STATE OF NEW JERSEY

In the Matter of Tamika Jones-Richardson
City of East Orange

CSC DKT. NO. 2017-3599
OAL DKT. NO. CSV 08152-17

DECISION OF THE
CIVIL SERVICE COMMISSION

ISSUED: JULY 20, 2018 BW

The appeal of Tamika Jones-Richardson, Data Control Clerk, City of East Orange, Department of Property Maintenance Revitalization, removal effective April 12, 2017, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on May 4, 2018. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision as well as his recommendation to modify the removal to a 30 working day suspension. The Commission also upholds the recommendation that the appellant undergo a psychiatric examination prior to her reinstatement.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a 30 working day suspension. The Commission also orders that the appellant undergo a psychiatric examination prior to her reinstatement. If the appellant is found not able to perform her duties based on the results of that examination or fails to complete the evaluation, the appointing authority *may* initiate a *new* disciplinary charge for the appellant's removal based on her current unfitness or noncompliance, with a current date of removal. Regardless, pursuant to *N.J.A.C.* 4A:2-2.10, the appellant would be entitled to receive mitigated back pay, benefits and seniority from the conclusion of the suspension until the actual date of

reinstatement or removal. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

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,* unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R.* 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF JULY, 2018

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Unit H
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 08152-17
CSC DKT. NO. 2017-3599

TAMIKA JONES-RICHARDSON,
Appellant,
v.
CITY OF EAST ORANGE, DEPARTMENT OF PROPERTY MAINTENANCE REVITALIZATION,
Respondent.

Jennelle Blackmon, Union Representative, CWA, AFL-CIO for Appellant, pursuant to N.J.A.C. 1:1-5.4(a)(6)

Mark A. DiPisa, Esq., for Respondent (Roth D'Aquanni, attorneys)

Record Closed: April 19, 2018 Decided: May 4, 2018

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Tamika Jones-Richardson, appeals a Final Notice of Disciplinary Action (FNDA), dated April 12, 2017, providing for a penalty of removal effective the same date.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on June 9, 2017.

A prehearing conference was held on June 23, 2017, and a prehearing order of the same date was entered by the undersigned.

A hearing was held on February 2, 2018, March 1, 2018, and March 8, 2018. The record remained open to April 19, 2018, to afford the parties the opportunity to submit written summations.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Michele Ralph-Rawls testified as follows:

She is the Director of Human Resources for the City of East Orange. She knows the appellant as an employee of East Orange. She had input in drafting the Preliminary Notice of Disciplinary Action (PNDA) dated November 1, 2016, in conjunction with the department director. She stated appellant refused to submit for an examination with a forensic psychologist, which was insubordination; refused a fitness for duty examination at Concentra and created a situation there that was conduct unbecoming a public employee; and, was frequently tardy and absent from work.

Appellant was sent to Concentra after Ms. Ralph-Rawls had a conversation with appellant about her tardiness and absenteeism in October 20, 2016. The department director, Dwight Saunders, had complained about this after issuing a written warning. She noted that appellant had two prior disciplinary matters for tardiness and absenteeism: a verbal warning and a written warning. During the conversation appellant had stated to Ms. Ralph-Rawls that she was depressed. This was the reason for the referral to Concentra for a fitness for duty examination.

Appellant had changed departments. She left Senior Services as she had problems with the manager there. Appellant requested a transfer. Appellant was transferred to the Department of Property Maintenance.

During the conversation with appellant in October 2016 appellant requested a return to Senior Services as she liked working with the senior population. Appellant told Ms. Ralph-Rawls she would only go back if the manager was removed.

She felt the referral to Concentra was necessary as appellant had stated she was depressed and it was incumbent on her to do something about it. Concentra is the medical service where the city sends its employees for fitness for duty examinations. The only reason for the referral was appellant stating she was depressed.

At Concentra appellant refused to be examined over an objection to Concentra's privacy agreement and did not want to sign it. She thought it was too broad. Appellant called the witness to advise her of her objection. The assistant manager at Concentra also called to advise appellant would not be examined for this reason.

