STATE OF NEW JERSEY

In the Matter of Bernacine Barnes	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2017-1610 and 2017-1812	:	
OAL Docket Nos. CSV 18070-16 and CSV 00015-17 (consolidated)	:	

ISSUED: MAY 24, 2018 (JET)

The appeals of Bernacine Barnes, a Senior Receptionist with Monmouth County, Department of Human Services, of her 20 working day and three working day suspensions, on charges, were heard by Administrative Law Judge Kathleen M Calemmo (ALJ), who rendered her initial decision on March 22, 2018. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on May 2, 2018, accepted and adopted the Findings of Facts and Conclusions as contained in the ALJ's initial decision. The Commission also adopted the ALJ's recommendation to reverse the three working day suspension. However, the Commission did not adopt the ALJ's recommendation to uphold the 20 working day suspension. Rather, the Commission modified the 20 working day suspension to a 10 working day suspension.

DISCUSSION

The appellant was charged with insubordination, conduct unbecoming a public employee, neglect of duty, misuse of public property, and other sufficient cause. Specifically, the appointing authority alleged in a Preliminary Notice of Disciplinary Action (PNDA) issued on September 14, 2016 that the appellant removed confidential information from her work site without authorization, delivered a packet of confidential information to an unidentified person at the Office

of Professional Standards (OPS), and misused County property. A Final Notice of Disciplinary Action (FNDA) was issued on November 9, 2016 which upheld the 20 working day suspension. Thereafter, a Notice of Minor Disciplinary Action seeking a three working day suspension was issued alleging that the appellant left a meeting and wore sneakers to work without approval, which was upheld on November 24, 2016. Upon the appellant's appeals, both matters were transmitted to the Office of Administrative Law (OAL) as contested cases.

In her consolidated initial decision, the ALJ found that on August 24, 2016, the appellant delivered a complaint containing personal and confidential client information without authorization in a packet regarding her alleged unfair treatment in the workplace. The ALJ found that the appellant complained that her supervisors subjected her to disparate treatment, and in support of her complaint, she submitted documentation from a client's file to show that she was unfairly accused of disparate treatment in the workplace. The ALJ found that the appellant utilized County property, a work computer, to write her complaint, and she removed County property, a client's file, that contained privileged and confidential information from the workplace without authorization. The ALJ found that confidential documentation including the case name, financial information, and social security number in the client's file was not redacted. Further, the ALJ found that the appellant hand delivered the complaint and placed it on the secretary's desk at OPS, which was received on August 25, 2016 by Gwendolyn Thomas. The ALJ found that the appellant's complaint was addressed to individuals including the Monmouth County Freeholders, Steven Kleinman, Special County Counsel, Teri O'Connor, a County Administrator, and Gwendolyn Thomas, an Assistant Nursing Home Administrator and the OPS investigator. The ALJ indicated that the appellant did not dispute that she did not have authorization to include the confidential information in support of her complaint.

Additionally, the ALJ found that, on September 21, 2016, the appellant was questioned in a series of three meetings by her supervisors with respect to her wearing sneakers at work. At the first meeting, the appellant's supervisor, Diane Prochnow, a Human Services Specialist 4, questioned the appellant about her authorization to wear sneakers in the workplace. The ALJ found that, during the second meeting, Amy Klinghoffer, a Personnel Assistant, stated that she could not locate the appellant's medical records that should have been maintained by the appointing authority's Human Resources Office supporting the appellant's accommodation to wear sneakers, and the appellant stated she would not provide new medical documentation in support of the accommodation.[1] Additionally, the ALJ found that the appellant was summoned to a third meeting on September 21, 2016 with Prochnow, Klinghoffer, and Robert Jaichner, an Assistant Administrative Supervisor, Income Maintenance. The appellant stated to the supervisors that she wanted to tape record the third meeting which was not permitted by Klinghoffer.

[1] Prochnow was also at the second meeting.

The ALJ found that, upon receiving such information, the appellant stated the meeting was not going to happen and she abruptly left the meeting. The ALJ found that Prochnow, Klinghoffer, and Jaichner viewed the appellant's conduct as inappropriate, as she disregarded their instructions by leaving the meeting and slamming the door shut. Moreover, the ALJ found that the appellant continued to wear sneakers at work after the September 21, 2016 incident and she had been doing so since November 2014 as a result of an accommodation. The ALJ found that the appellant submitted a doctor's note dated November 1, 2014 that Human Resources date stamped November 5, 2014, a request for an accommodation form under the Americans with Disabilities Act (ADA) dated November 24, 2014, and a disability certificate dated November 24, 2014 indicating that the appellant needed to wear sneakers at all times.[2] As a result, the appointing authority issued a specialized chair to the appellant and authorized her to wear sneakers at work.

Regarding the 20 working day suspension, the ALJ concluded that the appellant's action of delivering the complaint did not constitute insubordination, and there was no issue pertaining to the appellant's right as an aggrieved employee to file a disparate treatment complaint. The ALJ also concluded that the appellant did not disseminate confidential information, violate the appointing authority's computer and e-mail usage policy, or act disrespectfully toward her supervisors. As such, the ALJ did not uphold the charges of insubordination and conduct unbecoming a public employee. Nevertheless, the ALJ concluded that the appellant's removing of a client's confidential record from the workplace without authorization and her computer use after hours was not permitted. As such, the ALJ upheld the charges of neglect of duty, misuse of public property, and other sufficient cause. The ALJ also concluded that the appellant violated several of the appointing authority's policies.

With respect to the appellant's disciplinary history, the ALJ concluded that other than a notice of counseling[3] for an incident that occurred in September 2016, the appellant's personnel record did not contain any major disciplinary history in her over 27 years of service. As to the penalty, the ALJ recommended that, based on the sustained disciplinary charges, and considering the facts of the case, the 20 working day suspension was warranted.

