



STATE OF NEW JERSEY

 FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION

 In the Matter of Fatu Rimbart, Essex
 County, Department of Citizen
 Services

 CSC Docket No. 2019-528
 OAL Docket No. CSV 13513-18

Corrected Decision

ISSUED: NOVEMBER 12, 2019 (ABR)

The appeal of Fatu Rimbart, Family Service Worker, Essex County, Department of Citizen Services of her removal, effective November 28, 2017, on charges, was heard by Administrative Law Judge Julio C. Morejon (ALJ), who rendered his initial decision on September 18, 2019. No exceptions were filed by the parties.

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 October 23, 2019, did not adopt the ALJ's recommendation to modify the appellant's removal to a six-month suspension. Rather, the Commission upheld the appellant's removal.

DISCUSSION

The appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), removing her on charges of inability to perform duties, conviction of a crime, conduct unbecoming a public employee, violation of policies and procedures, and other sufficient cause. Specifically, the appointing authority asserted that on November 16, 2017, the appellant was indicted by a State Grand Jury on two counts of insurance fraud (second and third degree), two counts of impersonation (third degree), and theft by deception (third degree). On December 4, 2017, the appellant pled guilty to insurance fraud – false claim for payment, in violation of *N.J.S.A. 2C:21-4.6A*, a third-degree crime. Upon the appellant's appeal,

the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In his initial decision, the ALJ noted that most of the facts were not in dispute. The appellant began her employment with the appointing authority in 2010. Her duties as a Family Service Worker included evaluating clients, forming an assessment of benefits, and assessing eligibility determinations. To carry out these responsibilities, the appellant was routinely required to review confidential documents, including medical information, financial information, federal tax information, Social Security numbers, birth certificates, addresses and family information. On December 4, 2017, the appellant pled guilty to *N.J.S.A. 2C:21-4.6A*, insurance fraud, a third-degree crime. On April 13, 2018, she was sentenced to probation for three years and ordered to pay \$9,276.33 in restitution to two insurance companies. The judgment of conviction did not require the appellant to forfeit her position pursuant to *N.J.S.A. 2C:51-2*. The ALJ sustained the charges of conviction of a crime, conduct unbecoming a public employee and other sufficient cause. In sustaining the charge of conduct unbecoming a public employee, the ALJ found that the appellant's conviction for insurance fraud had a tendency to destroy public respect for public employees and confidence in the operation of public services. The ALJ sustained the charge of other sufficient cause based upon findings that the appellant's conviction constituted a violation of the appointing authority's Human Resources Policies and Procedures, Chapter VI-1, Work Rules and Standards - Standards of Conduct and that, pursuant to *N.J.S.A. 40A:9-2.1(e)*, it required the appointing authority to bar her from accessing federal tax information. The ALJ dismissed the charge of inability to perform duties, finding that the appointing authority failed to demonstrate that the appellant could not be placed in another position that did not require access to clients' personal and financial data.

In weighing the appropriateness of the penalty, the ALJ found that the appellant's criminal conviction did not automatically render her unable to perform her duties. The ALJ also considered the appellant's disciplinary record, noting that it included the following: an official written reprimand for chronic and excessive tardiness and willful violations of agency time and attendance policies in February 2014; a five working day suspension for chronic and excessive tardiness and willful violations of agency time in March 2015;¹ and a nine working day suspension for chronic and excessive absenteeism and tardiness in violation of County time and attendance policies in June 2016. The ALJ found that because the appellant's prior disciplinary history concerned lateness and absenteeism, rather than conduct involving fraud, insubordination or dishonesty, her removal would not adhere to progressive discipline principles. Based upon the foregoing, the ALJ recommended

¹ Agency records indicate that the appellant ultimately served a two working day suspension based upon these charges.

that the appellant's removal be modified to a six-month suspension and that she be subjected to a one-year probationary period upon her reinstatement.

Upon its *de novo* review of the record, the Commission agrees with the ALJ's upholding of the charges of conviction of a crime, conduct unbecoming a public employee and other sufficient cause and dismissing the charge of inability to perform duties. However, the Commission does not agree with the ALJ's recommendation to modify the removal to a six-month suspension. In this regard, the Commission observes that the appropriate inquiry in evaluating the charge of inability to perform duties is whether the employee is able to perform all of the essential duties which may be assigned to an incumbent in the employee's job title and that it does not require an appointing authority to prove that it has no other jobs the subject employee could perform. Here, the record supports the charge of inability to perform duties because the appellant would be unable to perform her above-noted responsibilities as a Family Service Worker given that, pursuant to *N.J.S.A. 40A:9-2.1(e)*, she would be barred from accessing federal tax information due to her conviction. 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).