Sergeant Williams from the city police department was called by Concentra as there was an outburst by appellant at Concentra. Sergeant Williams is the city's medical liaison officer. Sergeant Williams called the witness and communicated to her what the director at Concentra had said.

Appellant left Concentra and was not seen this day. Concentra edited the privacy statement by letter and this was acceptable to appellant. Appellant went back to Concentra a second time and was not seen. Appellant left but Ms. Ralph-Rawls did not know the reason why. Appellant went back a third time and was examined. Concentra recommended that appellant undergo a psychiatric evaluation.

An appointment was made for appellant to go to the Institute for Forensic Psychology (IFP) for an examination. Appellant was asked to come in to pick up registration documents for IFP. The examination was scheduled for October 31, 2016. Appellant did arrive at Ms. Ralph-Rawls but did not pick up the documents. IFP called to advise that appellant did not keep her appointment. Appellant was called and told it would be re-scheduled. Appellant advised she did not go as she did not have the money to get to IFP. Appellant was told arrangements would be made to get her to IFP. Appellant was also told that her continued employment was contingent on the examination. This was now in November 2016. Appellant did not go to the second appointment at IFP. Ms. Ralph-Rawls advised the doctor at IFP of appellant's work history at the city and why she was being referred for an evaluation.

Director Dwight Saunders submitted a memorandum to the witness, dated October 31, 2016, regarding appellant's impact upon the department by her tardiness and absences.

A Preliminary Notice of Disciplinary Action (PNDA), dated November 1, 2016, was prepared and suspended appellant without pay effective immediately. An amended PNDA was prepared, dated November 18, 2016. A Notice of Disciplinary Action was prepared by Director Dwight Saunders dated October 31, 2016, outlining her continued absences on October 26 and 27, 2016, where appellant called out sick; and, on October 28, 2016, where appellant did not call and did not report to work; and October 31, 2016, did not report to work or go to her fitness for duty examination. This document aided in the preparation of the PNDA.

Ms. Ralph-Rawls stated that appellant was suspended for ninety days, later reduced to forty-five days, when working at Senior Services. When appellant transferred into Property Maintenance the city did not continue with progressive discipline and gave her a clean slate in her new position.

Appellant was not referred to the Employee Assistance Program (EAP). Ms. Ralph-Rawls oversees EAP. When employees have mental health issues she has referred them to EAP. It is not city policy to send employees for a fitness for duty examination for excessive tardiness or absenteeism. The only reason appellant was sent for a fitness for duty examination was she said she was depressed.

On or about October 20, 2016, she met with appellant regarding her tardiness and absenteeism. This is also the day appellant went to Concentra.

A call was received by Sergeant Williams this date. He is the medical officer for the East Orange Police Department. He was called by Concentra regarding an incident with appellant. She understood that appellant was cursing at a Concentra employee. Cursing is a significant fact. She was not at Concentra when the incident occurred. The PNDA does not mention cursing. Cursing is also not mentioned in a letter from the witness to appellant dated November 1, 2016, advising appellant she was suspended.

She spoke with appellant regarding Concentra's privacy policy which appellant felt was too broad. She spoke with the director at Concentra to get the privacy policy changed.

The witness prepared a memo to file regarding appellant dated November 15, 2016. She acknowledged the contact with the director at Concentra to get the policy changed so that appellant could be seen. Concentra did submit a letter modifying the privacy policy for appellant. Thereafter appellant was seen by Concentra on October 24, 2016. Appellant was not refusing to be seen at Concentra. She was refusing to sign the privacy policy.

The IFP examination was scheduled for the end of October 2016. The second date scheduled was maybe November 14, 2016. This was after the PNDA date of November 1, 2016. Appellant was suspended from work immediately after November 1, 2016, without pay. The PNDA was dated October 31, 2016.

Ms. Ralph-Rawls was not sure if appellant was sent Family Medical Leave Act (FMLA) documents due to absenteeism. She does not distribute this material. It is another employee.

