B-52

STATE OF NEW JERSEY

In the Matter of David Anthony, Hudson County Sheriff's Office	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2016-1740	
	Request for Back Pay

ISSUED: JAN 2 0 2017 (JET)

David Anthony, a Management Specialist with the Hudson County Sheriff's Office, represented by David Beckett, Esq., seeks enforcement of the attached decision rendered on August 19, 2015 granting him back pay, benefits and seniority pursuant to *N.J.A.C.* 4A:2-2.10.

By way of background, the appointing authority initially removed the appellant from his position effective September 10, 2013. He appealed this removal to the Civil Service Commission (Commission) and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. Thereafter, the appellant filed a request for a stay of his removal which was denied by the Commission. *See In the Matter of David Anthony* (CSC, decided April 9, 2014). Further, the appellant filed suit in Superior Court concerning a separate but related matter with respect to his removal and rights under the Veteran's Tenure Act. In its April 14, 2014 decision, the Superior Court ordered that the matter be remanded to the appointing authority to conduct a new departmental hearing and awarded the appellant back pay from September 10, 2013 until date of the new hearing. In light of the Superior Court's order vacating the September 10, 2013 removal, the appellant withdrew his appeal of his removal.

In compliance with the Superior Court's order, the appointing authority issued the appellant a new Preliminary Notice of Disciplinary Action on April 14, 2014 seeking his removal. A departmental hearing was conducted on September 12, 2014 and the appellant was issued a Final Notice of Disciplinary Action on December 1, 2014 upholding his removal effective November 26, 2014. Upon the

appellant's subsequent appeal, the matter was referred for a hearing to the OAL. Following a hearing, the Administrative Law Judge (ALJ) recommended modifying the removal to a 90 working day suspension. Upon its review, the Commission adopted the ALJ's findings and conclusions, but did not adopt the ALJ's recommendation to modify the removal to a 90 working day suspension. Rather, in its August 19, 2015 decision, the Commission modified the removal to a 30 working day suspension. As such, the Commission reinstated the petitioner and awarded back pay, benefits and counsel fees in accordance with *N.J.A.C.* 4A:2-2.12. The record reflects that the appellant was not reinstated until November 23, 2015. However, it is uncontested that the appellant received back pay awarded as a result of the Superior Court order until June 5, 2014.

In his request to the Commission, the appellant states that he is entitled to back pay from June 5, 2014 through November 23, 2015. Further, the appellant argues that the appointing authority delayed reinstating him to his position as the Commission made its decision on August 19, 2015 and he was not reinstated until November 23, 2015. The appellant avers that he would have earned over $83,000 a year at the time of his suspension and he requests back pay in the amount of $111,037. Moreover, the appellant maintains that an award of counsel fees is appropriate for the seeking of enforcement of his back pay award.

In response, the appointing authority, represented by Sean Dias, Esq., asserts that the Commission's August 19, 2015 decision did not indicate that the appellant would receive an award of back pay prior to November 23, 2015. Further, the appointing authority contends that the appellant unreasonably delayed proceedings in this matter by withdrawing his appeal, filing a separate matter in Superior Court, and failing to appear for a departmental hearing. As such, the appointing authority maintains that the appellant should not be entitled to back pay from June 5, 2014 through November 25, 2015.

In reply, the appellant presents that he did not unreasonably delay the proceedings in this matter. Specifically, he states that the hearing officer at the June 5, 2014 departmental hearing adjourned the matter because the appointing authority indicated that it was considering further appeal of the Superior Court's April 14, 2014 decision. In this regard, the appellant states that the appointing authority terminated the hearing officer that it hired to conduct the June 5, 2014 hearing since his failure to conduct the hearing would result in it being required to continue to pay the appellant. Further, as his counsel requested the adjournment, any delays that occurred in this matter would be attributable to him and back pay cannot be denied due to delays caused by his attorney. The appellant adds that he did not withdraw the original matter pending at OAL. Rather, the matter was vacated by the Superior Court, which ordered back pay and a new departmental hearing. Thus, it was not necessary to continue with his initial appeal of his removal that was effective September 10, 2013. Moreover, the appellant contends

that the appointing authority does not dispute his attempts to find alternate employment and mitigate damages. In this regard, he states that he did not receive additional unemployment benefits from June 5, 2014 forward and that he worked a part-time job for eight months from March 2015 to October 2015 with East L.A., Inc., earning $250.00 a week for a total of $7,500. He also states that he is owed for his health benefits costs in the amount of $4,601.30.[1] Further, he requests that 32.5 sick days, 26 vacation days, 4 personal days and 15 compensatory days be restored.