Regarding the three working day suspension, the ALJ concluded that the appellant had been authorized and continued to wear sneakers for two years without incident pursuant to a 2014 ADA accommodation. Additionally, the ALJ concluded that the appellant's testimony with respect to the September 21, 2016 incident was credible, as the three meetings were excessive and the appellant appeared to be intimidated at the time, and there was no substantive evidence to

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[2] The appellant testified that she submitted such documentation to Granvelle LeMeune, an Assistant Chief of Administrative Services, and the documentation was date stamped November 2014.

[3] Counseling is not considered a formal disciplinary action under Civil Service rules.

show that the appellant was disrespectful toward her supervisors. As such, the ALJ recommended reversing the three working day suspension.

In its exceptions, the appointing authority asserts that the ALJ's recommendation to dismiss the three day suspension pertaining to the September 21, 2016 incident is contrary to the testimony presented at the hearing and applicable case law. The appointing authority contends that the ALJ's findings do not correctly set forth the facts pertaining to the actions it took with respect to the events that took place on September 9, 2016. The appointing authority states that its witnesses presented unrebutted testimony to establish that the dress code policy is enforced with respect to the appellant and every other employee at the agency. It adds that the purpose of the September 21, 2016 meeting was to discuss concerns that the appellant was ignoring the dress code policy as a result of her continued practice of wearing sneakers to work, and to determine if the appellant had been approved for an ADA accommodation to wear sneakers. Further, the witnesses testified that they made a good faith effort at the time of the incident to discuss the matter with the appellant, as the appellant's medical documentation with respect to her sneakers could not be located. The appointing authority explains that, although the appellant submitted medical documentation at the hearing indicating that she requested to wear sneakers, she did not present any evidence to show that such an accommodation was granted. The appointing authority states that it has the discretion to determine the proper accommodation under the ADA. As such, the witnesses were not precluded from making such inquiries of the appellant at the time of the meetings. The appointing authority adds that its witnesses did not act in such a manner that would have warranted the appellant's inappropriate behavior at the time, *i.e.,* stating that she wanted to record the meeting and, upon learning that she was not permitted to do so, abruptly leaving and slamming the door. The appointing authority states that it was unnecessary to conduct further investigation into the appellant's actions at it would have been a waste of taxpayer money and three witnesses confirmed her inappropriate behavior. The appointing authority adds that there was no evidence that the appellant was intimidated by anyone at the meetings.

Additionally, the appointing authority argues that the appellant's behavior is nearly identical to the facts that occurred in *In the Matter of Yvonne Ellis* (CSC, deemed adopted February 26, 2018). In that case, the ALJ found that there was no dispute that the appellant's actions in that matter constituted insubordination as clear directive was disregarded by not attending a meeting and leaving the school. Therefore, the appointing authority argues that, with respect to the September 21, 2016 incident, the appellant's actions clearly constitute insubordination. The appointing authority adds that the appellant's behavior also constitutes conduct unbecoming a public employee, as the appointing authority's request to discuss the appellant's ongoing practice of wearing sneakers was reasonable. Moreover, the appointing authority maintains that dismissing the three working day suspension

will set precedent allowing employees to disregard their supervisors in the future. Finally, the appointing authority maintains that none of the charges from the August 2016 incident should be dismissed, as the appointing authority provides sufficient evidence at the hearing to sustain the charges.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges. In its exceptions, the appointing authority challenges the credibility determinations of the ALJ. 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 sufficient credible evidence or was otherwise arbitrary. *See N.J.A.C.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon review, the Commission finds that the ALJ's determinations in this respect are proper and that this strict standard has not been met.

With respect to the appointing authority's other arguments, it has presented no substantive information that would somehow convince the Commission that the ALJ's findings were arbitrary, unreasonable or not based on the credible evidence in the record. In this matter, the Commission agrees that the ALJ correctly determined that the appellant was not insubordinate or disrespectful at the time of the three meetings on September 21, 2016. Rather, the credible evidence shows that the appellant appeared to have been intimidated at the time. The appellant testified and the witnesses acknowledged that the appellant specifically asked to tape record the third meeting, which is an indication of her unease in that situation. In this regard, the Commission cannot fathom why it would have been necessary to waste time questioning the appellant over the course of three meetings to ascertain if she was authorized to wear sneakers if such medical documentation could have been obtained from the Human Resources Office. As noted by the ALJ, the appointing authority could have allotted more time to find the appellant's medical documentation beyond the September 21, 2016 date, especially since the witnesses acknowledged that the medical documentation had been moved to a new location. The appellant continuously wore sneakers to work since August 2014 and there is no substantive evidence to show that the appointing authority was concerned about the appellant wearing sneakers at any time prior to the September 21, 2016 meetings.

Additionally, the facts in *Ellis* are distinguishable from this case and, as such, the appointing authority's arguments in that regard are misplaced. In that matter, the appellant, who was later charged with chronic and excessive lateness and absenteeism, did not appear at a meeting with the student attendance supervisor for Jersey City School District regarding her attendance for the coming school year, left the building, and was later observed on that same day in the union office by the student attendance supervisor. As such, the ALJ concluded the appellant's behavior in that matter was insubordinate. In contrast, the appellant in this matter actually appeared at all three meetings on September 21, 2016, and when she asked to tape record the third meeting, she was told that she could not do so. As noted above, the appellant appeared to have been intimidated as she asked to tape record the meeting, and since she could not tape record it, she left the meeting. Given the particular circumstances of this matter, the Commission cannot reasonably find that the appellant's behavior constituted insubordination or that the facts of her case are similar to those presented in *Ellis, supra.* Moreover, the ALJ found that the appellant was credible as no one else in the workplace heard her slam the door or reported that she was disrespectful toward anyone. Additionally, the dismissal of the three working day suspension will not set precedent allowing other employees to disregard their supervisors. Rather, the Commission reviews disciplinary matters on a case by case basis, and it has the final authority to uphold, modify or dismiss an employee's disciplinary sanction in such matters. In this case, the Commission has determined for the aforementioned reasons that the three working day suspension should be reversed.