Mark James Barner testified as follows:

He is the Director of the Division of Property and Maintenance for the City of East Orange. He started as director on January 1, 2018. Prior to this he was Assistant Director. Appellant was employed in his division. He spoke to appellant regarding her frequent tardiness and absenteeism. Appellant had started in Property Maintenance in April 2016. By that time she had used all her available sick time. By July she had used all her vacation time. Appellant continued to call in sick and arrive late. Initially he gave Appellant a verbal warning. He then gave her a written warning.

Petitioner would arrive late two or three times per week by fifteen to twenty minutes. Sometimes she would arrive at noon or one p.m. Sometimes she would leave early. When appellant did show up for work she performed her job. The policy for using sick time was to call. Appellant did not call every time she would be absent.

Mr. Barner stated appellant was given a verbal warning and then a written warning regarding her tardiness and absenteeism.

Mr. Barner reviewed appellant's time cards and time tabulation for appellant.

The policy is to call in when absent. Appellant did not do this every time. Appellant would come in late and leave early. One time appellant called in she was crying and stated she did not want to be at work. Appellant did not say why.

Prior to the Notice of Disciplinary Action dated September 1, 2016, appellant had no prior disciplinary matters at Property and Maintenance.

Michael Williams, Jr. testified as follows:

He is a sergeant with the East Orange Police Department. He is the medical officer. He tracks sick time, processes FMLA matters and line of duty cases. He knows appellant. He received a telephone call from Giovanni and Debbie from Concentra in the late afternoon. He does not recall the date. Giovanni is the manager at Concentra. Debbie works at Concentra also. Debbie told him an employee was being unruly and would not sign off on paperwork so the employee could be treated. He was called as he is one of the liaisons for the city with Concentra. He was called as Concentra could not locate Ms. Ralph-Rawls. He reached out for Director Saunders who told him that appellant did not work for him, but for Ms. Ralph-Rawls. Ms. Ralph-Rawls called him and he related the conversation he had with Debbie from Concentra. He has no idea of the time between the incident and the time he received the telephone call.

Deborah Beck testified as follows:

She is the Assistant Operations Manager for Concentra. Concentra does fitness for duty examinations for East Orange. She knows appellant from when she was at Concentra for a fitness for duty examination in October 2016. She recalls an incident with appellant. Appellant came in for a fitness for duty examination. Appellant did not feel comfortable with the forms and chose not to sign them. An evaluation could not be done without signed forms. Appellant still wanted the services provided but did not want to sign the forms. Appellant was aggravated. Appellant came in and out of Concentra. She was on her cell phone. Appellant became loud and disruptive and called her a "sarcastic bitch." Ms. Beck told appellant if the forms are not signed no service could be provided. Appellant left Concentra at this time. The date was October 20, 2016. Appellant did sign the forms on October 21, 2017.

Ms. Beck shared with Giovanni what happened and they felt the need to speak with someone at East Orange. They called Sergeant Williams as they deal with him a lot.

Petitioner was examined on October 24, 2016.

Giovanni Lepiani testified as follows:

He is the Operation Director for Concentra. He remembers appellant. He met her at Concentra, but does not remember the date. He did not witness the incident on October 21, 2016. Ms. Beck told him about it. He was told a patient was irate and used derogatory terms. He called Sergeant Williams. It is not normal to have disruption at the center. He told Sergeant Williams what happened. He spoke with Human Resources and later wrote the letter regarding Concentra's privacy policy. He spoke with appellant the next day and advised her she must sign the privacy policy to receive the examination. He had a good interaction with appellant.

Appellant signed the return to work evaluation after the doctor spoke with her.

Appellant asked him to write a letter stating that the police were not called to the center.