The charges that were sustained are serious. In particular, as noted by the ALJ, the appellant's insurance fraud conviction constitutes conduct unbecoming a public employee because it undermines the public's respect for public employees and its confidence in the operation of public services and, pursuant to *N.J.S.A. 40A:9-2.1(e)*, the appellant's conviction bars the appointing authority from allowing her to handle clients' federal tax information. As noted in the job specification for the title of Family Service Worker, the duties for an incumbent in that title include determining financial eligibility for public assistance programs. It is undisputed that in connection with this and other related responsibilities, incumbents are routinely required to review confidential documents, including medical information, financial information, federal tax information, Social Security numbers, birth certificates, addresses and family information. The appellant's insurance fraud

conviction raises significant questions about her ability to be trusted with access to such sensitive information. Against this backdrop, even if the appellant had an unblemished disciplinary record, removal would be an appropriate penalty. However, the Commission notes that the appellant's record during her seven-year tenure contains multiple disciplinary actions, including two minor disciplinary sanctions in February 2014 and March 2015, and a nine working day suspension in June 2016. Such a disciplinary record over such a relatively short period is significant, particularly as her June 2016 suspension was major discipline which occurred less than one-and-one-half years prior to the effective date of the appointing authority's disciplinary action. Accordingly, the Commission finds that the appellant's removal is also consistent with principles of progressive discipline.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was appropriate. Therefore, the Commission affirms that action and dismisses the appellant's appeal.

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 23RD DAY OF OCTOBER, 2019



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13513-18

AGENCY DKT NO. CSC 2019-528

FATU RIMBERT,

Appellant,

v.

**ESSEX COUNTY, DEPARTMENT
OF CITIZEN SERVICES**

Respondent.

David H. Weiner, President, CWA Local 1081, for appellant, Fatu Rimbart, appearing pursuant to N.J.A.C. 1:1-5.4

Robin E. McGrath, Assistant Essex County Counsel, for respondent Essex County, Department of Citizen Services (Essex County Counsel, attorneys)

Record Closed: August 12, 2019

Decided: September 18, 2019

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Fatu Rimbart, (Rimbart) appealed the action of respondent, Essex County, Department of Citizen Services (the Agency), removing her from employment as a Family Service Worker, effective November 28, 2017, resulting from sustained charges for violating N.J.A.C. 4A:2-2.3(a)(3), inability to perform duties, (5) conviction of a crime,

(6), conduct unbecoming a public employee, and 12, other sufficient cause for violating of county policies and procedures, including standards of conduct policy. In addition, Rimbart was also terminated for an additional specification or charge of removal under N.J.S.A. 40A: 9-2.1(e).

Rimbart requested a fair hearing and the matter was filed at the Office of Administrative Law (OAL) on September 17, 2018, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 14F-1 to 13. A telephonic prehearing conference was held on September 27, 2018. A hearing was held on November 26, 2019, at the OAL. At the conclusion of the hearing, the parties requested time to submit written summations. Written summations were due and submitted April 29, 2019. The record remained open until August 12, 2019.

ISSUES

Whether there is sufficient credible evidence to sustain the charges contained in the Final Notice of Disciplinary Action dated May 7, 2018; and, if sustained, whether a penalty of removal is warranted?

FACTUAL DISCUSSION AND FINDINGS

Summary of Testimony

Jeanette Page-Hawkins

Jeanette Page-Hawkins (Page-Hawkins) provided testimony that she was employed by the County of Essex, Division of Family Assistance and Benefits (DFAB) as the Division Head for more than three (3) years. She testified that prior to working at DFAB, she was employed by the State of New Jersey, Department of Human Services as the Division Director for the Division of Family Development for thirteen (13) years. As the Division Head for DFAB, she testified that she is responsible for the administration of the organization which consists of confirming compliance with state and federal regulations, financial stability of the agency, staffing of the agency, resources of the

agency, and the human resources of the agency such as the hiring and determinations of staff.

Page-Hawkins testified that she also supervises higher level staff of the agency, including confidential assistants, administrators, assistant administrators, financial manager, human resources staff, and other support staff. She explained that the administrators, assistant administrators and confidential assistants supervise family service workers and clerical series employees. Page-Hawkins testified that family service workers deal with federal tax information on a daily basis as part of their job functions, and in addition, they have access to social security information, tax information, birth certificates and accesses data systems containing this information. Page-Hawkins testified further, that a family service worker must identify possible financial resources for applicants and provide them with information to assist them in seeking benefits from other agencies federal and state agencies. Page-Hawkins provided some examples of these agencies to include Social Security Administration, Veterans Affairs, New Jersey State employment services.