In response, the appointing authority asserts that since the appellant was reinstated to his position, this matter only involves the back pay dispute and counsel fees were denied in the prior matter. Additionally, the appointing authority provides that the petitioner's salary was $83,232 from July 1, 2013 through June 30, 2014, $84,897 from July 1, 2014 through June 30, 2015, and $86,595 from July 1, 2015 through June 30, 2016.

CONCLUSION

Pursuant to *N.J.A.C.* 4A:2-2.10(d), an award of back pay shall include unpaid salary, including regular wages, overlap shift time, increments and across-the-board adjustments. *N.J.A.C.* 4A:2-2.10(d)3 provides that an award of back pay shall be reduced by the amount of money that was actually earned during the period of separation, including any unemployment insurance benefits received, subject to any applicable limitations set forth in (d)4. Further, *N.J.A.C.* 4A:2-2.10(d)4 states that where a removal or suspension for more than 30 working days has been reversed or modified and the employee has been unemployed or underemployed for all or a part of the period of separation, and the employee has failed to make responsible efforts to find suitable employment during the period of separation, the employee shall not be eligible for back pay for any period during which the employee failed to make such reasonable efforts. "Reasonable efforts" may include, but not be limited to, reviewing classified advertisements in newspapers or trade publications; reviewing Internet or on-line job listings or services; applying for suitable positions; attending job fairs; visiting employment agencies; networking with other people; and distributing resumes. The determination as to whether the employee has made reasonable efforts to find suitable employment shall be based upon the totality of the circumstances, including, but not limited to, the nature of the disciplinary action taken against the employee; the nature of the employee's public employment; the employee's skills, education, and experience; the job market; the existence of advertised, suitable employment opportunities; the manner in which the type of employment involved is commonly sought; and any other circumstances deemed relevant based upon the particular facts of the matter. The burden of proof shall be on the employer to establish that the employee has not made reasonable efforts to find suitable employment. *See N.J.A.C.* 4A:2-2.10(d)4, *et. seq.*

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[1] Included in this amount is $1,135 designated as "Student Health Fees" for the appellant's daughter paid to her University.

Initially, in its August 19, 2015 decision, the Commission modified the November 26, 2014 removal to a 30 working day suspension, and awarded back pay, benefits, and seniority from 30 days after his separation from employment to the actual date of the appellant's reinstatement in accordance with *N.J.A.C.* 4A:2-2.10. In accordance with the April 14, 2014 order of the Superior Court vacating his initial removal, the appointing authority reimbursed the appellant back pay from September 10, 2013 through June 5, 2014, the date it asserts that the appellant delayed the appeal proceedings. *N.J.A.C.* 4A:2-2.10(d)8 states that a back pay award is subject to reduction by any period of unreasonable delay of the appeal proceedings directly attributable to the employee. Delays caused by an employee's representative may not be considered in reducing the award of back pay. In this case, the hearing officer adjourned the June 5, 2014 hearing on the basis that the appointing authority had indicated that it was considering appealing the Superior Court's order. Further, it is unrebutted by the appointing authority that it terminated the hearing officer because he adjourned the June 5, 2014 hearing, which would require it to continue to pay the appellant. As such, the Commission is not persuaded that the appellant unreasonably delayed the departmental hearing. Moreover, there is no indication that the appointing authority ever returned the appellant to employment after June 5, 2014 until his ultimate reinstatement on November 23, 2015. In essence, the appellant was immediately suspended without pay until his removal on November 26, 2014. Additionally, the appointing authority has not challenged the sufficiency of the appellant's mitigation efforts. Therefore, the appellant is entitled to back pay 30 working days from June 6, 2014 until November 22, 2015.

The appointing authority has indicated that the appellant's annual salary as follows:

July 1, 2013 to June 30, 2014	$83,232
July 1, 2014 to June 30, 2015	$84,897
July 1, 2015 to June 30, 2016	$86,595

Therefore, his back pay would as follows:

Time Period	**Gross Amount Owed**
June 6, 2014 to June 30, 2014	-$0- (17 work days of 30 working day suspension)
July 1, 2014 to June 30, 2015	(262 work days – 13 remaining working days of suspension = 249 work days at per diem rate of $324.03 = $80,683.47) – (3 weeks part-time job at $250.00 per week = $750.00) = $79,933.49

July 1, 2015 to November 22, 2015	(103 work days at per diem rate of $330.52 = $34,043.56) – (26 weeks part time job at $250.00 per week = $6,500.00) = $27,543.56
Total Mitigated Back Pay Award	**$107,477.05**

N.J.A.C. 4A:2-2.10(d) provides for reimbursement of payments made to maintain health insurance coverage. *See In the Matter of Vito Cammisa* (MSB, decided September 20, 2006) *aff'd on reconsideration* (January 17, 2007) (Employee entitled to amounts spent to maintain medical insurance, which includes health, dental, and prescription insurance coverage). In this case, the appellant indicated that he spent $4,601.30 to maintain health insurance coverage during the time of his separation which has not been challenged by the appointing authority. However, $1,135 of that amount was paid to cover the "Student Health Fees" charged by the appellant's daughter's University. There is no indication that those "fees" are to maintain health insurance coverage. Moreover, *N.J.A.C.* 4A:2-2.10(d) only applies to maintaining **his** health insurance. Therefore, the appellant is entitled to be reimbursed $3,466.30 for the maintenance of these benefits.