Appellant's Case

Tamika Jones-Richardson, Appellant, testified as follows:

On October 20, 2016, she was told she was being sent to Concentra for a fitness for duty exam. She was not told why. She did not refuse to go. She went to Concentra on October 20, 2016, signed in and waited. She read the literature at Concentra. She became concerned and asked to speak with someone regarding the policy of sharing private health information. She was concerned that her private health information could be shared. She wanted it limited to sharing with East Orange and her insurance

company. She asked to speak with the manager, who was not in. She spoke with Deborah Beck the assistant manager. She was told by Ms. Beck "nope, not gonna happen," "not going to do it." Ms. Beck smiled at her which appellant took as sarcastic and condescending. Appellant asked to speak with a supervisor and was told the supervisor was not there. Ms. Beck told appellant she would tell her employer that she refused to be seen. She did not curse at Ms. Beck.

Appellant went back to work and was called into a meeting with Ms. Ralph-Rawls and the director and assistant director of Property Maintenance. She was asked why she refused to be seen at Concentra. She stated her concerns with the privacy policy. Ms. Ralph-Rawls told her she would call Concentra. Ms. Ralph-Rawls already knew what transpired at Concentra. No mention was made at this time regarding Ms. Beck stating appellant cursed at her.

The secretary at Human Resources called her to advise Concentra would amend her privacy policy to accommodate her concerns. Appellant went back on October 21, 2016, and spoke with Mr. Lepiani and had a good conversation with him. She thanked him for accommodating her concerns. She spoke with him for about thirty minutes. Mr. Lepiani never mentioned her cursing at Ms. Beck. Mr. Lepiani told her the wait that day would be about three hours. Appellant could not wait as she is a single mother and had to pick up her daughter. She went back to Concentra on October 24, 2016, and was examined.

After the October 24, 2016, examination at Concentra she was asked to pick up paperwork to do a follow-up examination. This was at 4:00 p.m. The examination was for Monday morning, October 31, 2016. She could not pick up the paper work as she had to be in court on a traffic warrant. She advised the assistant director of this and showed him the court notice.

She did not make the October 31, 2016, appointment as she suffered an extreme panic attack that morning. She did call out. She also had a pre-scheduled therapist appointment. She did go to her therapist appointment. It was a therapeutic

appointment. She tried to give this to her employer. It was not accepted as they were already in a termination meeting. She was given FMLA paperwork by her therapist. She tried to give this to the benefits coordinator when at work on November 1, 2016. They were not accepted. She went back to her desk and was told to go to Human Resources. She was told she was being terminated. As of November 1, 2016, she assumed she was terminated.

She had already exhausted her sick time. She did provide documentation for her previous doctor appointment. She submitted a document from Care Station Medical Group that she would be out of work from October 5, 2016, to October 12, 2016. She still received a discipline write up.

She did not go to the appointment with IFP on November 14, 2016, as she was already terminated and did not have funds to travel to IFP. The city never offered assistance with transportation.

She has been undergoing therapy and has much improved. She is able to cope in the work place now.

She acknowledged that the PNDA proposes termination. She was never told she was terminated. She assumed she was being terminated. She was suspended without pay as of November 1, 2016.

She did not find out about the October 31, 2016, meeting until Friday, October 28, 2016. She told an employee, Tonya, at the city that she had a scheduled appointment with her doctor.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the

overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

Ms. Ralph-Rawls testified is a straightforward and truthful manner. She was professional in her demeanor and did not shy away from or avoid answering questions. I deem her credible. However, her testimony as to what transpired at Concentra on October 21, 2016, is given no weight. This testimony is based upon a conversation with Ms. Beck, Mr. Lepiani, and Sergeant Williams. She did not witness the event.

Mr. James Barner was also credible. His testimony was largely confined to appellant's time tabulation and time cards, and the times she would either be late or miss work.

Sergeant Williams was also credible. His testimony was of little help as he did not witness the incident at Concentra on October 21, 2016, and was only able to relate what was told to him.

Ms. Deborah Beck was also credible. She related her understanding of what transpired between her and appellant on October 21, 2016, in a straightforward and direct manner.

Ms. Tamika Jones-Richardson was also credible. She related her understanding of what transpired between her and Ms. Beck on October 21, 2016, in a straightforward and direct manner. The balance of her testimony was likewise credible.

