



STATE OF NEW JERSEY

DECISION OF THE CIVIL SERVICE COMMISSION

In the Matter of Kimberly Hayes, New Jersey Veterans Memorial Home - Vineland, Department of Military and Veterans Affairs

CSC DKT. NO. 2017-1833 OAL DKT. NO. CSV 18911-16

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ISSUED: JULY 10, 2019 (NFA)

The appeal of Kimberly Hayes, Human Service Assistant, New Jersey Veterans Memorial Home -Vineland, Department of Military and Veterans Affairs, removal effective December 6, 2016 on charges was heard by Administrative Law Judge Jeffrey R. Wilson, who rendered his initial decision on June 3, 2019. 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 July 9, 2019, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision as well as his recommendation to reverse the removal.

DISCUSSION

Since the Commission substantially agrees with the ALJ's Findings of Facts and Conclusions, as well as his recommendation to uphold the removal, no extended discussion is necessary. However, the Commission will briefly address the exceptions filed by the appointing authority.

In its exceptions, the appointing authority argues that the ALJ's credibility determinations finding witness Lisa Powell not credible and the appellant credible were in error. In this regard, it contends that while the ALJ found Powell's testimony to be inconsistent with her written statement, the ALJ would not permit the in camera review of the unredacted statement to show that, in fact, her testimony was consistent with that statement. In support, it recites portions of the

transcript where the ALJ discusses the issue of the *in camera* review of the statement.

In her reply to the exceptions, the appellant argues that even if the exceptions are true, Powell's testimony was found to be not credible by the ALJ for other reasons. Further, it contends that Powell's testimony was inconsistent on other issues.

The Commission is not persuaded by the appointing authority's exceptions. Regarding credibility, 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, regardless of whether Powell's unredacted statement was reviewed. The ALJ explicitly indicated that he found the appellant's testimony credible as compared to Powell's. Further, it is clear he based that determination not merely on the purported inconsistency between Powell's testimony and statement. Specifically, the ALJ found Powell's overall testimony "defensive" while he indicated "(h)aving considered the testimonial and documentary evidence presented and observing the demeanor of Powell and the appellant while testifying, I accept the testimony offered by the appellant to be highly credible. The appellant's demeanor throughout the hearing was calm. Her testimony was consistent and free of any histrionics." Clearly, it cannot be considered arbitrary, capricious or unreasonable for the ALJ to have found Powell's testimony not credible given his direct observation and assessment of her demeanor and his conclusion that her overall testimony was defensive. In that regard, the Commission is satisfied that regardless of what Powell's unredacted statement may have revealed, the ALJ's credibility determinations were not compromised in any way by the failure to review the unredacted statement and are worthy of the customary deference afforded such determinations.

Since the removal has been reversed, the appellant is entitled to mitigated back pay, benefits, and seniority from the date of separation until the date of reinstatement pursuant to *N.J.A.C. 4A:2-2.10*, as well as reasonable counsel fees pursuant to and *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 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 Kimberly Hayes. The Commission further orders that appellant be granted back pay, benefits, and seniority from the first date of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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:2-2.12*, 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 ON  
THE 9TH DAY OF JULY, 2019



Deirdre L. Webster Cobb  
Chairperson  
Civil Service Commission

**Inquiries  
and  
Correspondence**

**Christopher S. Myers  
Director  
Division of Appeals and Regulatory Affairs  
Civil Service Commission  
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P. O. Box 312  
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**Attachment**



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 18911-16

AGENCY DKT. 2017-1833

**IN THE MATTER OF KIMBERLY HAYES,  
NEW JERSEY VETERANS MEMORIAL  
HOME VINELAND, DEPARTMENT OF  
MILITARY AND VETERANS AFFAIRS,**

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**William A. Nash, Esq.**, for appellant, Kimberly Hayes (Nash Law Firm, L.L.C., attorneys)

**Emily M. Bisnauth**, Deputy Attorney General, for respondent, New Jersey Veterans Memorial Home Vineland, Department of Military and Veterans Affairs (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: April 18, 2019

Decided: June 3, 2019

BEFORE **JEFFREY R. WILSON, ALJ**:

**STATEMENT OF THE CASE**

The appellant, Kimberly Hayes, a Human Services Assistant, challenges her removal from the New Jersey Veterans Memorial Home Vineland (VMH), Department of Military and Veterans Affairs (DMAVA) effective December 6, 2016, because of record falsification, conduct unbecoming a public employee and for other sufficient cause.