Page-Hawkins testified that the extent of review of financial information by family service workers varies within the different offices of Child Support, Medicaid, and SNAP, and that all family service workers must review sensitive documents to determine financial eligibility. Page-Hawkins testified that other positions at the Agency and DFAB, such as keyboard clerk 1, keyboard clerk 2, keyboard clerk 3, keyboard clerk 4 and clerk 1, must also handle sensitive documents as part of their job duties.

Page-Hawkins testified further that she became familiar with Rimbart through her termination proceedings. She explained that Rimbart's fraud conviction would impact her job since she must handle sensitive documents, specifically federal tax information documents, as a family service worker. Page-Hawkins explained that continuing to employ Rimbart would undermine the morale of the agency, destroy respect for other agency employees, and impact client's trust, as Rimbart's charges and conviction were widely publicized on the Attorney General's website, throughout the agency and on social media.

Page-Hawkins admitted that the crime committed by Rimbart is not directly related to her job as a family service worker, and it was her opinion that the conviction impacts Rimbart's ability to perform her work. Page-Hawkins testified that there are very few job duties that a family service worker can perform in the agency which do not require the handling of sensitive client information since the primary function of the position is to determine eligibility for services. She testified further that no position exists in the agency that would not require an employee having access to confidential information. Page-Hawkins explained that if an individual with a criminal history involving fraud applied for a job as a family service worker, the agency would not hire the individual.

During cross examination, Page-Hawkins was asked if she was aware of any currently County employees have criminal convictions, she answered "Not to my knowledge. If I could also add, if any do, they may be of a different nature and they may have – the offense may have been many, many years ago, but I have no knowledge".

Page-Hawkins admitted that Ms. Rimbart's union had filed numerous grievances to protest DFAB management allowing files containing client personal and financial information to be stored on the floor, radiators, and open booths that were accessible by employees and their clients alike having access to the secured portions of those offices. In cross-examination Page-Hawkins stated that "The files were never in an area where the clients could access them".

Robert Jackson

Robert Jackson (Jackson) has been employed by the County of Essex since March 2015 and currently holds the titles of County Administrator and Director of Human Resources since March 2017. Prior to acting in these roles, Jackson was employed by the County as the Deputy Director of Human Resources. Jackson testified that as the Director of Human Resources, he is responsible for the implementation and ensuring compliance with County policies and procedures; he works with the human resources team to organize volunteer efforts, coordinate community involvement, handle employee health benefits and related issues, manage leaves of absences, and assist with disciplinary related matters.

Jackson testified that as County Administrator his duties are similar to a chief operating officer for the County, as he is responsible for the day to day functions of the County and maintaining the County's relationship with the Essex County Board of Chosen Freeholders. Jackson testified that in his dual positions, he supervises eleven (11) employees in the Department of Human Resources, and 3,500 in the County. Jackson testified further that as the County Administrator he has some control over the DFAB and that he became familiar with Rimbart when she was charged with several criminal offenses, and then pleaded guilty to the crime of insurance fraud. Jackson testified that Rimbart was a family service worker who handled financial information, tax returns, pay stubs, etc. to determine the needs of the client.

Jackson testified that he became aware of N.J.S.A. 40A:9-2.1, when the County began reevaluating its background check procedures. He explained that he understood the statute to read that an individual who committed a crime of fraud in the State of New Jersey would be prohibited from receiving federal tax information and other financial information. Jackson testified that the ultimate decision for all employment decisions is made by the Administration of the County and that he technically oversees all disciplines within the County.

Jackson testified that in some circumstances Essex County will settle a disciplinary matter with a suspension and probationary period. He testified that Rimbart's disciplinary matter is not the type of case Essex County can settle with a suspension and probationary period because by law (N.J.S.A. 40A:9-2.1), he did not think she could continue to work as a family service worker.

Jackson explained that he considered Rimbart's criminal conduct to be conduct unbecoming a public employee and contrary to Essex County policy and that he would not "feel comfortable" with her continuing employment with Essex County and that he did not think that there was any flexibility with regards to her removal. Jackson testified that regardless of N.J.S.A. 40A:9-2.1, he would still support Rimbart's removal because her conduct ties so closely to her job duties. Jackson testified that he felt Rimbart's removal was the "right thing to do." He stated, "I sort of put myself in the client's shoes as it were,

and if I were the client of the Division, would I feel that the County did all it could to ensure that my information and the process under which it was determined for me to get assistance, was it operating at the highest level of integrity and ethics that it could...and I would think that if we did not move for this action I don't think that we would be."

Jackson explained that when determining Rimbart's discipline, he did not just "rubber stamp" a termination because she was convicted of a crime but rather, he reviewed the criminal conviction involved. Jackson testified that it is the practice of Essex County to review the nature of the offense, the timing of the offense, the job duties of the employee, and any other mitigating factors when a criminal charge or conviction is present during the application or employment process. Lastly, Jackson testified that it is the practice of the Office of Human Resources to look at the factors surrounding the crime committed for background checks, hiring and termination of employees.