It is not unusual for two witnesses to relate different versions of the same event and both be credible. It is ultimately up to the finder of fact to determine which version is more likely than not, or to determine that neither version carries the day in terms of preponderance.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I **FIND** the following **FACTS**:

1. Petitioner was employed by the City of East Orange in the Department of Property Maintenance. Prior to this position she was employed by the city in Senior Services.
2. During the course of her employment, and prior to the November 1, 2016, appellant had exhausted her personal, sick, and vacation time. (R-7, R-8, R-9 and R-10.)
3. Appellant continued to be absent and tardy from work even though she had no available personal, sick, or vacation time. (R-7, R-8, R-9 and R-10.)
4. Due to repeated tardiness and absenteeism, appellant received a Notice of Disciplinary Action (Verbal Warning) dated September 1, 2016. (R-9.)
5. Appellant was late eight times and absent eleven times after receipt of the verbal warning. Appellant received a Notice of Disciplinary Action (Written Warning) dated October 12, 2016, regarding this. (R-10.)

6. Appellant provided her employer with a note from Care Station Medical Group that appellant could return to work on October 12, 2016. (A-14.)

7. Appellant provided her employer with a Certification of Health Care Provider for Family Member's Serious Health Condition form under the FMLA, dated October 16, 2016. (A-13.)

8. Appellant was called into a meeting with Ms. Ralph-Rawls, director of Human Resources for the city, to discuss her continued tardiness and absenteeism. This meeting took place on October 20, 2016.

9. During the course of this meeting appellant advised Ms. Ralph-Rawls that she was feeling depressed. Ms. Ralph-Rawls then advised appellant that she was to undergo a fitness for duty examination at Concentra. The only reason for the request for the fitness for duty examination was appellant stating she was depressed. The fitness for duty examination was scheduled for October 20, 2016. (R-6.)

10. Appellant reported to Concentra to undergo the examination on October 20, 2016. While there she read the center's privacy policy and had issues with who could review appellant's medical information. She spoke with Ms. Beck, the assistant manager at Concentra, who advised appellant that the privacy form could not be changed and that without signing it the examination could not take place. Appellant asked to speak with Ms. Beck's supervisor and was advised that he was not present. Appellant left Concentra on October 20, 2016, without undergoing the examination.

11. After appellant left Concentra on October 20, 2016, upon Mr. Lepiani's return to the center, a call was placed to Sergeant Williams as he is the contact person for Concentra with the city. The call was made as Ms. Beck characterized appellant as unruly. Sergeant Williams contacted Ms. Ralph-Rawls to advise. Ms. Ralph-Rawls spoke with Ms. Beck and Mr. Lepiani.

12. Appellant called Ms. Ralph-Rawls to let her know about her concerns with the privacy policy. Ms. Ralph-Rawls, who had already spoken with Ms. Beck and Mr. Lepiani from Concentra, told appellant she would assist with getting the privacy statement modified. This was done by Mr. Lepiani by letter dated October 21, 2016, and was to appellant's satisfaction. (R-12.)

13. Appellant returned to Concentra on October 21, 2016, and spoke with Mr. Lepiani, the manager at Concentra, who advised her that the wait for an examination would be approximately three hours. Appellant, who is a single mother, could not wait that long as she had to pick up her daughter. Appellant left Concentra on October 21, 2016, without being examined.

14. On October 24, 2016, appellant returned to Concentra and was examined. The result of that examination was a recommendation for a psychiatric evaluation prior to appellant's return to work. (R-13.)

15. Mr. Lepiani wrote a letter, at the request of appellant, dated January 25, 2017, stating that Sergeant Williams was called as the public safety manager for the city was not available. Mr. Lepiani characterized the basis for the call was a "misunderstanding" that occurred.

16. An examination was scheduled at IFP for October 31, 2016. Appellant did not make this appointment for several reasons: she had no funds for transportation; she had a panic attack; and, she had a scheduled appointment with her therapist. (A-12.)