With respect to the charges of insubordination and conduct unbecoming a public employee pertaining to the 20 working day suspension, the Commission agrees with the ALJ's findings that those charges should be dismissed. Although the appellant's actions of disclosing confidential information was inappropriate, given the context of her disclosure, her actions did not constitute conduct unbecoming a public an employee or insubordination at the time of the incident. Nonetheless, the appellant's actions clearly had the potential to result in much more serious consequences and warranted a finding of neglect of duty, misuse of public property, other sufficient cause and violation of the appointing authority's rules and regulations.

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 the instant matter, the Commission notes that the appellant is a long term employee as she has been employed at the appointing authority for over 27 years, and her disciplinary record does not reflect any disciplinary history until the incidents that are the subject of this matter. Therefore, in light of these circumstances, the Commission finds the imposition of a 20 working day suspension unduly harsh. Accordingly, it modifies the 20 working day suspension to a 10 working day suspension. However, the Commission emphasizes that it does not condone the appellant's misconduct since, as stated above, the appellant's actions could have resulted in extremely serious consequences.

ORDER

The Civil Service Commission finds that the appointing authority's action of imposing a 20 working day suspension was not justified under the circumstances and modifies that action to a 10 working day suspension. Further, the Commission dismisses the three working day suspension. The Commission further orders that the appellant be granted 13 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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 2nd DAY OF MAY, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Christopher Myers
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOs. CSV 18070-16
and CSV 00015-17
AGENCY DKT. NOs. 2017-1610
and 2017-1812
(CONSOLIDATED)

IN THE MATTER OF BERNACINE M. BARNES, MONMOUTH COUNTY DEPARTMENT OF HUMAN SERVICES.

Bernacine M. Barnes, petitioner, pro se

Steven W. Kleinman, Special County Counsel, Monmouth County, for respondent

Record Closed: February 5, 2018 Decided: March 22, 2018

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Appellant, Bernacine M. Barnes (Barnes), a Senior Receptionist employed by Monmouth County (County) at its Division of Social Services (DSS), appeals a twenty-day suspension she received as major discipline for delivering a packet of information to the Office of Professional Standards (OPS) that contained personal, privileged,

protected, and confidential client information of a DSS client. Additionally, Barnes was charged with utilizing county property to generate these documents, with removing confidential client information from her work site without authorization, and with leaving said packet with an unidentified person in the OPS office. The County sustained the following charges: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); Misuse of public property, including motor vehicles, N.J.A.C. 4A:2-2.3(a)(8); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 104, Business ethics and conduct; County Policy 181, Confidentiality; County Policy 516, Computer and email usage; and County Policy 701, Employee conduct and work rules. Barnes admitted distributing confidential client information but maintained that the packet of information was intended to show disparate treatment by her supervisor against her in support of her longstanding grievance of unfair treatment. She claimed that her state of mind caused by the stress of working in a hostile work environment attributed to her failure to redact the confidential identifying information before disseminating it.

Barnes also appeals a three-day suspension she received as minor discipline pursuant to N.J.A.C. 4A:2-2.9(b) that allows for hearings when an employee received a prior suspension of fifteen days or more in the same calendar year. After receiving a twenty-day suspension, Barnes received a three-day suspension for displaying unacceptable workplace conduct and etiquette toward her superiors due to an incident that occurred after Barnes was questioned about wearing sneakers in contravention of proper workplace attire. The County sustained the following charges: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 722, Workplace etiquette; and County Policy 701, Employee conduct and work rules. Barnes maintained that she had an Americans with Disability Act (ADA) accommodation to wear sneakers. Moreover, she had been wearing sneakers to work every day since November 2014 without incident.

PROCEDURAL HISTORY

On September 14, 2016, the County issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against Barnes. (R-2.) Following the departmental hearing held on October 4, 2016, the County issued a Final Notice of Disciplinary Action (FNDA) on November 9, 2016, sustaining the charges in the PNDA and suspending Barnes from employment for twenty working days. (R-1.) Appellant filed a timely appeal and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on December 1, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52:14F-1 to 13.

On October 11, 2016, the County issued a Minor Disciplinary Action Notice setting forth the charges and specifications made against Barnes. (R-4.) Following the departmental hearing held on November 3, 2016, the County issued a Minor Disciplinary Action on November 23, 2016, resulting in a three-day suspension from employment. (R-3.) Appellant filed a timely appeal and the matter was transmitted by the Civil Service Commission Division of Appeals and Regulatory Affairs to the Office of Administrative Law (OAL) where it was filed on December 30, 2016 for hearing as a contested case. N.J.S.A. 52:14B-1 to 15; N.J.S.A. 52: 14F-1 to 13.

I entered an Order of Consolidation on October 11, 2017, consolidating both matters for hearing pursuant to N.J.A.C. 1:1-17.3(a), because the two matters involved identical parties and witnesses, and contained common questions of fact and law resulting in a savings in time, expense, duplication and inconsistency.

I heard the matters on October 16, 2017. The record remained open to allow the parties to submit post-hearing submissions. On December 1, 2017, the County filed a motion to strike the post-hearing submission submitted by Barnes. I conducted a telephone conference on January 24, 2018 that resolved the issues in the County's motion to strike and allowed the County to submit additional documentation. The record closed on February 5, 2018.

FACTUAL DISCUSSIONS AND FINDINGS

The following facts are not disputed. Barnes has worked for the County for over twenty-seven years. She worked in the customer care center of DSS assisting county residents with their requests for cash assistance, food stamps, emergency shelter, housing, and medical benefits from various county programs. As part of her regular duties, Barnes is privy to confidential information, including social security numbers, addresses, telephone numbers, and financial information of county residents seeking assistance.