**PROCEDURAL HISTORY**

On December 6, 2016, VMH issued a Final Notice of Disciplinary Action (FDNA) removing the appellant effective that date. She appealed her removal and the matter was transmitted to the Office of Administrative Law, where it was filed on December 16, 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 June 18, 2018, July 25, 2018 and August 23, 2018. The record closed on April 18, 2019, after the parties submitted written closing briefs.

### **FACTUAL DISCUSSION AND FINDINGS**

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

1. At all relevant times, the appellant was employed as a Human Services Assistant/Certified Nursing Assistant (CNA) at VMH.
2. On December 6, 2016, the appellant was served a FNDA seeking her removal effective December 6, 2016. (R-2.) The FNDA alleged the following:

On 1/19/16, you and Ms. Powell, HST, were reassigned to Freedom Center for the 6:30am–3:00pm shift. Around 4:00 pm, a CNA reported to the Charge Nurse that Resident B.B. (ID#1000377) had been left grossly soiled by the caregiver on the 7-3 shift. During an investigation on 01/20/16, the caregiver of Resident B.B. was identified as Ms. Powell. In her interview she stated that you assisted her with providing care for this resident just before the resident's lunch time between 11:00am–12:00am. Ms. Powell said she went onto the resident's room at last rounds and the resident was asleep so she did not bother her and that was the last time she was in that resident's room for that shift. When you were interviewed, you said that you and Ms. Powell went into the resident's room between 1:30pm–2:15pm and took the resident to the bathroom and put her back in bed. In addition, the Charge Nurse said she went into the resident's room between 1:30pm–2:00pm to give her medication and the resident was asleep. The Charge Nurse said she woke the resident up and the resident took the medication and voiced no concerns. On 1/22/16, while being given in-service

training, Ms. Powell told the ADONS that the day she was sent home from work (1/20/16), she spoke with you on the telephone and you told her that you told Nursing Administration that both of you took the resident to the bathroom during last rounds. Ms. Powell said that she replied to you, 'why would you say that after (sic) it did not happen.' Ms. Powell then said you responded, 'Wow, that's going to look crazy.' (R-2.)

3. The FNDA included the following sustained charges:

- C-8: Falsification: intentional misstatement of material fact in connection with work, employment, application, or in any record, report, investigation or other proceeding;
- N.J.A.C. 2:2.3(a)(6): Conduct unbecoming a public employee; and
- N.J.A.C. 2:2.3(a)(12): Other sufficient cause (R-2.)

### Testimony

**Vickey Mason** (Mason) was the Assistant Director of Nursing Services at VMH at all relevant times. She reported directly to Carmen Jackson, Director of Nursing Services (Jackson).

Mason testified that on the morning of January 19, 2016, Ms. B.<sup>1</sup>, a resident at VMH, and her daughter appeared at the facility to register a complaint. During cross-examination, Mason recalled that the pair had actually appeared at the facility on the morning of January 20, 2016. At that time, Jackson was occupied, so Mason met with them briefly. Ms. B.'s daughter reported that she received a telephone call from her mother stating that she had not been changed and that she was left covered in her own feces during the 3:00 p.m. to 11:00 p.m. shift. Mason noted that Ms. B. appeared to be crying and visibly upset but that she was wearing fresh, clean clothes. There was no

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<sup>1</sup> For purposes of confidentiality and privacy, the resident will be referred to as Ms. B. throughout this Initial Decision.

evidence of feces present. Mason also noted that Ms. B. was known to be forgetful and that she had declined cognitively. Ms. B. was also incontinent of bowel. Mason testified that she made notes of her interview with Ms. B. and her daughter, but no such notes were ever presented at the hearing. Neither Ms. B. or her daughter were offered as witnesses at the hearing.

Based upon the aforementioned reporting, Mason commenced an investigation. First, Mason reviewed assignment sheets, referred to as "Pink Sheets." Pink Sheets are used by the CNAs to document patient monitoring, including feedings, bowel movements and urinations. CNAs are required to complete their Pink Sheets at the end of every shift. The Pink Sheets referred to by Mason were not presented at the hearing.