17. Prior to her appointment at IFP, which was on a Monday, appellant was asked to pick up paper work for IFP on Friday, October 28, 2016. Appellant did not pick up the paper work that day as she had to be in court regarding a traffic warrant. (A-11.)

18. The IFP examination was rescheduled for November 14, 2016. Appellant did not appear for the examination this date as she assumed she had already been terminated from employment.

19. Appellant, while not terminated, had been suspended without pay and served with a PNDA seeking termination on November 1, 2016. (R-1 and R-18.)

20. Ms. Ralph-Rawls authored a memorandum regarding appellant, dated November 15, 2016, which led to the issuance of an amended PNDA. (R-4 and R-19.)

21. A FNDA was issued on providing for termination from employment effective April 12, 2017. (R-5.)

22. While employed at Senior Services appellant was twice disciplined, resulting in a five-day suspension and a ninety-day suspension (reduced to forty-five days after a hearing at the OAL). (R-20 and R-21.)

23. Respondent waived, in terms of progressive discipline, the discipline imposed on appellant while at Senior Services. (CourtSmart audio 2/2/18, 10:26:37 a.m. to 10:27:19 a.m.)

24. While the emotional issues appellant suffers from were not defined during the course of the hearing, based upon the testimony of Ms. Ralph-Rawls regarding her conversation with appellant on October 20, 2016, and the testimony of appellant, it is clear that appellant does suffer from some emotional issues and is undergoing therapy. (A-13 and A-14.)

LEGAL ANALAYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See 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). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory, and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-

1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). 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 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, 26 N.J. at 275. The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms, 218 N.J. Super. at 341. The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

An appeal to the Merit System Board[1] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987).

The sustained charges in the Final Notice of Disciplinary Action (R-5) are set forth as: insubordination; chronic or excessive absenteeism or lateness; and, conduct unbecoming a public employee. These charges are set forth in N.J.A.C. 4A:2.3(2), (4), and (6), respectively.

[1] Now the Civil Service Commission.

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

As to the charge of conduct unbecoming a public employee, at hand there are two different versions of what transpired at Concentra on October 21, 2016. One is given by Ms. Beck, the other by appellant. The versions of the incident set forth in the testimony of Ms. Ralph-Rawls, Sergeant Williams, and Mr. Lepiani are not given any weight. They are based entirely on their memory of what Ms. Beck told them. The two individuals actually involved in the matter testified. Only their respective testimony is considered herein in determining if respondent carried its burden by a preponderance of the credible evidence as to this charge. As there are two credible witnesses as to this event, each with their own version of what transpired I cannot determine that there is a preponderance of credible evidence either for or against sustaining this charge. The evidence is in equipoise.

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

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its

> presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

As to the question of insubordination, again I cannot determine that appellant was insubordinate. While Ms. Ralph-Rawls characterized appellant's behavior as a refusal to submit to a fitness for duty examination at Concentra, I cannot reach this conclusion. Appellant did go to Concentra on October 20, 2016, for purposes of submitting to an examination. She had an issue with the privacy policy and would not agree to it as written. She communicated this to Ms. Beck who advised her it could not be changed. This was incorrect as it could be changed and was by Mr. Lepiani. Further, appellant communicated her issue to Ms. Ralph-Rawls who then assisted with the change to the privacy policy. The second time appellant went to Concentra the wait, three hours, was too long as she had to attend to other business. Appellant did submit to the examination on October 24, 2016. This is hardly a refusal to submit for an examination.

The other examination, at IFP, was scheduled for October 31, 2016. Appellant did not make the appointment, advising Ms. Ralph-Rawls that she did not have funds to pay for transportation. Ms. Ralph-Rawls advised appellant that the city would arrange to get her to the appointment, which was re-scheduled for November 14, 2016. Appellant also had an appointment with her therapist the same day. Appellant was served with a PNDA, dated October 31, 2016, and a letter from Ms. Ralph-Rawls, dated

November 1, 2016, advising her she was suspended without pay and that respondent was seeking her termination. Appellant did not make the appointment on November 14, 2016, based upon her understanding that she was terminated and that it would be superfluous to attend. I cannot conclude, based upon these facts, that appellant was insubordinate for not undergoing the examination at IFP.

