A-5

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Wanda Hunt,
Department of Human Services

CSC Docket Nos. 2014-2628 and
2014-2629
OAL Docket Nos. CSV 05772-14 and
CSV 05773-14

ISSUED: MAY 21 2015 (WR)

The appeal of Wanda Hunt, a Senior Therapy Program Assistant at Hagedorn Psychiatric Hospital, Department of Human Services of her removal,[1] effective September 20, 2011, on charges, was heard by Administrative Law Judge (ALJ) Sarah G. Crowley, who rendered her initial decision on March 19, 2015. Exceptions were filed on behalf of the appointing authority. Cross-exceptions were filed on behalf of the appellant.

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 May 6, 2015, did not adopt the ALJ's recommendation to reverse the removal. Rather, the Commission modified the penalty to a six-month suspension.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA) which indicated that she was removed on the charges of sleeping while on duty; neglect of duty; loafing, idleness or willful failure to devote attention to task which would not result in causing danger to persons or property; conduct unbecoming a public employee and other sufficient cause. Specifically, the

[1] Hunt had actually received a second removal, effective September 21, 2011, based on different charges and specifications, under docket number 2014-2629. However, that matter was dismissed by the appointing authority.

appointing authority asserted that John Renfer, the appellant's supervisor, found the appellant sleeping during her scheduled group time. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found Renfer's testimony credible. However, she found that he had no knowledge of when an employee was allowed to take a break or what an employee could do while on a break. She further found that Renfer did not know if the appellant was not permitted to supervise a particular patient at the time he found her sleeping. The ALJ also found the appellant's testimony credible. In particular, the ALJ credited the appellant's contention that she was on break during the time she was allegedly sleeping and was not allowed to supervise the patient she otherwise should have during that time due to an allegation of abuse. In this regard, the ALJ accepted an e-mail produced by the appellant, dated subsequent to the incident, stating that she could again supervise the patient. Accordingly, the ALJ concluded that the appointing authority failed to meet its burden in proving the charges against the appellant.

In its exceptions, the appointing authority argues that the appellant was sleeping on duty, which placed vulnerable psychiatric patients at risk. The appointing authority states that the appellant's testimony was self-serving and not credible. Therefore, it asserts that the ALJ should not have found that appellant was on break, as she was supposed to be on duty from 9:30 a.m. to 10:15 a.m. and has presented no contrary evidence. In this regard, the appointing authority contends that the e-mail the appellant presented was vague and Renfer testified that he had no knowledge of it. Moreover, the appointing authority observes that Renfer's testimony was credible and he stated that the appellant was on duty during the time at issue. In light of their contradictory testimony, the appointing authority argues that the ALJ erred in finding both Renfer and the appellant credible. It asserts that the Commission should uphold the charges and remove the appellant.

In her cross-exceptions, the appellant argues that Renfer lacked recollection of the most critical facts necessary for the appointing authority to meet its burden, *e.g.*, that he did not know when the appellant was allowed to take breaks, who was in the appellant's work group and whether the appellant was prohibited from working with the patient. Moreover, she contends that Renfer had "difficulties" with the appellant and therefore, his testimony was biased. The appellant additionally claims that the e-mail to Renfer corroborates her claim that she was not permitted to work with a patient due to an allegation of abuse by that patient. The appellant concludes that the ALJ's decision should be upheld because she was not sleeping while on duty and was on break at the time at issue.

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 dismiss the charges. 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) On March 22, 2011, the appellant was on duty from 9:30 a.m. to 10:15 a.m.

2) The appellant did not take an authorized break during this time.

3) The appellant slept while on duty.

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. The Commission agrees with the ALJ's determination that Renfer was credible. However, in light of Renfer's credible testimony that the appellant was in such a deep sleep that he had to physically wake her, the appellant's testimony that she was not sleeping strains belief. In this regard, the ALJ indicated that the appellant

testified that "she did not think she was sleeping at the time but she may have dozed off." Upon the Commission's review of the testimony, it finds that, on more than one instance, the appellant completely denied being asleep and only testified that she "might have blinked" and did not recall Renfer nudging her. The appellant's claim that she was on a break is also unconvincing. First, Renfer testified that when he woke the appellant, she made no mention of being on break. Rather, she stated that her medication made her tired. Second, the appellant did not tell anybody that she was going to take a break. Third, there is no indication that the appellant attempted to continue her break upon being woken up, as the Request for Disciplinary Action (Ex. R-3) states that after Renfer woke the appellant, they went to the room "where her group was to be held."