On August 23, 2016, Barnes prepared a typewritten complaint addressed to Freeholders, S. Kleinman, T. O'Connors, and Gwendolyn Thompson.[1] (R-10.) In the body of the letter, Barnes complained of disparate treatment from her supervisors. She submitted papers from a client's file to show how she was allegedly being singled out and unfairly accused of doing something wrong. The papers contained confidential information that Barnes did not redact; including case name; social security number; customer's address; customer's date of birth; and financial information. (R-11.[2]) On August 24, 2016, Barnes hand-delivered the packet to OPS. Because the OPS office had recently moved, a building security guard escorted Barnes to the new office. The office was locked and believed to be unattended; however, the door was opened by an unidentified male and Barnes instructed him to place the packet on the secretary's desk. It was later learned that the man who opened the door was in the office to repair the copier. The following day, Ms. Thomas opened the packet left in her office at OPS and started an investigation as to how the packet came to be in her office and whether there were any authorizations for the release of the confidential information contained therein. Barnes does not dispute that she unintentionally included confidential records in the packets. Barnes did not have authorization to take this information from her work space or release this information to third parties. On September 14, 2016, the Director of OPS, on behalf of the County, sent the PNDA to Barnes and advised her of her right to

[1] The recipients of the letter were the Freeholders of Monmouth County, Special County Counsel, Steven Kleinman; County Administrator, Teri O'Connor; and OPS investigator, Gwen Thomas.

[2] Exhibit R-11 contains redacted call center logs. These are the same call center logs, but without the redactions, that were included within the packet submitted by Barnes with the cover letter dated August 23, 2016.

a hearing to defend the charges. (R-2.) On November 9, 2016, the County upheld the charges and issued a FNDA. (R-1.)

On the morning of September 21, 2016, Barnes had a meeting with her supervisor, Diane Prochnow (Prochnow), about wearing sneakers in the workplace. Barnes had a second meeting that day with Prochnow and Amy Klinghoffer (Klinghoffer), Personnel Assistant in the Human Resources Department of DSS, about whether Barnes had an ADA accommodation to wear sneakers. Klinghoffer offered to look for the required paperwork in Barnes' personnel and medical files. Barnes was called into a third meeting that day in Prochnow's office with Prochnow, Klinghoffer, and Robert Jaichner (Jaichner), Assistant Administrative Supervisor in attendance. Barnes entered the office and advised the supervisors that she intended to tape record the meeting on her phone. Klinghoffer informed her that taping conversations was not permitted. Upon receiving that information, Barnes left the meeting. Barnes continued to wear sneakers. She had been wearing sneakers every day to work since November of 2014. On October 11, 2016, the County informed Barnes that a disciplinary hearing was scheduled to answer the charges relating to the meeting involving her wearing sneakers in the workplace. (R-4.) On November 23, 2016, the County notified Barnes that the charges in the minor disciplinary action were upheld. (R-3.)

These essential facts are undisputed and found as **FACT**.

TESTIMONY

Lorraine Scheibener (Scheibener) is the current Director of DSS. At the time that the two disciplinary actions were administered she was an Executive Consultant to DSS. She testified as to the importance of safeguarding confidential information expected of all DSS employees and noted that confidentiality and compliance with the Health Insurance Portability and Accountability Act (HIPAA) were prominently displayed on the County's website. (R-5.) Scheibener stated that she was personally familiar with Barnes. She also reported that Barnes, as a customer service agent, had access to confidential information as part of her duties and received training in the proper handling of confidential information. (R-13, 14, and 15.)

As part of Scheibener's duties as an Executive Consultant, she was made aware of certain complaints made by Barnes about incidents within her department. She was copied on a letter dated May 11, 2016 from the Director of the Department of Human Resources that described concerns about Barnes' use of county property and concerns about the tone of Barnes' emails. (R-7.) According to Scheibener, the County did not take any disciplinary action at that time.

Enforcing the dress code was also part of Scheibener's duties. She asked Klinghoffer, Personnel Assistant for Human Resources, to question any employee who was not adhering to the dress code. Scheibener stated that she was aware of a discussion that Barnes was wearing sneakers in the workplace. She also knew that Klinghoffer was looking for paperwork that Barnes stated she gave to Mr. LeMeune, the former director of Human Resources, who had retired.

On cross-examination, Scheibener stated that Klinghoffer reported to her that when Barnes was called into a meeting to discuss the missing paperwork, Barnes wanted to record the conversation. Klinghoffer told her that recording was not permitted, causing Barnes to abruptly leave the meeting and slam the door behind her. Scheibener stated that she spoke to the three supervisors about that meeting but never spoke to Barnes about her side of the story. Scheibener also acknowledged that she personally never found Barnes to be disrespectful.

Qwendolyn Thomas (Thomas) is the Investigator for OPS. She was the intended recipient of the packet delivered by Barnes to her office but left with the copier repair man. She noted that the packet contained a letter of complaint by Barnes for being singled out and disrespected by her supervisors, purportedly supported by pages of information from a customer's file with identifying confidential information. Thomas immediately called Scheibener to see if the release of this information had been authorized. She was also concerned about how the packet got to her office which is secured. She obtained a written statement from the security guard and the copier repair person and put her findings in a written memorandum. (R-8 and R-9.) Thomas expressed her grave concern about the breach of confidentiality caused by the inclusion

of the unredacted statements in the packet. She was tasked with investigating the breach of confidentiality charge against Barnes.

On cross-examination, Thomas stated that she had two or three unrelated meetings with Barnes regarding Barnes' concerns about her treatment in the workplace. She stated that Barnes had never been disrespectful during those meetings.

Diane Prochnow (Prochnow) is a Human Services Specialist IV with DSS and Barnes' direct supervisor. She testified that on August 23, 2016, the records indicated that Barnes logged off her assigned computer at 5:26 p.m. Barnes' work hours are from 8:30 a.m. until 4:30 p.m. County policy only allows access after those hours with supervisor's authorization, which had not been granted.