As to the charge of chronic or excessive absenteeism or lateness respondent has more than met their burden by a preponderance of the credible evidence. In fact, appellant does not dispute the number of days she was either late or absent. Nor does she dispute that at times she failed to comply with policy and call in.

I **CONCLUDE** that the respondent has carried its burden to prove by a preponderance of the credible evidence that that appellant was guilty of the charge of chronic or excessive absenteeism or lateness set forth in the Final Notice of Disciplinary Action.

I further **CONCLUDE** that the respondent has not carried its burden to prove by a preponderance of the credible evidence that that appellant was guilty of the charges of insubordination and conduct unbecoming a public employee set forth in the Final Notice of Disciplinary Action.

The question remains as to what the appropriate penalty should be. Here appellant has several prior disciplinary matters, as follows: appellant was suspended for five days by Notice of Minor Disciplinary Action dated May 19, 2014, for conduct unbecoming a public employee; appellant was suspended for ninety days by Final Notice of Disciplinary Action dated October 28, 2014, for conduct unbecoming a public employee[2]; appellant received a verbal warning by Notice of Disciplinary Action dated September 1, 2016, for tardiness and absenteeism; and, appellant received a written warning by Notice of Disciplinary Action dated October 12, 2016, for tardiness and absenteeism. The two suspensions occurred while appellant was working for Senior

[2] This suspension was later reduced to forty-five days by the Honorable Leland S. McGee, ALJ, after a hearing at the OAL. See CSV 00937-15, http://njlaw.rutgers.edu/collections/oal/.

Services. The verbal and written warnings occurred while appellant was working for Property Maintenance.

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State-Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d. (CSV) 463, 465.

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, 38 N.J. at 523-24.

As the Supreme Court explained in Herrmann, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct . . . .

> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions . . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [Hermann, 192 N.J. at 30-33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Commission modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." Id. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, 38 N.J. at 523-524, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div.

1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter the penalty herein of termination seems disproportionate to the offense and mitigating circumstances as to be arbitrary and unreasonable. Respondent, pursuant to the testimony of Ms. Ralph-Rawls, gave appellant a clean slate when she was transferred from Senior Services to Property Maintenance. While appellant does have a disciplinary history which includes two prior suspensions for conduct unbecoming a public employee while at Senior Services, I cannot consider them in terms of progressive discipline as the city has, in effect, waived them in terms of progressive discipline.

Further, I have determined that respondent has not met its burden as to the charges of insubordination and conduct unbecoming a public employee. That leaves the only sustained charge of excessive absenteeism and tardiness. It is important to note that the tardiness and absenteeism was extensive. It is also important to note that appellant is addressing her emotional issues by seeking therapy. This willingness to address the issue that caused appellant to either be late or miss work is a mitigating factor.

It would be appropriate herein to impose a substantial suspension in lieu of termination. In light of the fact that appellant continued to be late and absent after receiving a verbal and then written warning for this, it is not disproportionate to the offense and mitigating circumstances to impose a penalty of suspension for thirty days. It is also appropriate for appellant to undergo a psychiatric evaluation as recommended by Concentra in their return to work evaluation dated October 24, 2016.

Based upon the foregoing, I **CONCLUDE** that the penalty of termination be reversed and that a penalty of a thirty-day suspension be imposed; and, that appellant undergo a psychiatric evaluation prior to her return to work.