After reviewing these sheets, Mason determined that Tanya Olinda, CNA (Olinda), was the caregiver responsible for Ms. B. on the 3:00 p.m. to 11:00 p.m. shift on January 19, 2016. Mason interviewed Olinda who told her that she reported to her charge nurse, Leslie Wiltshire (Wiltshire), that she found Ms. B. heavily soiled while making rounds at 3:10 p.m. From speaking with Olinda, Mason deduced that the feces on Ms. B. and her bed linens had dried and therefore had to have been present for some time. Mason did not see the feces or the linens. It must be noted that Olinda was not offered as a witness at the hearing, nor was any report memorializing her interview.

Based upon her interview with Olinda, Mason deduced that Ms. B. must have had the bowel movement resulting in the reported feces during the 7:00 a.m. to 3:00 p.m. shift on January 19, 2016. From a review of the Pink Sheets for the 7:00 a.m. to 3:00 p.m. shift, Mason discovered that it was Lisa Powell, CNA (Powell) who was responsible for Ms. B. during that shift. She noted that there was no bowel movement documented for Ms. B. for the entire 7:00 a.m. to 3:00 p.m. shift. The Pink Sheets referred to by Mason were not presented at the hearing.

On January 20, 2016, Mason summoned Powell to her office to be interviewed. Powell informed her that she was primarily responsible for Ms. B.'s care during the shift in question, but that she had teamed up with the appellant to care for their respective residents. Powell stated that at approximately 2:00 p.m., she and the appellant entered



Ms. B.'s room during last rounds. Ms. B. was asleep, but they changed Ms. B.'s roommate. At that time, Powell did not see any feces on Ms. B. or smell any evidence that Ms. B. had a bowel movement. She provided no other care to Ms. B. for the rest of the shift. Mason directed Powell to provide a written statement relative to her actions on January 19, 2016.

Mason then summoned the appellant to her office to be interviewed. The appellant informed her that she assisted Powell with Ms. B. during the 7:00 a.m. to 3:00 p.m. shift. They took Ms. B. to the bathroom before lunch and again in the afternoon. Mason directed the appellant to provide a written statement relative to her actions on January 19, 2016.

Mason approached Jackson with what she deemed to be conflicting statements and the appellant was re-interviewed. The appellant was consistent with her first statement that she and Powell changed Ms. B. together. At that time, Jackson made the determination to send Powell home pending the investigation.

Within a few days, Powell met with Jackson. After meeting with Jackson, Powell met with Mason. Powell told Mason that she received a telephone call from the appellant asking her what she had told Mason and Jackson about the events of January 19, 2016. Powell told her that she reported that Ms. B. was not changed a second time on that date. The appellant said, "That's gonna sound crazy," or something of that nature. Powell was directed to write a second statement relative to the alleged call from the appellant.

Mason testified that she interviewed others as part of her investigation. However, none of those persons were offered as witnesses at the hearing, nor were any reports memorializing their interviews. A written statement from Wiltshire (P-1) was entered into evidence although she was not called as a witness during the hearing. From a review of the document, it appears that it was originally dated January 26, 2016, but changed to January 20, 2016. In that statement, Wiltshire documented a conversation with Powell on January 19, 2016, relative to Ms. B.'s declining condition. She also documented that she administered medications to Ms. B. between 1:30 p.m. and 2:00 p.m. and that no foul odors such as urine or stool was present.

At the end of her investigation, Mason concluded that Powell and the appellant presented conflicting statements. Furthermore, she concluded that it was the appellant that was not being truthful.

Jackson was the Director of Nursing Services at the Veterans Memorial Home Vineland at all relevant times. She testified that she never met with Ms. B. or her daughter relative to their complaint lodged on January 20, 2016. Mason was fully responsible for the resulting investigation. Jackson conducted no interviews nor did she review any Pink Sheets. On January 20, 2016, after discussing the matter with Mason, she sent Powell home, with pay, pending the investigation. Powell was directed not to discuss the situation with anyone. At some point, Powell called Jackson to report a phone call she received from the appellant to discuss the situation. Powell was directed to return to the facility to provide a second written statement.