With respect to his request for vacation leave for 2013 through 2015, vacation leave not taken in a given year can only be carried over to the following year. *See N.J.S.A.* 11A:6-3(e) and *N.J.A.C.* 4A:6-1.2(f); *See also, In the Matter of Donald H. Nelsen, Jr.*, Docket No. A-2878-03T3 (App. Div. February 4, 2005); *In the Matter of John Raube, Senior Correction Officer, Department of Corrections*, Docket No. A-2208-02T1 (App. Div. March 30, 2004). Since the accumulation of vacation leave is statutory, the Commission is unable to award him the leave he would have earned during this time period. As to the amount of sick leave due to the appellant, he should receive any unused sick days up to and following his removal, since sick leave can accumulate from year to year without limit. *See N.J.S.A.* 11A:6-5 and *N.J.A.C.* 4A:6-1.3(f). Regarding his personal days and compensatory time, the Commission has no authorization to review benefits provided by the local jurisdiction and not specifically awarded by Title 11A of the New Jersey Statutes Annotated. *See In the Matter of James Nance* (MSB, decided October 1, 2003).

With respect to the appellant's request for counsel fees as part of this back pay enforcement request, it is noted that while an appellant is entitled to counsel fees regarding an enforcement request for a counsel fee award since New Jersey courts have recognized that attorneys should be reimbursed for the work performed in support of any fee application, he is not entitled to counsel fees for any work performed pursuing his claim for back pay. *See H.I.P. (Heightened Independence and Progress, Inc.) v. K. Hovnanian at Mahwah VI, Inc.*, 291 *N.J. Super.* 144, 163 (Law Div. 1996) [quoting *Robb v. Ridgewood Board of Education*, 269 *N.J. Super.* 394, 411 (Ch. Div. 1993)]. In that regard, *N.J.A.C.* 4A:2-1.5(b) provides, in pertinent part, that counsel fees may be awarded where the appointing authority

has unreasonably failed or delayed to carry out an order of the Commission or where the Commission finds sufficient cause based on the particular case. In the instant matter, the record does not evidence that the appointing authority unreasonably delayed implementing the Commission's order. Rather, the Commission issued its order reinstating the appellant on September 2, 2015 and the record indicates that he was contacted by the appointing authority on November 13, 2015 confirming his return to work on November 23, 2015. The record also fails to indicate that the appointing authority's actions were based on any improper motivation. Thus, the record does not reflect a sufficient basis for an award of counsel fees for time spent on back pay issues. *See In the Matter of Lawrence Davis* (MSB, decided December 17, 2003); *In the Matter of William Carroll* (MSB, decided November 8, 2001).

ORDER

Therefore, it is ordered that the appellant be awarded back pay in the amount of $107,477.05 and reimbursement for health benefits in the amount of $3,466.30 within 30 days of the issuance of this decision.

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

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

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries and Correspondence
Nicholas F. Angiulo
Assistant Director
Division of Appeals & Regulatory Affairs
Civil Service Commission
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Attachment

c: David Anthony
David Beckett, Esq.
Sean Dias, Esq.
Elinor M. Gibney
Records Center

STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of David Anthony,
Hudson County

CSC Docket No. 2015-1886
OAL Docket No. CSV 00435-15

ISSUED: SEP 02 2015 (JET)

The appeal of David Anthony, a Management Specialist with the Hudson County Sheriff's Office, of his removal effective November 26, 2014, on charges, was heard by Administrative Law Judge Joann Lasala Candido (ALJ), who rendered her initial decision on July 9, 2015. Exceptions were filed on behalf of the appellant and 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 August 19, 2015, accepted and adopted the Findings of Facts and Conclusions as contained in the ALJ's initial decision, but did not adopt the ALJ's recommendation to modify the removal to a 90 working day suspension. Rather, the Commission modified the removal to a 30 working day suspension.