ORDER

It is hereby **ORDERED** that charge contained in the Final Notice of Disciplinary Action dated April 12, 2017, of Chronic or Excessive Absenteeism or Lateness in violation of N.J.A.C. 4A:2.3(a)(4) is **SUSTAINED**; and,

It is further **ORDERED** that charges contained in the Final Notice of Disciplinary Action dated April 12, 2017, of Insubordination in violation of N.J.A.C. 4A:2.3(a)(2) and Conduct Unbecoming a Public Employee in violation of N.J.A.C. 4A:2.3(a)(6) are **NOT SUSTAINED**; and,

It is further **ORDERED** that the penalty of termination is **REVERSED**; and that the appropriate penalty shall be a suspension, without pay, of thirty days; and,

It is further **ORDERED** that appellant undergo a psychiatric evaluation prior to her return to work; and

It is further **ORDERED** that appellant be awarded appropriate back pay for the period of her separation from employment in excess of thirty days (subject to mitigation for income earned during this period), including benefits, and seniority subject to N.J.A.C. 4A:2-2.10.

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.

May 4, 2018
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: May 4, 2018

Date Mailed to Parties: May 4, 2018
db

APPENDIX

List of Witnesses

For Appellant:

Tamika Jones-Richardson, Appellant

For Respondent:

Michele Ralph-Rawls, Director of Human Resources

Mark James Barner, Director Division of Property Maintenance

Michael Williams, Jr., Sergeant, East Orange Police Department

Deborah Beck, Asst. Director Concentra

Giovanni Lepiani, Operations Director Concentra

List of Exhibits

For Appellant:

A-1 2005-2006 CWA and City of East Orange Collective Bargaining Agreement

A-2 a. July 1, 2006 – June 30, 2010, CWA & East Orange MOA

b. July 1, 2010 – December 31, 2013, CWA & East Orange MOA

c. January 1, 2014 – December 31, 2018, CWA & East Orange MOA

A-3 November 1, 2016, PNDA

A-4 November 1, 2016, Michele Ralph-Rawls letter to Appellant

A-5 November 18, 2016, Amended PNDA

A-6 October 20, 2016, email to Dwight Saunders

A-7 Concentra Health Services Notice of Privacy Practices Policy

A-8 January 25, 2017, letter from Giovanni Lepiani

A-9 October 21, 2016, letter from Giovanni Lepiani

A-10 Concentra Employer Service Patient Agreement regarding Appellant

A-11 October 28, 2016, City of East Orange Municipal Court Notice

A-12 October 31, 2016, Palisade Behavioral case release notice

A-13 October 17, 2016, MLA certification form

A-14 Care Station return to work note

For Respondent:

R-1 PNDA dated November 1, 2016

R-2 Acknowledgment of Receipt of PNDA, unsigned

R-3 Acknowledgment of Receipt of PNDA, signed

R-4 Cover letter dated November 21, 2016, regarding Amended PNDA and amended PNDA

R-5 FNDA dated April 12, 2017

R-6 Receipt for disciplinary package

R-7 Time tabulation for Appellant from April 11, 2016, to August 12, 2016

R-8 Time sheets for Appellant from August 15, 2016, to November 4, 2016

R-9 Notice of Disciplinary Action (verbal warning) with time tabulation, time sheets, and written disagreement to same from appellant

R-10 Notice of Disciplinary Action (written warning) with time sheets and written disagreement to same from appellant

R-11 Concentra Employer Service Patient Information form completed by appellant

R-12 Correspondence from East Orange Human Resource Department to Concentra, dated October 21, 2016

R-13 Return to work evaluation form dated October 24, 2016

R-14 Fax cover sheet from IFP to East Orange and letter from IFP to East Orange

R-15 Letter from Michelle Ralph-Rawls to Dr. Lewis R. Schlosser dated October 28, 2016

R-16 Correspondence from Michelle Ralph-Rawls dated October 31, 2016

R-17 Notice of Disciplinary Action (suspension) dated October 31, 2016

R-18 Correspondence from Michelle Ralph-Rawls dated November 1, 2016

R-19 Memo from Michelle Ralph-Rawls dated November 15, 2016

R-20 Prior discipline documentation for five-day suspension, May 19, 2014f

R-21 Prior discipline documentation for forty-five-day suspension, October 26, 2014