After reviewing Mason's investigation, Jackson decided not to discipline Powell. However, Powell was required to be in-serviced relative to patient rights and sensitivity. Jackson determined that the appellant provided false information as part of the investigation and recommended that she be removed for violation of the following:

- C-8: Falsification: intentional misstatement of material fact in connection with work, employment, application, or in any record, report, investigation or other proceeding;
- N.J.A.C. 2:2.3(a)(6): Conduct unbecoming a public employee; and
- N.J.A.C. 2:2.3(a)(12) Other sufficient cause (R-2.)

Jackson was aware that the appellant had prior discipline based upon similar allegations that were resolved via a settlement agreement.

Powell was a CNA at the Veterans Memorial Home Vineland at all relevant times. She testified that due to a staffing shortage, she was reassigned to work the 6:30 a.m. to

3:00 p.m. shift on January 19, 2016, in the facility's Freedom Center that housed residents in need of almost total care. On that date, the appellant was also reassigned the Freedom Center for the same shift. Ms. B. resided in the Freedom Center at that time and was assigned to Powell. Powell and the appellant agreed to help each other with their assigned residents.

On January 20, 2016, Powell was summoned to Mason's office and faced with the allegation that she left Ms. B. soiled with feces at the end of her shift on January 19, 2016. Powell was shocked by the allegation because Ms. B. was fine when she left the day prior. Mason directed her to provide a written statement relative to her activities on the date in question. Powell's statement read:

When first coming in going around checking res. to get my routine together I ask Ms. B was she getting dressed for the day she said no not feeling well to get up. I said OK I will be back, went to do normal duties. When getting back to Res. Rm. I did her roommate, then took her to the solarium. I went o the take another res. from across the hall to the solarium. When coming back Ms. B had her light on. Terri the receptionist ask if I could get the light. I said yes I am going there now. Went in Rm Res was lying in the bed. I said hello Ms. B I am here to help you. She said I need to use the bathroom, I said OK. I went and got the wheelchair myself and Ms. Hayes assisted her into the chair. Ms. Hayes oh she had a bowel movement it was on the bed pads, to her, took the bathroom. We assisted her on the toilet where she had a large bowel movement again, I ask if I could change her now that your sitting up it would be easier she said OK. Ms. Hayes went to get towels and wash cloths. I washed her up while on the toilet change her gown. She pulled up on the bar we put her brief on put her back in the chair then assisted her back to bed. She said she was fine. She stays sitting up on the side of her bed. I put her lunch table in front of her then went to start passing trays and feeding. After feeding I took my lunch at 1pm. When coming back to the floor, I assisted Ms. Hayes with Ms. B then did my 2<sup>nd</sup> rounds. When doing Ms. B roommate Ms. B was sleeping. I finished her roommate and left the rm. Finished my pink sheets and left for the day. (R-5.)

It must be noted that upon cross-examination, Powell stated, that contrary to what she wrote in her statement, she did not assist the appellant with Ms. B. after her lunch

break. Despite this misstatement of a material fact, Powell was not charged with falsification.

After providing her written statement, Mason informed Powell that she was not permitted to return to the Freedom Center and then Jackson sent her home. Powell was informed not to discuss the investigation with anyone.

Later, on January 20, 2016, while at home, Powell received a telephone call from Tosma Childers, a CNA that worked at the Freedom Center, asking if she was alright because she heard that Powell said one thing and that another CNA reported something different. Powell terminated the call because she was instructed not to discuss the investigation. Childers was not offered as a witness at the hearing. Powell also received a telephone call from the appellant who said, "It was crazy because we changed Ms. B." Powell replied that they had not changed Ms. B. and then terminated the call. Powell then called Jackson to report that others were discussing the investigation.

On January 21, 2016, Powell received a call that she was cleared through the investigation and that she was to return to work on January 22, 2016. Upon her return to work, she was first in-serviced and then directed to provide a written statement relative to the telephone calls she received on January 20, 2016. That statement read:

I was sent home due to a situation at work after getting home I received several phone calls concerning my situation out of concern. It was said to me that I said one thing and the other aide said another. So I stated I had no reason to lie. So after speaking to the (Kim) aide I was saying why would you say that after it didn't happen. She just said wow that's gonna look crazy. I said well it is over now. In the conversation Kim stated well I told them we took her to the bathroom between 1:30-2:45. (R-6.)