Prochnow testified that she has a challenging working relationship with Barnes. On the morning of September 21, 2016, Prochnow had a meeting with Barnes wherein she questioned whether Barnes had proper documentation that allowed her to wear sneakers in the workplace. She stated that based on her conversation with Barnes she understood that Barnes had given a doctor's note to Ann Sayer about six months ago. Ann Sayer was not identified. After that initial meeting, there was another meeting and Klinghoffer also attended. At that meeting, Barnes stated that she was not going to get another note because her doctor would charge her for it and questioned why it was necessary when she had previously given all her information to Bucky LeMeune, the former head of human resources. Klinghoffer stated that she would look for the paperwork in Barnes' medical records. Later that afternoon, Prochnow stated that Klinghoffer came to her office while she was meeting with Robert Jaichner, Assistant Administrative Supervisor. Klinghoffer informed them that she could not find any supporting documents for Barnes. According to Prochnow, Klinghoffer asked her to call Barnes into the office and she asked Jaichner to stay. Prochnow stated that Barnes entered the office and immediately informed them of her intention to record the meeting on her phone. She heard Klinghoffer tell Barnes that recording a meeting was not permitted to which Barnes replied that the meeting was over. Barnes then left the meeting, pulled the door behind her causing it to slam shut. Prochnow stated she was dumbfounded by Barnes' actions.

On cross-examination, Prochnow stated that she never asked any of the employees in the customer care center if they had been disturbed by Barnes' actions during or after the third meeting.

Amy Klinghoffer (Klinghoffer) is the Personnel Assistant in Human Resources under DSS. She stated that in September 2016, Scheibener asked her to investigate whether employees who were deviating from the dress code had ADA accommodations. Because Barnes was wearing sneakers, she asked Prochnow whether Barnes had a doctor's note. She recalled receiving an email from Jaichner that morning stating that Barnes would not get a new note because it was too expensive and unnecessary because she had already submitted a doctor's note. Klinghoffer recalled meeting with Barnes and Barnes' supervisor, Prochnow, later that morning, wherein she told Barnes that she did not have any paperwork but that she would look for it and get back to her. Klinghoffer stated that she looked in boxes that were available and called the downtown office, where records were moved after the DSS reorganization, to ask if someone could locate Barnes' medical folder. According to Klinghoffer, no records were found. At approximately 3:00 p.m. that day, Klinghoffer went to Prochnow's office and because Jaichner was already there and familiar with the situation, she asked him to stay. Klinghoffer asked Prochnow to call Barnes to her office. Barnes complied, but when she entered the office she stated that she wanted to tape the meeting. Klinghoffer told her that taping was not permitted. Barnes responded by stating that the meeting was over, walked out, and slammed the door. Because of Barnes' abrupt departure, Klinghoffer never told her that she could not find her paperwork. Klinghoffer stated that Barnes' behavior was inappropriate and she reported it to Scheibener. Klinghoffer also stated that she was only trying to help Barnes get the proper documentation for an ADA accommodation.

On cross-examination, Klinghoffer stated that she thought that Barnes may have been confusing her paperwork for Family Medical Leave Act (FMLA) with ADA. She also testified that she never found any of Barnes' medical records. When questioned about whether Barnes' behavior disrupted her co-workers, Klinghoffer responded that she never asked any of Barnes' co-workers if they had been disrupted.

On recall, Klinghoffer testified that Barnes never mentioned having the paperwork for an ADA accommodation allowing her to wear sneakers. Klinghoffer testified about the process stating that the employee would first have to submit a doctor's note which would trigger the interactive process for a determination if an accommodation was warranted. She stated that she never got the chance to talk to Barnes because Barnes walked out of the meeting before she had the chance. Klinghoffer maintained that she could not find Barnes' medical records despite her best efforts to locate them.

Robert Jaichner (Jaichner) is the Assistant Administrative Supervisor with DSS. On September 21, 2016, he was in Prochnow's office when Klinghoffer came in to talk about Barnes' accommodation for wearing sneakers. She asked him to stay because he was familiar with the topic. He recited the same story that when Barnes was told by Klinghoffer that she could not record the meeting, Barnes abruptly left and slammed the door. Jaichner stated that he was taken aback by Barnes' behavior. On cross-examination, Jaichner was asked about his prior knowledge of the incident and he responded that he had been informed of the situation by Prochnow.

Bernacine Barnes testified on her own behalf. Regarding the twenty-day suspension, she admitted including confidential information within the packet that she delivered to the five Freeholders, the County Clerk, the County Administrator, County Solicitor, and the Investigator for OPS. Due to her level of distress, she forgot to redact the confidential information from the customer's files before including them in the packet. She maintained that her actions were not intentional. She was using the logs to show how she was being singled out by her supervisor, when in her opinion she did not do anything wrong. She attributed the mistake to her state of mind and anxiety caused by her unfair treatment at work. Pertaining to the issue of leaving the packet with a copier man, Barnes stated that when she knocked on the door for the OPS office accompanied by a security guard, she did not know that the man in the office was the copier repair man. She placed the packet face down on the secretary's desk in a secure room. She believed that the man who opened the door worked there. She had previously filed grievances with the OPS but was unfamiliar with the new office.

Regarding the three-day suspension, Barnes testified that she was concerned that her medical records were missing. She stated that she is disabled and has had numerous surgeries during her employment with the County. She questioned how the County could lose her confidential medical files which she assumed had to be extensive given her medical history over twenty-seven years.

In support of her defense to wearing sneakers in the workplace, Barnes provided the following documentation (P-2):

> 1. Prescription dated November 1, 2014 from Magdy L. Shendouda, M.D. describing her condition and specifying an accommodating chair, stamped as being received by Human Resources on November 5, 2014;
>
> 2. Human Resources ADA Medical Questionnaire – Request for Accommodation Form dated November 24, 2014. The doctor's answer to question number 6 states that "using sneakers help to reduce her back pain" and the impairment was listed as permanent. In answer to number 10, the doctor responded that she could continue to perform her duties "as long as she can use sneakers." The doctor's recommendation at question number 20 was to provide an accommodating chair and allow her to wear sneakers; and
>
> 3. Disability certificate dated November 24, 2014 that stated that the "Patient needs to wear sneakers at all times during work hours."