Fatu Rimbart

Rimbart testified that as a family service worker she handles various documents throughout the day, which include documents containing the following information: medical information, financial information, federal tax information, birth certificates, addresses of clientele and family members, and other confidential information. Rimbart testified that all of her performance evaluations had been good, albeit they noted her tardiness. She also testified she had never had any negative interactions with clients and was not aware if any had complained about her. Rimbart also confirmed that many clients' case records had been left within the open area on the tenth floor Medicaid office to which she had been assigned with all of their very personal information, including IRS information, included.

She also testified that she has a probation officer and that she reports to the probation department as required and that she does consider that as part of rehabilitation. Rimbart testified that as part of her guilty plea of committing insurance fraud she was required to make financial restitution in the amount of \$9,276.33 and serve three-year probation. She further explained that when she pleaded guilty to the crime of fraud she was represented by an attorney and that the sentencing judge explained the

consequences of a guilty plea to her. Despite the same, Rimberty testified that she was not aware that she could lose her job with the DFD as a result of her criminal conviction.

Rimberty testified that neither she nor other Agency employees are provided with the Agency's policies and procedures, which is contrary to Page-Hawkins and Jackson testimony, and which policies and procedures was admitted in evidence (J-8).

FINDINGS OF FACT

Most of the facts in this case are undisputed. Below are the facts derived from the testimony of the parties submitted and my assessment of its credibility, together with the documents that the parties submitted and my assessment of their sufficiency, I **FIND** the following as **FACT**:

Facts not in dispute

Rimberty was employed at the Agency since 2010 as a family service worker for the DFAB until her removal in November 28, 2017 (T1:197-1 to 25¹). More specifically, Rimberty worked in the Medicaid office for approximately seven (7) years and thereafter in the Food Stamp office. (T1:197-20 to 25; T1:198-1 to 5). Rimberty's duties as a family service worker included: evaluating clients, forming an assessment of benefits, and assessing eligibility determinations. (T1:204-15 to 25). As part of her job duties, Rimberty reviewed various confidential client documents including medical information, financial information, federal tax information, social security numbers, birth certificates, addresses of clientele and family members. (T1:205-1 to 25).

On November 16, 2017, Rimberty was criminally charged with two (2) counts of insurance fraud, two (2) counts of impersonation and theft by deception in an indictment by a State Grand Jury (J-4). Pursuant to N.J.A.C. 4A:2-27, upon notice of these charges, the County issued a Preliminary Notice of Disciplinary Action dated December 1, 2017,

¹ T1 reflects the November 26, 2018 Transcript.

(PNDA), immediately suspending Rimbart from employment pending the outcome of the criminal charges (J-1). The PNDA-1 provided a statement that N.J.S.A. 2C:51-2,² may apply and that Rimbart may wish to consult an attorney concerning the provisions of said statute. Rimbart did not request a departmental hearing of the PNDA, and she was suspended without pay effective November 28, 2017 (Id.).

On December 4, 2017, Rimbart plead guilty to N.J.S.A. 2C:21-4.6A, insurance fraud – a third degree crime (J-5),³ and on April 13, 2018, she was sentenced to probation for three years and ordered to pay restitution in the amount of \$9,276.33 to Progressive Insurance Company and Minnesota Life Insurance Company (Id.) The Judgment of Conviction did not order Rimbart to forfeit her position as Family Service Worker under N.J.S.A. 2C: 51-2 (Id.).

Following her criminal sentence, on May 7, 2018, the County then issued a second PNDA (May PNDA), dated May 7, 2018, (J-2) charging her with the following:

N.J.A.C. 4A:2-2.3 (a)(3)- Inability to perform duties
N.J.A.C. 4A:2-2.3 (a)(5) -Conviction of a crime
N.J.A.C. 4A:2-2.3 (a)(6) -Conduct unbecoming a public employee
N.J.A.C 4A:2-2.3 (a)(12) - Other Sufficient Causes: Violation of County Policies and Procedures, including Standards of Conduct Policy

² The Agency argued that the Agency's decision to terminate Rimbart should be upheld under N.J.S.A. 2C: 51-2, forfeiture of public office, position, or employment. However, the said statute concerns sentencing by the Superior Court at the time of conviction or guilty plea by an elected official or public sector employee or appointment. There is no provision in N.J.S.A. 2C: 51-2, that would allow the Agency to terminate Rimbart's employment, and therefore the same will not be addressed in the initial decision herein.