DISCUSSION

The appointing authority removed the appellant on charges of insubordination, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that the appellant made a derogatory and inappropriate comment toward S.B., an African-American co-worker and subordinate employee, while in the presence of another co-worker on November 28, 2012. Specifically, the appointing authority alleged that the appellant referred to

S.B. as "Buckwheat." 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 that the appellant was serving in a supervisory capacity in the same unit with S.B., but was not S.B.'s immediate supervisor. It was not disputed that the appellant uttered the word "Buckwheat" toward S.B. in the workplace on November 28, 2012, and that more than one employee overheard the remark. Specifically, the ALJ found that the appellant referred to S.B.'s garb as "Buckwheat" during a conversation at work. The ALJ explained that the term "Buckwheat" references an African-American fictional character from many years ago, and it is now considered a racial slur. The appellant admitted in his testimony that he made the offensive remark, but that he did not intend to offend S.B. However, the appellant denied making the offensive statement during the appointing authority's initial investigation of the incident. The ALJ noted that the appellant completed diversity training and he received a copy of the employee handbook which prohibits the use of discriminatory language. In this regard, the ALJ indicated that the employee handbook prohibits any form of harassment based on race, creed, color, and national origin. As such, the ALJ found that the appellant was aware of the racial implications of the term "Buckwheat" when he uttered it. Moreover, the ALJ found that the appellant's reference to the term "Buckwheat" was particularly offensive to S.B. Therefore, the ALJ concluded that the evidence established that the appellant was guilty of the charges of conduct unbecoming a public employee and other sufficient cause, but did not constitute insubordination. Thus, since the appellant did not have any prior major disciplinary history and was otherwise an exemplary employee, the ALJ recommended modifying the removal and imposing a 90 working day suspension.

In his exceptions to the ALJ's decision, the appellant asserts that he did not refer to S.B. as "Buckwheat." Rather, he only referred to S.B.'s hat while using that term and he was only attempting to engage in light banter. The appellant contends that the remark was mischaracterized and it was not intended to be discriminatory. As such, the ALJ erroneously concluded that he was aware of the racial implications of the remark. In this regard, the appellant explains that, at the time of the incident, he had no idea that the term "Buckwheat" was a racial slur. Further, the appellant avers that the record does not support the finding that he received training to avoid using the term. The appellant asserts that the appointing authority's policies, as well as the training he received, did not primarily focus on discrimination issues. Rather, the policies are primarily focused on sexual harassment. The appellant states that the "diversity dictionary" he received from the appointing authority indicates 400 terms that are considered offensive in the workplace, however, the term "Buckwheat" was not one of them. In addition, the appellant contends that the appointing authority's witnesses were not credible. In this regard, the appellant explains that S.B. and the other witness to the remark, Alice Nestor, did not immediately object to the inappropriate remark. He also

alleges that Nestor's testimony is questionable since she had some prior history with S.B.. The appellant adds that the appointing authority's failure to call S.B. as a witness undermines the racial implication of the statement. As such, he maintains that the ALJ's finding that S.B. was offended by the remark is not supported by the evidence. Moreover, the appellant asserts that he answered truthfully during the appointing authority's investigation and he did not say, "Hey Buckwheat." In this regard, the appellant explains that the appointing authority never asked him if he stated, "You have a Buckwheat hat thing going on." He also states that the ALJ ignored the fact that he continued to perform his duties for an additional nine months after the incident and the testimony from his supervisor that he is an exemplary employee. The appellant adds that he was not separated from S.B. after the incident occurred, and while the term "Buckwheat" may be out of date, it is not a racist slur. As such, the appellant asserts that the remark is not sufficient to warrant his removal or a 90 working day suspension.

In response, the appointing authority maintains that removal is the appropriate penalty. Specifically, the appointing authority asserts that, as a supervisor, the appellant had a greater duty to refrain from referring to a subordinate employee as "Buckwheat." In this regard, the ALJ properly determined that supervisory employees are held to a higher standard of conduct than non-supervisory employees. Further, the appointing authority contends that the appellant attended mandatory training for unlawful harassment which he disregarded. The appointing authority adds that its employee handbook includes an anti-harassment policy, which prohibits, among other things, harassment on the basis of race. The policy also sets forth "managerial/supervisory" responsibilities and requires supervisors to enforce the policy. The appointing authority states that the term "Buckwheat" is a racial slur and was not an inadvertent use of poor language. In addition, the appointing authority asserts that the appellant was less than truthful with regard to his actions, as he initially denied that he used the term "Buckwheat."

In reply, the appellant states that it appears that the appointing authority is inventing claims that he engaged in deceitful conduct and falsely states that he attended training without providing any evidence of such.

Upon independent review of the entire record, including the exceptions and reply to exceptions filed by the parties, the Commission agrees with the ALJ's determination to uphold the charges of conduct unbecoming a public employee and other sufficient cause. However, the charge of insubordination has not been sustained. Further, while the Commission agrees with the ALJ's recommendation to modify the removal, for the reasons noted below, the Commission modifies the removal to a 30 working day suspension.