The appellant testified that on January 19, 2016, she was reassigned to the Freedom Center for the 7:00 a.m. to 3:00 p.m. shift due to understaffing. It was the first time she was ever assigned to that unit. She arrived at 6:30 a.m. and received a report from the nurse on the 11:00 p.m. to 7:00 a.m. shift. She then reported to the nurses station for her resident assignments.

The appellant was assigned twelve residents, all requiring total care. She then reviewed each resident's Kardex<sup>2</sup>, prepared her linen cart and checked in with the other CNAs on that shift to wash and dress the residents for breakfast. It was at that time she met up with Powell.

The appellant was familiar with Powell as they were both reassigned to the Freedom Center from other units in the facility. Powell offered to team up with the appellant as they were each responsible for twelve residents – some requiring total lifts.

Ms. B. was one of the residents assigned to Powell. The appellant had never provided care for Ms. B. and was not familiar with her condition or her needs. Powell did not review the Kardex for Ms. B. because she was familiar with the resident from previous assignments.

Between 10:30 a.m. and 11:00 a.m., the appellant assisted Powell with Ms. B. because the resident had a messy bowel movement. The pair got Ms. B. out of her bed, toileted her, washed her, dressed her and returned her to her bed. Thereafter, the appellant continued checking on other residents and prepared for the lunch service. Powell took her lunch break around 1:00 p.m. or 1:30 p.m. The appellant did not take a lunch break.

Sometime between 1:30 p.m. and 2:15 p.m., while Powell was at lunch, Ms. B. rang for assistance to go to the bathroom. The appellant reported to her room and Powell entered shortly thereafter. The pair transported Ms. B. to the bathroom where she had another bowel movement. There was no need to change the resident because she had not soiled her clothes, so she was returned to her bed. That was the last contact the appellant had with Ms. B.

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<sup>2</sup> A Kardex is a medical information system used by nursing staff as a way to communicate important information on their patients. It is a quick summary of individual patient needs that is updated at every shift change.

Before leaving at the end of her shift, the appellant checked on the residents assigned to her and completed their respective Pink Sheets. Powell did not complete the Pink Sheets for the residents for which she was responsible. The next day, the appellant returned to her regular assignment at the Honor Circle Unit.

On January 20, 2016, between 10:00 a.m. and 11:00 a.m., Powell called the appellant and told her that she was sent home after being called into the office concerning Ms. B. because someone on 3:00 p.m. to 11:00 p.m. shift reported that the resident had been left soiled in feces from the prior shift. The appellant was not concerned because it was very likely that Ms. B. had the bowel movement in question after the end of their shift. Furthermore, someone from an oncoming shift always does rounds with a person from the shift that they are relieving. If Ms. B. had been covered in feces prior to the end of the 7:00 a.m. to 3:00 p.m. shift then it surely would have been noticed during those rounds.

Shortly after the telephone call from Powell, the appellant was summoned to report to Mason. Upon her arrival, Mason informed her of the complaint relative to Ms. B. and directed her to provide a written statement. That statement read:

I was pulled to FC to work and L Powell and I worked together for the whole day. We provided care to the resident in question between 10:30 a.m. and 11:00 a.m. We went in and washed and dressed her roommate first then we took resident to the bathroom washed and put a nightgown back on her. She then went back to her bed. Resident had a bowel movement while on the toilet. About 1:30 p.m. to 2:15 p.m., me and coworker did rounds again on both my residents and hers. We then took resident back to the bathroom she then went back to bed. (R-8.)

After completing her written statement, the appellant was returned to her unit and she completed her shift for the day. Approximately two weeks later, the appellant was summoned to Jackson's office where she met with Jackson and Mason. The appellant was asked to recount the events of January 19, 2016. After doing so, she was informed that she was being formally charged with falsification because her statement as to the events of January 19, 2016, did not match Powell's.

Here, the recommendation to remove the appellant was based upon what was determined to be conflicting statements between Powell and the appellant. Jackson made the credibility call that it was the appellant that made intentional misstatements of material facts in her written statement provided on January 20, 2016. (R-8.)

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.  
[5 N.J. at 522.]

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.)

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.)