³ 2C:21-4.6. Crime of insurance fraud

a. A person is guilty of the crime of insurance fraud if that person knowingly makes, or causes to be made, a false, fictitious, fraudulent, or misleading statement of material fact in, or omits a material fact from, or causes a material fact to be omitted from, any record, bill, claim or other document, in writing, electronically, orally or in any other form, that a person attempts to submit, submits, causes to be submitted, or attempts to cause to be submitted as part of, in support of or opposition to or in connection with: (1) a claim for payment, reimbursement or other benefit pursuant to an insurance policy, or from an insurance company or the "Unsatisfied Claim and Judgment Fund Law," P.L.1952, c.174 (C.39:6-61 et seq.); (2) an application to obtain or renew an insurance policy; (3) any payment made or to be made in accordance with the terms of an insurance policy or premium finance transaction; or (4) an affidavit, certification, record or other document used in any insurance or premium finance transaction.

In addition to the allegations of the civil service rules stated above, the May PNDA contained an additional specification or charge of removal under N.J.S.A. 40A: 9-2.1(e).

On August 15, 2018, the Agency issued a Final Notice of Disciplinary Action (FNDA) (J-3) which reflected that the charges in the May 7, 2018 PNDA against Rimbart were sustained and she was removed from employment with the County effective November 28, 2017 (Id.).

Employees of the DFD are subject the County policy, Work Rules and Standards – Standards of Conduct (policy) states that employees are to “refrain from behavior or conduct deemed offensive or undesirable, or which is contrary to the County’s best interest.” (J-8). The policy further states that “conduct that interferes with the operation of the government, discredits the County of Essex, or is offensive to the public or fellow employees shall not be tolerated”, and any violations of the policy may result in an employee being “subject to disciplinary action, including dismissal.” (Id.).

Credibility

Prior to conducting a legal analysis and making a conclusion as to the testimony provided herein, it is necessary to address the credibility of the testimony of the witnesses. “The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the . . . trier of fact, whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.” State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952). The choice of accepting or rejecting the witness’s testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960).

I **FIND** the testimony of Page-Hawkins and Jackson to be credible as they have testified to facts stipulated in evidence, as well as testimony concerning their respective duties and responsibilities with the Agency and Essex County, respectively. Both witnesses are fact witnesses and not expert witnesses, and thus any opinion which they provided in the hearing will not be considered by the undersigned.

I **FIND** the testimony of Rimbart to be credible as most of her testimony also consisted of facts which have been stipulated in evidence, including her criminal conviction and sentence. In addition, I **FIND** Rimbart's testimony that not all Agency employees are made aware of the policies and procedures for standard of conduct as persuasive as her testimony was persuasive that the same was not included in the Employee Handbook. I **FIND** Rimbart's testimony that she was not aware that her criminal conviction could result in her termination by the Agency as credible, as her criminal sentence reflects that the State [Prosecutor] did not seek a forfeiture of her public employment under N.J.S.A. 2C:51-2. ⁴

LEGAL ANALYSIS AND CONCLUSION

In appeals concerning major disciplinary action, the appointing authority bears the burden of proof. N.J.A.C. 4A:2-1.4(a). The burden of proof is by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962), and the hearing is de novo, Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980). On such appeals, the Civil Service Commission may increase or decrease the penalty, N.J.S.A. 11A:2-19, and the concept of progressive discipline guides that determination, In re Carter, 191 N.J. 474, 483-86 (2007).

Thus, an employee's prior disciplinary record is inherently relevant to determining an appropriate penalty for a subsequent offense, Id. at 483, and the question upon appellate review is whether such punishment is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness," Id. at 484 (quoting In re Polk, 90 N.J. 550, 578 (1982) (internal quotes omitted)). Indeed, progressive discipline may only be bypassed when the misconduct is severe, when it renders the employee unsuitable for continuation in the position, or when the application of progressive discipline would be contrary to the public interest, such as when the position involves public safety and the misconduct causes risk of harm to persons or property. In re Herrmann, 192 N.J. at 33.

⁴ The Agency's argument that "Individuals convicted of offenses falling under N.J.S.A. 2C:51-2(a)(1) automatically forfeit a position of public employment.", is misplaced. See, footnote 2 above.