In the present matter, the Commission agrees with the ALJ that the evidence established that the appellant uttered a racial slur toward S.B., a subordinate co-worker, and the incident was compounded because the appellant is in a supervisory position. Further, the Commission agrees that the appellant's conduct violated the appointing authority's policy against harassment and discrimination in the workplace. Although the appellant may have been referring to an item of clothing, *i.e.*, a hat, it does not excuse him from such inappropriate behavior. The appellant is in a supervisory position and he is held to a higher standard of conduct. Moreover, the Commission is not convinced that the appellant was unaware that the term "Buckwheat" constitutes a racial slur. Such behavior disrupts the work environment and cannot be minimized.

However, in determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock,* 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. Moreover, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison,* 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007). In this case, the record indicates that the appellant's record does not contain any major disciplinary history. The appointing authority's arguments that the appellant's removal should be upheld are not persuasive. While discriminatory language in the workplace is never appropriate, especially for a supervisory employee, given the totality of the circumstances present in this matter, including the appellant's prior disciplinary history, the fact that he continued to serve for nine months after the incident occurred, and his apparent lack of intent, it is appropriate to impose a 30 working day suspension. The Commission emphasizes that it does not condone such behavior and further instances of such conduct would support a harsher penalty up to and including removal.

Since the removal has been modified, the appellant is entitled to mitigated back pay, benefits and seniority for the period following his 30 working day suspension to the date of actual reinstatement pursuant to *N.J.A.C.* 4A:2-2.10.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the

primary issues in an appeal. 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. A4489-02T2 (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 this case, the Commission sustained the charges of conduct unbecoming a public employee and other sufficient cause, and imposed a 30 working day suspension. Therefore, he is not entitled to counsel fees.

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 his permanent position.

ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 30 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following his 30 working day suspension until his 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 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 this issue.

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 the appellant's reinstatement. 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 of Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19th DAY OF AUGUST, 2015

Richard E. Williams
Member
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 00435-15
AGENCY DKT. NO. 2015-1886

IN THE MATTER OF DAVID ANTHONY,
HUDSON COUNTY, SHERIFF DEPARTMENT.

David Beckett, Esq., for appellant, David Anthony (Law Office of David Beckett)

Sean Dias, Esq. for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: June 12, 2015 Decided: July 9, 2015

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals his removal by the Hudson County Sheriff Department (respondent). By Preliminary Notice of Disciplinary Action dated April 14, 2014, respondent charged appellant with insubordination, conduct unbecoming a public employee, and other sufficient cause, alleging that appellant on November 28, 2012, made a derogatory and inappropriate comment to a co-worker Serita Broady referring to her as "Buckwheat," a long-ago television character of African American decent. This was uttered in the presence of Alice Nestor, a co-worker. Respondent further charged him with attempting to influence co-worker Nestor's recollection of the incident and for his lack in judgment of Broady's bereavement leave claim. After a departmental hearing

on September 12, 2014, respondent issued its Final Notice of Disciplinary Action, dated December 1, 2014, sustaining only the charge of uttering the derogatory statement to a subordinate employee. On this sustained charge, respondent removed appellant. He received his pay until June 5, 2014, based upon a salary of $80,000 per year.

Appellant filed an appeal with the Civil Service Commission and the matter was transmitted to the Office of Administrative Law, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. This matter came to the undersigned on January 12, 2015, for disposition and a hearing was scheduled for and conducted on May 8, 2015. The record closed on June 12, 2015, upon receipt of written summations.

ISSUE

The issue is whether respondent has proven the charges of insubordination, conduct unbecoming a public employee, and other sufficient cause by a preponderance of the credible evidence and, if any of the charges are sustained, the disciplinary action warranted under the circumstances.

TESTIMONY

A summary of the evidence offered in support of, and in opposition to, the charges against appellant follow. The factual discussion is not intended to be a verbatim report of the testimony of all the witnesses. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented. In short, appellant significantly disputes the facts that give rise to the charges against him.

Francine Shelton

Undersheriff Francine Shelton testified on behalf of respondent. She oversees all four civilian employee units, 911 unit, weights and measures, security guards, and business sales departments. Appellant was the supervisor/office manager of the business sales department. Alice Nestor was chief clerk in the same department. Serita Broady was an employee in that department. All employees are required to attend harassment and discrimination training. Appellant received this training on July 11, 2011. (R-5.) In addition, appellant received training on May 10, 2011, in the understanding and managing of today's diverse workplace. (R-6.) Shelton was not present at those trainings.

Alice Nestor was Serita Broady's immediate supervisor. Appellant supervised Nestor. On November 29, 2012, Broady wrote a letter to Shelton complaining of an incident between her and appellant on November 28, 2012. (R-3 (for identification purposes).) Shelton was not in the area where the comment was made, and consequently had no personal knowledge of what was said. Shelton testified that appellant's work performance was outstanding. She was not aware of any other complaints about him.