Barnes testified that she was not willing to hand over her copies of her accommodation form to her supervisors without a receipt. According to Barnes, she wanted a letter signed by either Klinghoffer or Prochnow acknowledging that the County had lost her records before Barnes would provide her copies. She claimed that they refused to sign a receipt. Instead, Klinghoffer stated that she would look for her records. Barnes disputed Klinghoffer's and Prochnow' s testimony about her statement that she gave a note within the last six months to Ann Sayer. She had given the note and ADA Accommodation Form to Mr. LeMeune as stamped on her documents in November 2014. Barnes stated that she had been wearing sneakers every day since her accommodation was granted in November 2014, but for some reason on September 21, 2016, she was summoned to three meetings to discuss whether she had paperwork

allowing her to deviate from the dress code. Barnes stated that she felt bombarded, so after being called into the third meeting on the same day with three supervisors behind closed doors, she told them she was going to record the meeting. When Klinghoffer said she could not record the meeting, Barnes stated that the meeting was over and left. According to Barnes, she opened and closed the door behind her. She stated that she did not slam the door and none of her co-workers commented when she walked out of Prochnow's office. She did not notice any disruption in the workplace.

On cross-examination, Barnes stated that she keeps all her documents, emails, and paperwork relating to her job. She did not offer the ADA accommodation documents because Klinghoffer told her she was going to try and locate them and she wanted a receipt before handing them over. She stated that she wore sneakers in the workplace every day since her accommodation in November 2014 and was never questioned until September 21, 2016. She also noted that she was given a different chair as part of the same accommodation and that was not questioned but the sneakers were questioned.

Barnes testified that she never saw the May 11, 2016 letter from the Director of Human Resources regarding her misuse of county property by sending inappropriate emails. (R-7.) She stated that it is her practice to respond to any email sent to her. She takes exception to the statements contained in the letter; therefore, she would have sent the Director a responding email had she received it. In addition, she maintained that she saves every email and document from the County because of her on-going unanswered complaints about her disparate treatment. If she had opened this email, she is confident that she would have saved it, and responded to it. She vehemently denied ever receiving it.

Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). " A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions

which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

The credibility issues to be determined concern Barnes' receipt of the May 11, 2016 letter from Director Tragno (R-7) and certain discrepancies in the testimony about the events of September 21, 2016.

I **FIND** that the testimony of Barnes regarding her receipt and review of the May 11, 2016 letter authored by Human Resources Director Frank Tragno (R-7) to be sincere and credible. Barnes testified that she never saw the letter before it was sent to her by respondent in discovery. She further stated that it is her practice to respond to every email sent to her. Given the inflammatory content of the letter, Barnes' testimony that she would have responded to it is consistent with her conduct as testified to by the County's witnesses and as shown by the documents submitted. The overall sense from the testimony is that Barnes filed numerous complaints and challenged any action that she perceived as unfair. The post-hearing submissions submitted by respondent show that the letter was transmitted from Mr. Tragno's computer to Barnes' county computer at her county email address on Wednesday, May 11, 2016 at 17:03. Converting the military time to civilian time, the email was sent at 5:03 p.m., after Barnes' 4:30 p.m. departing time. I have no doubt from the documents submitted that Director Tragno sent this email to Barnes. However, without a county "read receipt," I only have Barnes' testimony that she did not open the emailed letter which I found to be credible. While I note that email is a widely accepted form of communication, the fact that this email was sent on May 11, 2016 in response to emails sent by Barnes on February 25, 2016 makes it less reliable, because the communication chain was clearly interrupted by the passage of three months' time. Therefore, I **CONCLUDE** that the email of May 11,

2016 does not show that Barnes had prior notice from the County about the use of her work-related computer and emails when she drafted her August 23, 2016 complaint and copied confidential client files.

Barnes disputes certain testimony regarding the events of September 21, 2016. In judging the strength of the evidence, I **FIND** that the testimony presented by Klinghoffer that she was trying to assist Barnes on September 21, 2016 because she believed Barnes may have confused FMLA paperwork with ADA accommodation paperwork lacked credibility. Barnes had been wearing sneakers every day for almost two years and had been given an accommodating work chair. The alleged infraction of deviation from the dress code did not warrant the urgency of a frantic search for medical records and the need for involving Barnes in three meetings in one day. From the testimony, it was clear that both Klinghoffer and Prochnow were aware that Barnes referenced the existence of a doctor's note that had been given to the former head of Human Resources. After twenty-seven years and numerous surgeries, Barnes clearly had a medical file with DSS. While Klinghoffer did not know whether that file contained appropriate accommodation paperwork, she was more concerned with repeatedly questioning Barnes rather than finding Barnes' missing medical records. I further **FIND** that Barnes' disbelief that her supervisors were only trying to help her has a greater "ring of truth" than the scenario offered by respondent. Klinghoffer's testimony was geared to the ADA accommodation process. It was never clear if she intended to find the missing medical records before subjecting Barnes to a repeat of the ADA accommodation process. Barnes also disputed the testimony by all three supervisors, Klinghoffer, Jaichner, and Prochnow, that she slammed the door when she left the office. In support of her position, Barnes' claimed that none of her co-workers noticed anything amiss. There was no testimony offered by any of the co-workers about the incident, and the supervisors acknowledged that no one was questioned. Barnes left the meeting, abruptly. She needed to open and close the door to leave the office. Barnes' actions took the supervisors by surprise and their shocked reactions to Barnes' departure was genuine. However, I cannot **FIND** based on the evidence presented whether Barnes intentionally slammed the door or shut it forcefully as she left.

FINDINGS OF FACT

After carefully reviewing the exhibits and documentary evidence presented numerous times during the hearing, and after having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter:

1. On August 24, 2016, Barnes included personal and confidential client information in a packet that contained a complaint about unfair treatment in the workplace and disseminated this information to third parties without authorization.

2. Barnes utilized county property to write her complaint and removed county property in the form of privileged and confidential information from her workplace without authorization.

3. On August 23, 2016, Barnes logged off her county computer at 5:26 p.m., one hour past her 4:30 p.m. assigned end of day.

4. In November 2014, Barnes submitted a doctor's note to Human Resources and received an ADA accommodation form that was completed by Barnes' doctor. (P-2.) Thereafter, the County provided Barnes with an accommodating chair and allowed Barnes to wear sneakers to work.

5. On September 21, 2016, Barnes was questioned by two supervisors, Prochnow and Klinghoffer, about her authorization to wear sneakers in the workplace.