A review of the record also reveals that the appellant should have been supervising the patient work group from 9:30 a.m. to 10:15 a.m. The Commission observes that apart from her testimony, the appellant only offers an unauthenticated, vaguely worded e-mail to support her claim that she was not allowed to supervise the patient. Even if the e-mail is taken as genuine, it does not completely support the appellant's position because it was sent after the date at issue and does not indicate when the appellant was first prohibited from supervising the patient. However, even if the appellant was prohibited from working with the patient, it is clear that the appellant should have been working during the time in question and neglected her duty by sleeping. Thus, the Commission finds that it was arbitrary, capricious and unreasonable for the ALJ to have found the appellant's testimony credible. Accordingly, the Commission finds that the appellant was sleeping on duty and neglected her duty.

With regard to the penalty, the Commission, in addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock, supra.* 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 this regard, in *In the Matter of Tammy Herrmann*, 192 *N.J.* 19 (2007), the State Supreme Court upheld the removal of Herrmann, a Family Service Specialist Trainee with the Department of Youth and Family Services, who, during an investigation of alleged child abuse, flicked a lighted cigarette lighter in front of a special needs child. Herrmann had been employed for approximately six months at the time of the incident and had no prior discipline but her conduct "divested her of the trust necessary for her position" and "progressive discipline [was not] appropriate in this matter." *Id.* at 38. In the

present matter, the appellant is responsible for a vulnerable population and holds a position of trust, *i.e.*, the care of patients in a psychiatric hospital. The appellant's sleeping while on duty indicates a lack of judgment and had the potential to put patients and staff at risk. However, it appears that her sleeping did not actually result in any harm. Nevertheless, in light of the appellant's disciplinary history, which includes, *inter alia*, a four month suspension, the Commission finds that a six month suspension, the highest suspension allowed under civil service laws and rules, is proper.

Since the penalty has been reduced, the appellant is entitled to 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, while the penalty was modified, the Commission has sustained the 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,* Docekt 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, decided 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).

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 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 Commission finds that the appointing authority's action in removing Wanda Hunt was not justified. Therefore, the Commission modifies the removal to

a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority following the six-month suspension from the first date of separation without pay until her reinstatement to 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. 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. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

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 6th DAY OF MAY, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals
and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

IN THE MATTER OF WANDA HUNT, DEPARTMENT OF HUMAN SERVICES, TRENTON PSYCHIATRIC HOSPITAL.	OAL DKT. NO. CSV 5772-14 AGENCY DKT. NO. 2014-2628
IN THE MATTER OF WANDA HUNT, DEPARTMENT OF HUMAN SERVICES, TRENTON PSYCHIATRIC HOSPITAL.	OAL DKT NO. CSV 5773-14 AGENCY DKT. NO. 2014-2629 **CONSOLIDATED**

William A. Nash, Esq., for appellant (Nash Law Firm, LLC, attorneys)

Peter H. Jenkins, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: February 2, 2015 Decided: March 19, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Wanda Hunt is a Senior Therapy Program Assistant at Hagedorn Psychiatric Hospital (Hagedorn). She was hired by the Department of Human Services in May 1992. Respondent seeks to remove appellant from her position as a result of being found sleeping on duty on March 22, 2011. She was charged with sleeping on duty, neglect of duty, loafing, idleness or willful failure to devote attention to task which would not result in causing a danger to persons or property; conduct unbecoming a public employee and other sufficient cause.

On April 15, 2011, the respondent served a Preliminary Notice of Disciplinary Action stemming from a March 22, 2011 incident. The departmental hearing was postponed until the resolution of subsequent charges brought against the appellant stemming from an incident which occurred on April 1, 2011. On May 7, 2013, the appellant was given a four month suspension in connection with the April 1, 2011, incident, but the determination with respect to any back pay was stayed pending the resolution of the instant matter. Appellant was scheduled to return to work on July 12, 2013, when an issue arose regarding her return to work drug screening. The charges relating to that matter were dismissed.

The Final Notice of Disciplinary Action in this matter was served on April 15, 2014. The appellant requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL), on May 9, 2014, 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 January 12, 2015. The parties submitted post hearing submissions on February 2, 2015, and the record closed on that date.

FACTUAL DISCUSSION

Appellant works for the New Jersey Department of Human Resources as a Senior Therapy Program Assistance at Hagedorn. She has worked at Hagedorn since

1996. Her position requires her to oversee vocational programs for patients. On March 22, 2011, the appellant was at her desk when her supervisor, John Renfer found her sleeping at her desk. Respondent alleged that she was responsible for running a work group at that time, so she was charged with neglecting her duties, as well as sleeping on duty, conduct unbecoming and other sufficient cause. The appellant seeks her removal.

TESTIMONY

For respondent:

John Renfer is the appellant's supervisor at Hagedorn. He testified that on March 22, 2011, he was taking some papers to the office when he observed the appellant sleeping at her desk. He testified that he called her name and got no response and eventually tapped her on her shoulder. He testified that when she woke up she advised him that she was on some medication that made her sleepy. He testified that at the time she was supposed to be running a work group and she was responsible for overseeing the clients doing housekeeping. He reported the incident to his supervisor, Andre Valente.