Alice Nestor

Chief Clerk Alice Nestor testified on behalf of respondent. She has been employed with the Sheriff's Office for twenty-five years. Appellant was her supervisor.

Nestor testified that, on November 28, 2012, at approximately 4:00 p.m., while she was in the office, she heard appellant state to Broady as she was putting on her coat in a coat room "Hey, Serita, you look like Buckwheat." Broady, who is African American, was about four feet away from appellant when he made the utterance. Nestor, who called out sick the day after the incident for a planned surgery, did not return to work for three weeks. At the time of incident, she had not filed a complaint or advised anyone of the incident because she assumed that Broady would file it. She stated that Broady did not complain at the time of the utterance.

Nestor submitted an unfinished written statement as well as a handwritten statement to the undersheriff about the incident and was questioned by investigators six months later. However, this was now after the death of her son on January 8, 2013. Accordingly, she felt this incident had become secondary to her and that it was insensitive to question her at that time.

Richard Sires

Richard Sires testified on behalf of appellant. He is currently employed by respondent as a principal personnel technician. Shelton is his direct supervisor. He and Shelton were both involved in the investigation of appellant. Nestor, who was asked to submit a handwritten statement about the incident, submitted it in typewritten form. When asked why it was typewritten, Nestor responded that Broady had typed the document for her. Nestor stated that Broady "was getting in her face" and she felt intimidated by her. Nestor also stated that her computer was not working properly.

David Anthony

David Anthony testified on his own behalf. He has been a management specialist for respondent since May 2011.

He stated that at the end of the day on November 28, 2012, staff was getting ready to leave and he engaged in "chit chat" with Broady while she was exiting the coat closet and was putting on her coat. She asked Anthony what he thought of her outfit, and he responded, in part, that she had that "Buckwheat hat look going on" but he did not intend to upset Broady. Neither Broady nor anyone else in the area voiced any concern about his comment.

He admitted that he failed to mention his reference to "Buckwheat" during the investigation conducted by respondent of the incident. Accordingly, when asked during the investigation if he had ever said "hey Buckwheat" to Broady, he denied it. He further

stated that in retrospect, he should not have used the word "Buckwheat" to describe Broady's hat.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS of FACT**. Appellant is a management specialist for respondent since May 2011. He supervised the business sales department. As part of his employment, appellant received harassment and discrimination as well as training and understanding and managing diverse workplace training. He is not Broady's immediate supervisor.

I **FIND** that there is no dispute that a racial slur was uttered by appellant on November 28, 2012, in the workplace. I further **FIND** that appellant was aware that the term "Buckwheat" referred to an African American child on a television show many years ago. Although no complaint was initially made, the term was offensive to Broady. Appellant admitted that he used the term, but that he did not intend to offend Broady and, in retrospect, admitted that he should not have uttered it. There is no dispute that more than one person heard the slur. Appellant has had no major prior disciplinary actions and was viewed as an exemplary employee.

Because appellant admitted to uttering the term "Buckwheat," I will not address credibility. I **FIND** that he was aware of its racial implication and I further **FIND** that it was offensive to a worker-subordinate.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is designed to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972);

Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, a civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be removed or subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing before an administrative law judge are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, to be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). The County bears the burden of proving the charges against Laban by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Appellant has been charged with insubordination, which is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; and disrespect or use of insulting or abusive language to supervisor. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation. Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002).

Appellant argued that he did not willfully disobey or disregard an order or instruction of his superior (who, in this case, was Undersheriff Shelton), nor was there a claim that he was disrespectful or that he refused to perform any action that was required of him. To the contrary, Shelton testified that appellant was an outstanding employee and was not aware of any prior disciplines. Because there has been no proof

that appellant was non-compliant with a superior or disobeyed an order of a superior, I **CONCLUDE** respondent has not demonstrated by the preponderance of the legally competent, credible evidence that appellant committed acts of insubordination on November 28, 2012.

An employee may be subject to discipline for conduct unbecoming a public employee. Conduct unbecoming a public employee constitutes grounds for major discipline under N.J.A.C. 4A:2-2.3(6). Although the term is undefined under the Administrative Code, the charge has been interpreted to include any conduct that adversely affects the morale or efficiency of the bureau or "which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). The employee need not violate the criminal code or a written rule or policy of the employer.

Here, appellant referred to "Buckwheat," a television character of African American decent when commenting on the garb worn by Broady. This was offensive, particularly to an employee also of African American decent, and was clearly against public policy. The Employee Handbook dated May 1, 2003, specifically states that the "County prohibits any form of harassment based on race, creed, color, national origin . . . ." (R-4.) Appellant, as a co-worker and particularly as a supervisor, inappropriately racially offended a worker under his supervision, conduct that is clearly unacceptable. I therefore **CONCLUDE** that respondent has met its burden of proof on the charge of conduct unbecoming.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is generally defined in the charges against appellant as all other offenses caused and derived as a result of all other charges against him. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. Therefore, I also **CONCLUDE** that the respondent has met its burden of proof on this charge.

