 192 N.J. at 30–33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Commission modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." In re Stallworth, supra, 208 N.J. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, supra, 38 N.J. at 523-524, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter, Appellant has three failed tests, one for marijuana, one for alcohol (in violation of his treatment program for the positive marijuana test) and one for cocaine. Further, Appellant has a substantial history of vehicle accidents while working. The penalty herein of termination is not so disproportionate to the offense and mitigating circumstances as to be arbitrary and unreasonable.

I **CONCLUDE** that the respondent has carried its burden to prove by a preponderance of the credible evidence that that appellant was guilty of the charges set forth in the Final Notice of Disciplinary Action; and, that the penalty of removal is warranted.

ORDER

It is hereby **ORDERED** that appellant's appeal is **DENIED**;

It is further **ORDERED** that sustained charges contained in the Final Notice of Disciplinary Action dated August 6, 2015 are **AFFIRMED**, and the penalty of removal, effective August 6, 2015, is **AFFIRMED**.

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.

December 22, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: December 22, 2017

Date Mailed to Parties: December 22, 2017

APPENDIX

List of Witnesses

For Appellant:

Steve Vizzi, Sewer Repairman

Harold Kewer, Jr., Appellant

For Respondent:

Catherine Shanahan, Administrative Secretary

List of Exhibits

Joint Exhibits:

J-1	Positive drug test dated October 22, 2012
J-2	PDNA dated October 23, 2012
J-3	Memo dated January 9, 2013
J-4	Kewer positive test for cocaine dated July 10, 2015
J-5	PDNA dated July 15, 2015
J-5a	PDNA dated July 15, 2015 with handwritten corrected address
J-6	Time line Scott Kewer (Appellant)
J-7	Referral letter
J-8	Memo from West Milford to Kewer
J-9	FNDA dated August 6, 2015
J-10	June-August 2015 time line
J-11	Interrogatories
J-12	Responses to Interrogatories
J-13	West Milford's Mandatory Drug and Alcohol Employee Testing Policy