Mr. Renfer testified that he was unaware of any condition or medication that Ms. Hunt was taking. He was also unaware that she was unable to run the morning group because of an allegation of abuse made by a resident. He was shown a copy of an email that was sent to him dated April 12, 2011, which advised that Ms. Hunt could resume group with one of the residents, since the charges were found unsubstantiated. He could not recall anything about her not being able to attend a work session because of a complaint filed by one of the participants. The email, which was sent to Mr. Renfer, stated that "Ms. Hunt could resume participation in the group with Arnold D."

Mr. Renfer testified that the room where he observed Ms. Hunt was the room where the employees have a desk and where they take their breaks. Mr. Renfer was

unaware of what time Ms. Hunt took her break, but stated that her lunch was scheduled from 12:00 p.m. to 12:30 p.m. He testified that employees are permitted two breaks a day for approximately fifteen minutes, but he did not know when Ms. Hunt's break was. He was unaware of any restrictions on what employees can do while they are on break.

For appellant:

Wanda Hunt began working for the Department in 1992, and is a Senior Program Assistant. Her position required her to run programs with the residents. At the time of the incident in question, she testified that she was on break, as she was unable to run her regular group as a result of allegations made by an individual in the group. She testified that a resident named Arnold D. had made a claim of patient abuse against her and she was not to handle any groups he was in until the investigation was completed. The investigation was completed and she was ultimately cleared to return to that group in April 2011. However, on March 22, 2011, she was not permitted to handle that morning group. An email, dated April 12, 2011, was identified and entered into evidence which stated that "Wanda Hunt was cleared to resume working with Arnold D., as the allegation with respect to abuse was unsubstantiated." (P-1.)

Ms. Hunt testified that when she was not handling a group or other responsibilities, she was free to take her break whenever she wanted and there were no restrictions on what she could do during her break. She testified that she did not think that she was sleeping at the time but she may have dozed off. She does not recall anyone telling her that she could not rest on a break. She testified that she has a number of medical conditions and that some of the medications make her a little sleepy. She testified that she is diabetic, has a heart condition and takes medicine for allergies, high cholesterol and neuropathy.

FINDINGS OF FACT

The resolution of the charges against Ms. Hunt requires that I make a credibility determination regarding the critical facts. 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. 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. Super. 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 carefully observe the demeanor of the witnesses, it is my view that Mr. Renfer was honest and sincere in his testimony. However, I **FIND** he had no knowledge regarding when scheduled breaks were or what employees were permitted to do during their scheduled breaks. In addition, I **FIND** Mr. Renfer had no recollection regarding a group that Ms. Hunt was not permitted to handle around this time period or that Ms. Hunt failed to handled a scheduled group. I found Ms. Hunt to be sincere and credible. I **FIND** that she was on break at the time and that she was not permitted to handle her morning group due to an allegation of abuse by a resident.

LEGAL DISCUSSION 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. Super. 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 employments. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14 (a). This applies to both permanent career service employees or those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14; N.J.S.A. 11A:2-6. The State has the burden 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. Super. 143 (1962); In re Polk Licence Revocation, 90 N.J. Super. 550 (1980).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking her removal. Specifically, Ms. Hunt has been charged with violating the following offenses:

- Sleeping while on duty, in violation of Administrative Order 4:08-BB03
- Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would result in causing a danger to persons or property Order 4:08-BB01
- Conduct unbecoming a public employee N.J.A.C. 4A:2-2.3
- Other sufficient cause N.J.A.C. 4A:2-2.3(11)

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of proving that appellant was "on duty" at the time they found her resting/sleeping on her desk. I further **CONCLUDE** that respondent has not satisfied its burden of proving what is permitted during break time, or that that appellant was not on her scheduled break. Finally, I **CONCLUDE** that respondent has failed to prove that appellant neglected any of her duties, displayed conduct unbecoming or other sufficient cause. Accordingly, I **CONCLUDE** that the charges have not been sustained and must be dismissed.

ORDER

Since the charges have not been dismissed, I **ORDER** that appellant is entitled to back pay, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10. Any award is subject to modification based upon the closure of the Hagedorn on June 30, 2012, and a determination of lay off rights related to appellant.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless 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 19, 2015
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: March 19, 2015

Date Mailed to Parties: March 19, 2015

SGC/cb

APPENDIX

WITNESSES

For appellant:

Wanda Hunt

For respondent:

John Renfer

EXHIBITS

Joint:

J-1 NJ Department of Human Services Disciplinary Action Program

J-2 Disciplinary History

For appellant:

P-1 Email, dated April 12, 2011

P-2 Civil Service Commission Decision

For respondent:

R-1 Preliminary Notice of Disciplinary Action, dated April 13, 2011

R-2 Final Notice of Disciplinary Action, dated April 15, 2014

R-3 Request for Corrective Step or Disciplinary Action, dated March 22, 2011