As to the penalty of removal sought by respondent, I **CONCLUDE** that such penalty is too harsh. Appellant's work performance, other than for this singular transgression, was considered by those who knew him as exemplary, thus requiring progressive discipline for removal. Progressive discipline is a system that has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is an evaluation of the nature, number and proximity of prior disciplinary infractions, and in turn, the imposition of progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. Bock, supra, 38 N.J. at 522-24.

As was stated here, appellant's record is absent any prior formal disciplines. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to reevaluate the proofs and penalty on appeal based on the charges presented. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, supra, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Even though appellant did not have any prior disciplines and was considered an exemplary worker, his insensitive utterance of "Buckwheat" to a co-worker must never be tolerated—particularly in a workplace setting where he was given sensitivity training—and where he not only has acknowledged receipt of the policy against harassment, but has attended training sessions about its requirements. The Employee Handbook clearly prohibits such conduct, although, for some unexplained reason, it does not direct termination when an employee is guilty of discriminatory conduct. Although respondent correctly asserted that its policy addresses this discriminatory conduct, the policy itself does not automatically require a penalty of termination.

Respondent contends that because appellant was a supervisor, he had a greater responsibility to refrain from using the derogatory comment. In Griffith v. Bayside State Prison, CSV 4178-02, Initial Decision (February 11, 2004), modified, Merit System Board (April 13, 2004), <http://njlaw.rutgers.edu/collections/oal/search.html>, a supervisor referred to an African American subordinate as "boy" in the presence of other staff. She, as the appellant here, urged that the comments were not intended to be insulting or derogatory. The atmosphere at the time the comment was made was lighthearted and jovial. The Merit System Board reduced the penalty to a five-day suspension, but noted that the use of inappropriate language by a supervisor is unacceptable, even if the resulting affront was unintentional. The Griffith decision held that the imposition of minor discipline "should serve as a warning to the appellant that future infractions may result in a more serious penalty, up to and including removal."

Appellant's conduct clearly violated the policy against harassment and as a supervisor is held to a higher standard. However, for the reasons stated above, I cannot conclude that his conduct warrants removal, but rather a penalty of a ninety-day suspension.

ORDER

Based upon the foregoing, it is **ORDERED** that appellant be and is hereby suspended for a period of ninety (90) days on the sustained charges of conduct unbecoming a public employee and other sufficient cause. And it is further **ORDERED** that the charge of insubordination be and is hereby **DISMISSED**.

The suspension will commence as of November 26, 2014, the date of his removal. Upon serving the suspension, he shall be reinstated to the same position of management specialist with back pay, benefits and seniority retroactive to the date of his reinstatement. The amount of back pay shall be mitigated in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 9, 2015

DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

APPENDIX

WITNESSES

For Appellant:

Richard Sires

David Anthony

For Respondent:

Francine Shelton

Alice Nestor

EXHIBITS

For Appellant:

A-1 Civilian Payroll Attendance Record

A-2 Preliminary Notice of Disciplinary Action

A-3 Letter dated February 18, 2011

A-4 Letter dated September 15, 2011

A-5 2013 Budget Presentation

A-6 Diversity dated April 2010

A-7 Pre-employment

A-8 Paycheck dated April 24, 2015

For Respondent:

R-1 Preliminary Notice of Disciplinary Action

R-2 Final Notice of Disciplinary Action dated December 1, 2014

R-4 Employee Handbook

R-5 Unlawful Harassment sign-in sheet

R-6 Understanding and managing today's diverse workplace dated May 10, 2011

B50

STATE OF NEW JERSEY
CIVIL SERVICE COMMISSION

In the Matter of David Anthony

CSC Docket No. 2014-874

Request for Interim Relief

ISSUED APR 10 2014 (EG)

David Anthony, a Management Specialist with Hudson County, represented by David B. Beckett, Esq., petitions the Civil Service Commission (Commission) for interim relief of his termination.

The record indicates that the appointing authority issued the petitioner a Preliminary Notice of Disciplinary Action (PNDA) on March 22, 2012, via personal service, which indicated a suspension for an indeterminate number of days. The PNDA indicated charges of insubordination, conduct unbecoming a public employee and other sufficient cause. Specifically, it was alleged that the petitioner referred to another employee as "Buckwheat," attempted to influence another employee's recollection and testimony regarding the uttering of this word, and that he lacked judgment in the investigation of a bereavement leave claim by this same employee which could be perceived as retaliation. On September 9, 2013, the hearing officer issued a decision recommending termination of the petitioner. A Final Notice of Disciplinary Action (FNDA) was issued on September 10, 2013, indicating a removal effective September 10, 2013. The petitioner filed an appeal of his removal which was transmitted to the Office of Administrative Law (OAL) for a hearing before an Administrative Law Judge.