Having considered the testimonial and documentary evidence presented and observing the demeanor of Powell and the appellant while testifying, I accept the testimony offered by the appellant to be highly credible. The appellant's demeanor

throughout the hearing was calm. Her testimony was consistent and free of any histrionics. Of note, is that in Powell's January 20, 2016 written statement, (R-5) she clearly stated that after lunch she assisted the appellant with Ms. B. for the second time that day. This is consistent with the appellant's testimony and written statement. (R-8.)

Powell, on the other hand, appeared defensive. As noted above, upon cross-examination, Powell stated, that contrary to what she wrote in her statement, she did not assist the appellant with Ms. B. after her lunch break.

Mason offered testimony as to her investigation but did not provide any reports or witnesses to support her investigative efforts. Of interest is that she testified that Powell listed no bowel movements for Ms. B. for her entire shift on January 19, 2016, but no Pink Sheets, nor any testimony, was ever produced at the hearing. Furthermore, Mason testified that Olinda found Ms. B. soiled at 3:10 p.m. on January 19, 2016 and reported it to Wilshire, the charge nurse for the 3:00 p.m. to 11:00 p.m. shift. Interestingly, in Wiltshire's January 20, 2016 (or January 26, 2016) written statement (P-1), she indicated that she had a conversation with Powell concerning Ms. B.'s deterioration and detailed that she administered medications to Ms. B. between 1:30 p.m. and 2:00 p.m. on January 19, 2016, which would actually place her on the 7:00 a.m. to 3:00 p.m. shift. Wiltshire wrote that at that time, there were no foul odors such as urine or stool related to Ms. B.

Jackson conducted no interviews relative to this incident. She merely relied upon Mason's investigative efforts in making her determination to recommend the appellant's removal.

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 was being truthful in her January 20, 2016 written statement. Accordingly, I **FIND** that the appellant did not falsify her written statement nor did she provide an intentional misstatement of material facts in connection with her work, employment, and application, attendance or in any record, report, investigation or other proceeding.



Furthermore, I **FIND** that the appellant's actions relative to the investigation of the January 19, 2016 incident involving Ms. B. did not rise to the level of conduct unbecoming a public employee. And finally, I **FIND** that the appellant's actions relative to the investigation of the January 19, 2016 incident involving Ms. B. did not rise to the level constituting other sufficient cause.

### **LEGAL ANALYSIS AND CONCLUSIONS**

The 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 respondent 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.)

Based upon my findings, I **CONCLUDE** that the respondent failed to meet its burden as to any of the charges brought against the appellant relative to the investigation of the January 19, 2016 incident involving Ms. B.

### **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 other sufficient cause. See N.J.A.C. 4A:2-2.3(a)(2), (4), (6), and (12).

Here, the respondent failed to meet its burden as to any of the charges brought against the appellant relative to the investigation of the January 19, 2016 incident involving Ms. B. I, therefore, **CONCLUDE** that no penalty shall be assessed.

### **ORDER**

Accordingly, I **ORDER** that the appellant's removal recommended by the respondent 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.



June 3, 2019  
DATE

JEFFREY R. WILSON, ALJ

Date Received at Agency:

June 3, 2019

Date Mailed to Parties:

June 3, 2019

JRW/tat/lam

**WITNESSES**

**For Petitioner:**

Kimberly Hayes

**For Respondent:**

Lisa Powell, CNA

Carmen, Jackson, RN, DON

Vickey Mason, RN, ADONS

**EXHIBITS**

**For Appellant:**

P-1 Written Statement of Lesly Wiltshire, dated January 20, 2016

**For Respondent:**

R-1 Withdrawn / Not Admitted

R-2 Final Notice of Disciplinary Action, dated December 6, 2016

R-3 New Jersey Department of Military and Veterans Affairs, Corrective and Disciplinary Action Booklet

R-4 Settlement Agreement, dated November 15, 2011

R-5 Facility Reporting Incident Data & Analysis Yield – Lisa Powell, dated January 20, 2016

R-6 Facility Reporting Incident Data & Analysis Yield – Lisa Powell, dated January 22, 2016

R-7 Withdrawn / Not Admitted

R-8 Facility Reporting Incident Data & Analysis Yield – Kimberly Hayes, dated January 20, 2016