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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 Respondent alleges appellant failed to carry out a reasonable order to destroy all copies of outdated workbooks entitled "Prevention and Response Strategies to Workplace Violence" from the basement storage area in a timely manner.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

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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