Rimbert has been charged with violating the following civil service regulations:

N.J. A.C. 4A:2-2.3 (a)(3)- Inability to perform duties

N.J.A.C. 4A:2-2.3 (a)(5) -Conviction of a crime

N.J.A.C. 4A:2-2.3 (a)(6) -Conduct unbecoming a public employee

N.J.A.C 4A:2-2.3 (a)(12) - Other Sufficient Causes: Violation of County Policies and Procedures, including Standards of Conduct Policy, and

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(3), charge of inability to perform duties, there is no definition in the New Jersey Administrative Code of inability to perform duties. Concerning, N.J.A.C. 4A:2-2.3 (a)(5), conviction of a crime, the Agency argues that under N.J.S.A. 2C:51-2 and N.J.A.C. 4A: 2-2.3(a)(5), an employee forfeits their public employment upon a conviction of an offense of dishonesty or a third degree crime or above. However, N.J.S.A. 2C:51-2, concerns an action by the State of New Jersey to remove a public official from office following the public official's conviction of a crime while in office or in the course of his public employment, and is not an action that the Agency can undertake to remove Rimbert. State v. Musto, 187 N.J. Super. 264 (Law. Div. 1982), aff'd, State v. Musto, 188 N.J. Super. 106 (1982).

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

Rimbert is also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "other sufficient cause". Other sufficient cause is generally defined in the charges against an appellant as all other offenses caused and derived as a result of all other charges against him. Other sufficient cause is an offense for conduct that violates the implicit standards of good

behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct.

The proofs presented herein demonstrate that the basis for the Agency charging Rimbart with violating N.J.A.C. 4A:2-2.3(a)(3), inability to perform services, and N.J.A.C. 4A:2-2.3(a)(5), conviction of a crime, derives from the Agency's argument that Rimbart's admission to the charge of committing insurance fraud results in her "conduct unbecoming a public employee" under N.J.A.C. 4A: 2-2.3(a)(6), and for "other sufficient cause" under N.J.A.C. 4A: 2-2.3(a)(12). That is, Rimbart's criminal conviction alone is not the reason for her termination by the Agency, but that it is deemed "conduct unbecoming a public employee", and because of her duties as a family service worker, her criminal conviction now results in her "inability to perform her duties." The Agency further postulates that Rimbart's criminal conviction now triggers N.J.S.A. 40A: 9-2.1(e), which prohibits her from "having access to federal tax information", which is one of the requirements of Rimbart's duties; and is proof of her "inability to perform her duties."

I **CONCLUDE**, that the Agency has met its burden of proof by a preponderance of the evidence that Rimbart's criminal conviction under N.J.A.C. 4A:2-2.3 (a)(5), is conduct in violation of N.J.A.C. 4A:2-2.3 (a)(6), for conduct unbecoming a public employee, inasmuch as her criminal conviction "has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 163. In addition, the Agency has demonstrated by a preponderance of the evidence that Rimbart's criminal conviction is in violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient causes: violation of county policies and procedures; specifically, Essex County Standards of Conduct Policy (J-8). For these reasons, I **CONCLUDE** that the Agency's decision that Rimbart's criminal conviction on April 23, 2018, was conduct that violated N.J.A.C. 4A:2-3(a)(6) and (12), and the Agency's findings contained in the FNDA is **AFFIRMED** herein.

I **CONCLUDE** that the Agency has not demonstrated by a preponderance of the evidence that Rimbart's criminal conviction results in a violation of N.J.A.C. 4A:2-2.3(a), inability to perform duties, as the evidence presented did not establish that Rimbart is unable to perform other duties within the Agency and the DFD. Specifically, Page-

Hawkins' testimony admitting that the crime committed by Rimbert is not directly related to her job as a family service worker leads me to **CONCLUDE** that the Agency has failed to prove that Rimbert's criminal conviction is a violation of N.J.A.C. 4A:2-2.3(a).

I **CONCLUDE** that the Agency has failed to prove that Rimbert's criminal conviction automatically disqualified her from performing the duties of a family service worker in Medicaid department, as it failed to demonstrate that there are no other jobs in the Agency and DFD that do not require access to client personal and final data. For these reasons, I **CONCLUDE** that the Agency's decision that Rimbert's criminal conviction results in a violation of N.J.A.C. 4A:2-2.3(a) is **REVERSED** herein.

Rimbert has also been charged with violating N.J.S.A. 40A: 9-2.1(e). The statute at issue, N.J.S.A. 40A: 9-2, provides for a local government agency to authorize an individual employed by that agency or employed or utilized by a contractor of that agency to have access to federal tax information if it has been determined that the individual employee does not have a criminal history record, which would disqualify the individual from having access to federal tax information in accordance with standards established by N.J.S.A. 40A: 9-2.1(e).

N.J.S.A. 40A: 9-2.1(e) provides:

An individual shall be disqualified from having access to federal tax information if that individual's criminal history background check reveals a record of conviction of any of the following crimes or offenses:

(1) in New Jersey, any crime or disorderly persons offense:

(a) involving theft as set forth in chapter 20 of Title 2C of the New Jersey Statutes;
or

(b) involving forgery or fraudulent practices as set forth in chapter 21 of Title 2C of the New Jersey Statutes; or

(2) in any other state or jurisdiction, of conduct which, if committed in New Jersey, would constitute any of the crimes or disorderly persons offenses described in paragraph 1 [N.J.S.A. 40A: 9-2.1] of this subsection.