In the instant matter, the petitioner argues that the hearing officer exceeded his authority in recommending a removal when only a suspension was indicated on the PNDA. He contends that the PNDA form provides boxes to check for the penalty being sought. In addition, the petitioner relies on *In the Matter of Lamont*

Walker (MSB, decided December 19, 2000), arguing that the Merit System Board (now the Commission) found amended notices provided insufficient notice in correcting PNDAs and FNDAs. Further, the petitioner argues that notice of the potential penalty is an essential element of due process per *N.J.S.A.* 11A:2-13. Moreover, the petitioner contends that had he known that termination was sought, he would have made an application for a fair and impartial hearing before a neutral hearing officer as well as seeking to subpoena additional information and compel testimony of certain individuals. The petitioner seeks to have the removal rescinded, to be reinstated and to have a new departmental hearing on a suspension only.

In response, the appointing authority, represented by Sean D. Dias, Esq., initially argues that the petitioner's argument is essentially that he would have presented a better defense had he known termination was sought. It contends that such an argument is impractical and that the petitioner knew he was subject to major disciplinary action of up to a six month suspension. Additionally, the appointing authority asserts that *N.J.A.C.* 4A:2-2.5 does not limit the penalty that can be imposed after a departmental hearing. It only requires that the employee be notified of the charges and statement of facts supporting the charges and an opportunity for a hearing. The appointing authority followed these procedures. Further it states that in *West New York V. Bock*, 38 *N.J.* 500 (1962), the Court set forth that notice of prospective penalty is not a vital element of the statement of charges and no ultimate prejudice was suffered since the employee knew of the discipline sought by the time of the *de novo* hearing. Moreover, the appointing authority argues that while the petitioner claims that the hearing officer was biased, such claims are cured by a *de novo* hearing at OAL. Finally, it asserts that the petitioner has not met any of the factors necessary to grant interim relief.

CONCLUSION

N.J.A.C. 4A:2-1.2(c) provides the following factors for consideration in evaluating petitions for a interim relief:

1. Clear likelihood of success on the merits by the petitioner;

2. Danger of immediate or irreparable harm;

3. Absence of substantial injury to other parties; and

4. The public interest.

Additionally, *N.J.S.A.* 11A:2-13 and *N.J.A.C.* 4A:2-2.5(a)1 provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any

person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order, or effective direction of public services.

Further, *N.J.S.A.* 11A:2-13 states in pertinent part that except as otherwise provided herein, before any disciplinary action in subsection a.(1), (2) and (3) of *N.J.SA.* 11A:2-6 is taken against a permanent employee in the career service or a person serving a working test period, the employee shall be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative. *N.J.A.C.* 4A:2-2.5(a) states that an employee must be served with a PNDA setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline.

In reviewing this matter, the information provided in support of the instant petition does not clearly demonstrate likelihood of success on the merits. A critical issue in any disciplinary appeal is whether or not the petitioner has actually committed the alleged infractions. In this regard, the petitioner does not challenge the charges brought against him. Rather, the petitioner contends that alleged procedural violations warrant granting his request for interim relief. The petitioner contends that the hearing officer exceeded his authority in recommending a removal when only a suspension was indicated on the PNDA. He also contends that the hearing officer was biased. The appointing authority claims that the failure to indicate a removal on the PNDA did not prejudice the petitioner in any way. It relies on *N.J.A.C.* 4A:2-2.5(a) and *West New York, supra*. Based on the evidence in the record at this time, it appears that the petitioner was not prejudiced in this matter as he was aware of the charges against him, which is what *N.J.A.C.* 4A:2-2.5(a) and *West New York, supra,* require. However, even if there were procedural violations at the departmental level, they are deemed cured by the granting of a *de novo* hearing at the OAL. *See Ensslin v. Township of North Bergen, 275 N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971). Similarly, any alleged bias by the hearing officer would be cured by a *de novo* hearing before the ALJ.

Moreover, the petitioner has failed to show the danger of immediate or irreparable harm or how the public interest would be served by granting his request. In this regard, if the petitioner's termination is not sustained, there are available mechanisms for relief, such as back pay in appropriate cases pursuant to *N.J.A.C.* 4A:2-2.10. Accordingly, under these circumstances, the record does not demonstrate a basis for granting interim relief.

ORDER

Therefore, it is ordered that the petitioner's request for interim relief be denied.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 9TH DAY OF APRIL, 2014

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
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