6. On September 21, 2016, Klinghoffer could not locate Barnes' medical records that should have been maintained by the County within its Human Resources department.

7. On September 21, 2016, Barnes was summoned to a third meeting regarding her wearing sneakers. When Barnes entered the office, there were three supervisors, Klinghoffer, Prochnow, and Jaichner, already present. Before anyone

spoke, Barnes stated that she intended to record the meeting on her phone. Klinghoffer told Barnes that recording the meeting was not permitted. Barnes replied that the meeting was not going to happen and she abruptly left the office.

8. After September 21, 2016, Barnes continued to wear sneakers to work.

LEGAL DISCUSSION

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

CONCLUSIONS OF LAW

FNDA- November 9, 2016

Barnes received a twenty-day suspension after being charged with insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); Neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); Misuse of public property, N.J.A.C. 4A:2-2.3(a)(8); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 104, Business ethics and conduct; County Policy 181, Confidentiality; County Policy 516, Computer and email usage; and County Policy 701, Employee conduct and work rules. Although the same specifications support each of the charges and they are not compartmentalized, I will discuss each charge in turn.

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

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Barnes was charged with delivering a packet that contained confidential client information and utilizing county property to generate the documents contained in the packet. In support of the insubordination charge, the County relied on the letter from Director Tragno dated May 11, 2016. The contents of that letter contained a directive informing Barnes to immediately desist from using her work computer systems to present her grievances and to stop misusing county property. The County provided sufficient information to show that Director Tragno sent this email. However, I accepted as credible Barnes' testimony that she never saw the email; therefore, the emailed letter, in this instance, did not provide adequate notice of a specific order or directive to Barnes that was disobeyed. In addition, there can be no issue with Barnes' right as an aggrieved

employee to file a complaint of disparate treatment. While the County expressed concern with the tone of Barnes' emails and the nature of her complaints, these actions do not meet the definition of insubordination. Therefore, I **CONCLUDE** that the County did not produce sufficient evidence to support the charge of insubordination under N.J.A.C. 4A:2-2.3(a)(2) by a preponderance of the credible evidence. The charge of insubordination is **DISMISSED**.

The next charge was conduct unbecoming a public employee. This charge is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Scheibener testified that she was aware, in her capacity as Executive Consultant, that the County had concerns about Barnes' use of county property, specifically, her use of emails to lodge complaints. She also testified that she had knowledge of certain complaints made by Barnes that were investigated by DSS. However, when asked on cross-examination, Scheibener stated that Barnes had never been disrespectful. Thomas, who was charged with investigating this incident, also testified that Barnes had never been disrespectful to her during any of their meetings. Barnes' misuse of confidential client information, which is the gravamen of the complaint, was addressed to the Freeholders and County Officials. It was not disseminated to the public or made public by Barnes. Therefore, I **CONCLUDE** that the County did not produce sufficient evidence to support the charge of conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) by a preponderance of the credible evidence. The charge is **DISMISSED**.

Barnes was also charged with neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that an "an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009),

http://njlaw.rutgers.edu/collections/oal/. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "negligent" connotes a deviation from normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). There is no doubt that preserving client confidential information was an essential element of Barnes' duties. Therefore, I **CONCLUDE** that the County has met its burden of proving by a preponderance of the credible evidence that Barnes' conduct constituted neglect of duty.

Barnes was also charged with misuse of public property under N.J.A.C. 4A:2-2.3(a)(8). This phrase can be understood to mean the unauthorized use of property owned, leased or otherwise acquired by a governmental or official entity, which is provided to employees to assist them in the performance of their official duties in carrying out the mission of the entity, other than such incidental or minimal use not unexpected by the employer. Such property can include vehicles, computers, copiers, telephones, uniforms, etc. Barnes copied and disseminated call center records in violation of County Policy 104, 181, and 701. Barnes prepared her Complaint that included call center records on August 23, 2016. The County records indicated that Barnes logged off her computer at 5:26 p.m. that evening; therefore, the evidence shows that Barnes stayed after hours to use county property to prepare her complaint about disparate treatment. I am mindful of the fact that Barnes did not use public property for personal reasons; however, her taking and copying a client's confidential information and computer use after work hours were not authorized. Therefore, I **CONCLUDE** that the County has met its burden of proving by a preponderance of the credible evidence that Barnes' misused public property.

Barnes was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Specifically, Barnes was charged with the following employee policy violations: County Policy 104, Business ethics and conduct; County Policy 181, Confidentiality; County Policy 516, Computer and email usage; and County Policy 701, Employee conduct and work rules.

Policy 104 prohibits the taking of materials from the worksite for any purpose. As discussed above, I **FIND** that Barnes took materials from her worksite. Therefore, I **CONCLUDE** that Barnes violated this policy.

Policy 181 states that all client information is classified as confidential and may not be copied or removed from the premises. As discussed above, I **FIND** that Barnes copied and removed client information from her worksite. Therefore, I **CONCLUDE** that Barnes violated this policy.

Policy 516 regulates computer and email usage. Barnes is charged with using her county computer to write her letter of complaint. The testimony from Scheibener indicated that Barnes used her work email to present complaints or grievances and that the County was concerned by the tone of those emails. The only letter written by Barnes, for my consideration, is her complaint dated August 23, 2016. I note that Policy 104 invites employees to discuss concerns with their supervisors, contact the County Administrator's Office, or the Personnel Department. Barnes used her county computer to lodge a complaint relating to an event that transpired during working hours on August 23, 2016. In the letter, Barnes wrote that she was using her lunch; therefore, she was not on county time. Although it was established by the County that Barnes stayed after hours to complete her packet on August 23, 2016, that conduct is not specifically addressed in Policy 516. Significantly, Thomas, the investigator for OPS who received the letter, described it as a letter of complaint wherein Barnes stated that she was being singled out and disrespected by her supervisors. Therefore, I **CONCLUDE** that Barnes did not violate the County's computer and email usage policy by using her county computer to type a complaint against her supervisors on August 23, 2016.