The statute provides that an individual employee is not automatically disqualified under the provisions of N.J.S.A. 40A: 9-2.1, if the employee can demonstrate that he or she has been "rehabilitated". N.J.S.A. 40A:9-2.1(f) provides in part:

- (1) Notwithstanding the provisions of subsection e of this section ... [I]n determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:
 - (a) the nature and responsibility of the position involved in which access to federal tax information is authorized or required;
 - (b) the nature and seriousness of the offense;
 - (c) the circumstances under which the offense occurred;
 - (d) the date of the offense;
 - (e) the age of the individual when the offense was committed;
 - (f) whether the offense was an isolated or repeated incident;
 - (g) any social conditions which may have contributed to the offense;
 - (h) any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the individual under their supervision.

- (2) The jurisdictional State agency head shall make the final determination regarding the disqualification from access to federal tax information by an individual with a criminal conviction specified under this section.

A violation of N.J.A.C. 40A: 9-2.1, is not grounds for termination from an Agency position, but only serves to disqualify an individual from "having access to federal tax information". "Federal tax information" means federal tax returns and return information, and information derived therefrom, in the possession or control of a local government

agency which is covered by the confidentiality protections of the federal Internal Revenue Code and subject to the safeguarding requirements of paragraph (4) of subsection (p) of section 6103 of the federal Internal Revenue Code (26 U.S.C. § 6103), including federal Internal Revenue Service oversight (N.J.A.C. 40A: 9-2.1(f)).

I **CONCLUDE** that Rimbart's criminal conviction for insurance fraud under N.J.S.A. 2C: 21-4.6(a), is in violation of N.J.S.A. 40A: 9-2.1(e), as the criminal statute involved satisfies the statutory requirement of N.J.S.A. 40A: 9-2.1(e)(1)(b). Notwithstanding my decision, Rimbart has an opportunity under N.J.S.A. 40A: 9-2.1(f), to affirmatively demonstrate by clear and convincing evidence of her rehabilitation from her criminal conviction, so that she can have access to federal tax information. The following factors under N.J.S.A. 40A: 9-2.1(f), must be considered in order to determine if Rimbart has proven by clear and convincing evidence of her rehabilitation:

(a) the nature and responsibility of the position involved in which access to federal tax information is authorized or required;

Rimbart's duties as a family service worker, result in her handling federal tax information of client's of DFD. This factor has a negative effect Rimbart's application for rehabilitation.

(b) the nature and seriousness of the offense;

Rimbart submitted fraudulent information to the insurance companies resulting in her having to pay them \$9,276.33, for monies she wrongfully received (J-4 and J-5). This factor has a negative effect Rimbart's application for rehabilitation.

(c) the circumstances under which the offense occurred;

No proofs were presented to address this factor. This factor has no effect on Rimbart's application for rehabilitation.

(d) the date of the offense;

The criminal conduct occurred in 2014, and Rimberty pled guilty in April 2018. No proofs were submitted for me to consider the impact of when the crime was committed and when she pled guilty. This factor has no effect on Rimberty's application for rehabilitation.

(e) the age of the individual when the offense was committed;

The criminal conduct occurred in 2014, and Rimberty pled guilty in April 2018. Rimberty was an adult when she knowingly committed the crime of insurance fraud and therefore this factor has a negative effect on her application for rehabilitation.

(f) whether the offense was an isolated or repeated incident;

The criminal conduct leading to Rimberty's criminal conviction, was an isolated incident and she has no further criminal arrest or conviction, and therefore this factor has a positive effect on Rimberty's application for rehabilitation.

(g) any social conditions which may have contributed to the offense; and

No proofs were provided to address this factor, and therefore this factor has no effect on Rimberty's application for rehabilitation.

(h) any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the individual under their supervision.

Rimberty submitted proof that she agreed to pay restitution to the insurance companies that she defrauded, and therefore this factor has a positive effect on Rimberty's application for rehabilitation.

After considering the above factors under N.J.S.A. 40A: 9-2.1(f), I **CONCLUDE** that Rimbart has not submitted proof by a clear and convincing evidence that she is rehabilitated, and therefore, I **CONCLUDE** that under N.J.S.A. 40A: 9-2.1(e), the Agency's decision barring Mr. Rimbart from handling federal tax information of clients of DFD is **AFFIRMED**.

Appropriateness of Penalty

In West New York v. Bock, 38 N.J. 500, 522 (1962), 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. 523-24.

As the Supreme Court explained in In re 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.

[In re Hermann, 192 N.J. at 30-33 (citations omitted).]

It is well established that where the underlying conduct is of an egregious nature a penalty up to and including removal is appropriate. Henry v. Rahway State Prison, 81 N.J. 571 (1980). Such conduct negates the need for progressive discipline. In re Carter, 191 N.J. 474 (2007).

Rimbert has been previously disciplined. In 2014, Rimbert was issued a Written Reprimand for chronic and excessive tardiness and willful violations of agency time and attendance policies. (J-9). Then in 2015, Rimbert received a Notice of Minor Disciplinary Action for a five (5) work day suspension for chronic and excessive tardiness and willful violations of County time and attendance rules and regulations. (J-10). Following in 2016, Rimbert was issued a Preliminary Notice of Disciplinary Action for a ten (10) working day suspension for chronic and excessive absenteeism and tardiness and violation of County time and attendance policies. (J-11). In June 2016, Rimbert signed a settlement agreement agreeing to a nine (9) work day suspension with a six (6) month probationary period from June 2016 through December 2016. (J-12).

Rimbert's prior disciplinary history concerns being late to work and absenteeism. She does not have a disciplinary history for conduct involving fraud, insubordination, or dishonesty. While it is recognized that Rimbert's criminal conviction is in violation of conduct unbecoming a public employee, and a violation of the Agency's policies and procedures for county employees, it does not rise to a termination of Rimbert as determined by the Agency.

The Agency has not proven by a preponderance of the evidence that Rimbert's criminal conviction automatically results in her "inability to perform her duties" as contained in the FNDA. Page-Hawkins testified that while the crime committed by Rimbert is not directly related to her job as a family service worker, the crime impacts her ability to do the job. Similarly, Robinson testified that Rimbert's disciplinary matter is not the

type of case the County can settle with a suspension and probationary period because by law he did not think she could continue to work as a family service worker. I **CONCLUDE** that the substance of the testimony of Page-Hawkins and Robinson are beliefs not founded in principals of progressive discipline or the Civil Service Regulations, let alone the facts of this case.

For these reasons, I **CONCLUDE** that the appropriate discipline is a six-month suspension effective November 18, 2017, and that upon reinstatement to her position as a Family Service Worker, or other similar position within the Agency, Rimbart is subject to a one-year probationary period. The one-year probationary period is to commence the date Rimbart is reinstated and not retroactive to the six-month suspension.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the Agency's action to remove Rimbart effective November 28, 2017, contained in the FNDA dated August 15, 2018, is hereby **REVERSED**, and the Agency is to reinstate Rimbart, effective November 18, 2017, subject to the imposition of a six-month suspension without pay effective November 18, 2017, through May 18, 2018, and that upon the completion of her six-month suspension and reinstatement to her position as a Family Service Worker, or other similar position within the Agency, she is subject to a one-year probationary period.

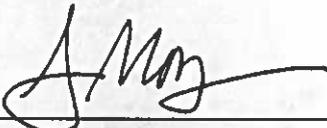
It is further **ORDERED** that Rimbart is entitled to back pay and benefits following the completion of her six-month suspension commencing November 28, 2017.

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.

September 18, 2019
DATE



JULIO C. MOREJON, ALJ

Date Received at Agency: September 18, 2019

Date Mailed to Parties:
lr _____

APPENDIX

WITNESSES

FOR PETITIONER:

Fatu Rimbart

FOR RESPONDENT:

Jeanette Page-Hawkins

Robert Jackson or Human Resources designee, *tentative*

LIST OF JOINT EXHIBITS

- | | |
|--------------|---|
| Exhibit J-1 | Preliminary Notice (31-A) dated December 1, 2017 |
| Exhibit J-2 | Preliminary Notice (31-A) dated May 7, 2018 |
| Exhibit J-3 | Final Notice (31-B) dated August 15, 2018 |
| Exhibit J-4 | Indictment and Order of Venue of Fatu Rimbart dated November 16, 2017 |
| Exhibit J-5 | Judgment of Conviction for Fatu Rimbart dated April 23, 2018 |
| Exhibit J-6 | <u>N.J.S.A. 40A:9-2.1</u> |
| Exhibit J-7 | Job Specification Family Service Worker |
| Exhibit J-8 | Essex County Standards of Conduct policy |
| Exhibit J-9 | Written Reprimand for Fatu Rimbart dated February 3, 2014 |
| Exhibit J-10 | Notice of Minor Disciplinary Action – 5-day suspension for Fatu Rimbart dated February 29, 2015 |
| Exhibit J-11 | Preliminary Notice (31-A) dated April 4, 2016 |
| Exhibit J-12 | Final Notice (31-B) dated June 9, 2016 with Settlement Agreement dated May 16, 2016 |
| Exhibit J-13 | CBA (added on date of hearing-November 26, 2018) |