Policy 701 regulates employee conduct and specifies certain work rules. Among the listed examples are: unauthorized use of county-owned equipment and unauthorized disclosure of confidential information. As discussed above, I **CONCLUDE** that Barnes violated both those policies.

Therefore, I **CONCLUDE** that, after consideration of the charges constituting a violation of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) limited to Policy 104, 181,

and 701, the County has met its burden of proving by a preponderance of the credible evidence the charge of other sufficient cause and violations of Policy 104, 181, and 701.

Minor Disciplinary Action

Barnes received a three-day suspension for the following sustained charges: Insubordination, N.J.A.C. 4A:2-2.3(a)(2); Conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and Other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). The County also determined that Barnes violated the following polices: County Policy 722, Workplace etiquette; and County Policy 701, Employee conduct and work rules.

Regarding the events that transpired on September 21, 2016, I accepted Barnes' testimony as having the greater "ring of truth." Prior to September 21, 2016, Barnes had been wearing sneakers for two years without incident pursuant to a 2014 ADA accommodation. The County charged Barnes with being insubordinate for wearing sneakers in the workplace without approval. (R-3 and 4.) To support this charge, the County presented testimony that Barnes' paperwork and medical files could not be found on the day in question. The concern about whether Barnes had the appropriate doctor's note could have been rectified by allotting more time to locate the missing records or by asking Barnes to produce her documentation in a fair and appropriate manner. The County also charged Barnes with conduct unbecoming a public employee for what the County deemed as "gross misconduct" (R-3) and behavior that damages the workplace morale and created an unprofessional working environment. To support this charge, the County presented undisputed testimony that when Barnes was told she could not tape the third meeting of the day, she left the meeting and closed the door with enough force that it slammed. Barnes' behavior shocked the three supervisors. However, the supervisors never considered how intimidating it is for an employee to be summoned into a closed office with three supervisors for a third meeting in one day. This occurred just seven days after Barnes had been notified of her twenty-day suspension for an incident involving treatment by these same supervisors. A third meeting with three supervisors in one day to discuss paperwork for sneakers that she had been wearing for two years could easily be perceived as hostile. There was no evidence presented by the County that other employees in the call center were even

aware of what had transpired. In addition, Scheibener testified that she only discussed the incident with the supervisors; she never interviewed Barnes about what happened that day. I reviewed County Policy 701, intended to promote a respectful workplace environment, and County Policy 722, intended to promote courtesy and respect among all employees. From the testimony presented and the description of Barnes' conduct on September 21, 2016, I do not find that Barnes violated either policy by walking out of a meeting that appeared hostile. Therefore, I **CONCLUDE** that the County did not prove by a preponderance of the credible evidence insubordination, conduct unbecoming a public employee, and violations of Policy 701 and 722. These charges are **DISMISSED.**

PENALTY

When dealing with the question of penalty in a de novo review of a disciplinary action against an employee, it is necessary to reevaluate the proofs and "penalty" on appeal based on the charges. N.J.S.A. 11A:2-19. Factors determining the degree of discipline include the employee's work history, his prior disciplinary record and the gravity of the misconduct.

In addition to the two matters on appeal herein, Barnes only received a Notice of Counseling dated October 18, 2016 for an incident that occurred in the call center on September 14, 2016 for inappropriate behavior after accusing Supervisor Prochnow of discriminating behavior. She had no other prior disciplinary history.

In mitigation, Barnes had worked for the County for over twenty-seven years with no prior disciplinary history until the events herein. Barnes was very distressed about her feelings of disparate treatment by her supervisors. From the contents of her letter of complaint dated August 23, 2016, she felt that she was being singled out and treated unfairly. A further mitigating factor is that I did not sustain all the charges.

However, an aggravating factor is the seriousness of any breach of confidential information in the workplace. Having found that Barnes committed the violations set forth above, and having considered the aggravating and mitigating factors, I

CONCLUDE that the proper penalty must remain the twenty-day suspension for the breach of confidential information.

Based on my finding that the County did not support the charges for the minor disciplinary action, I **CONCLUDE** that no penalty is warranted.

ORDER

Regarding the twenty-day suspension, I **CONCLUDE** that the County has sustained its burden of proof as to the following charges: N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty; N.J.A.C. 4A:2-2.3(a)(8), Misuse of public property; and N.J.A.C. 4A:2-2.3(a)(12), Other sufficient cause, including violations of Policy 104, 181, and 701. Accordingly, I **ORDER** that the action of the County in suspending Barnes for twenty-days is **AFFIRMED.**

Regarding the three-day suspension, I **CONCLUDE** that the County has not sustained its burden of proof on any of the charges. Accordingly, I **ORDER** that the action of the County in suspending Barnes for three days in **REVERSED**. Barnes is entitled to back pay if the penalty has already been served, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10 for the three-day suspension.

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

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

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

March 22, 2018
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: March 22, 2018

Date Mailed to Parties: March 22, 2018

cmo

APPENDIX

PWITNESSES

For Appellant:

Bernacine M. Barnes

For Respondent:

Lorraine Scheibener
Gwendolyn Thomas
Diane Prochnow
Amy Klinghoffer
Robert Jaichner

EXHIBITS

For Appellant:

P-1 Not admitted
P-2 November 2014 ADA Accommodation paperwork

For Respondent:

R-1 FNDA 20-day suspension
R-2 PNDA 20-day suspension
R-3 Minor Disciplinary Action Results
R-4 Minor Disciplinary Action Notice
R-5 County Information Sheet
R-6 Job specifications
R-7 May 11, 2016 letter (not admitted as notice)
R-8 Memorandum from Thomas
R-9 Statement from Echevestre

R-10 Statement from Hazel

R-11 DSS client records

R-12 Statement from Prochnow (not admitted)

R-13 Employee Guide to Policies

R-14 Acknowledgement Form

R-15 Sign-in Sheet

R-16 Admissions

R-17 Letter from Rosenstein

R-18 Notice of Counseling (not admitted – progressive discipline)

R-19 County metadata showing email transmittal