



STATE OF NEW JERSEY

In the Matter of Durell McClendon
 New Jersey Veterans Memorial
 Home - Vineland, Department of
 Military and Veterans Affairs

**DECISION OF THE
 CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2018-3470
 OAL DKT. NO. CSV 09508-18

ISSUED: JANUARY 29, 2020 BW

The appeal of Durell McClendon, Senior Food Service Handler, New Jersey Veterans Memorial Home - Vineland, Department of Military and Veterans Affairs, removal effective May 26, 2018, on charges, was heard by Administrative Law Judge Kathleen M. Calemno, who rendered her initial decision on December 18, 2019 reversing the removal. Exceptions and a reply to exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and replies, the Civil Service Commission (Commission), at its meeting on January 29, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Durell McClendon. The Commission further orders that appellant be granted back pay, benefits, and seniority from the first day of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned and 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.

The Commission further orders that counsel fees be awarded to the attorney for appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees 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* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay and counsel fees 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 29TH DAY OF JANUARY, 2020



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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and
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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 09508-18

AGENCY DKT. NO. 2018-3470

**IN THE MATTER OF DURELL MCCLENDON,
NEW JERSEY VETERANS MEMORIAL
HOME, VINELAND, DEPARTMENT OF
MILITARY AND VETERANS AFFAIRS.**

William A. Nash, Esq., for appellant Durrell McClendon, (Nash Law Firm, L.L.C., attorneys)

Paul Nieves, Deputy Attorney General, for respondent, New Jersey Veterans Memorial Home, Vineland Department of Military and Veterans Affairs, (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: November 4, 2019

Decided: December 18, 2019

BEFORE KATHLEEN M. CALEMMO, ALJ:

STATEMENT OF THE CASE

The appellant, Durrell McClendon (McClendon), appeals his removal from the New Jersey Veterans Memorial Home, Vineland, Department of Military and Veterans Affairs, (Veterans Home), effective May 26, 2018, for allegedly intimidating a co-worker because of her alleged involvement as a witness in his prior disciplinary action. Charges presented include N.J.A.C. 4A:2-2.3(a)(6) - conduct unbecoming a public employee; and N.J.A.C.

4A:2-2.3(a)(12) - other sufficient cause. McClendon is also charged with violating the following sections of the New Jersey Department of Military and Veterans Affairs Corrective and Disciplinary Booklet – C25 and E-1.

PROCEDURAL HISTORY

On May 24, 2018, the Veterans Home issued a Final Notice of Disciplinary Action (FDNA) sustaining the charges and removing the appellant. McClendon appealed his removal and the matter was transmitted to the Office of Administrative Law, where it was filed on July 5, 2018, as a contested case. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. A hearing was conducted in this matter on June 13 and June 14, 2019. The record closed after the parties submitted written closing briefs.

FACTUAL DISCUSSION AND FINDINGS

Based on the testimony of the witnesses and examination of the documentary evidence, I **FIND** the following **FACTS** are undisputed:

McClendon had been a food service worker for the Veterans Home since 2013. On October 6, 2017, McClendon's shift ended early due to an approved leave. After finishing his assigned duties, McClendon stood in the hallway, outside the kitchen, for a few minutes engaging with co-workers while he waited for his shift to end. According to McClendon's timecard for October 6, 2017, McClendon's shift began at 5:55 a.m. and ended at 11:03 a.m. (R-I.)

The hallway area where McClendon was standing is monitored by a camera. The camera depicted a busy hallway with staff going to and from the kitchen and the employee breakroom. (R-L.) There was no audio recording. While standing in the hallway, outside the kitchen, McClendon encountered a co-worker, Michelle Glenn (Mrs. Glenn), who was just starting her shift. They engaged in conversation from 11:00:33 a.m. until 11:02:27 a.m., when Mrs. Glenn entered the kitchen.

Mrs. Glenn did not report this brief encounter with McClendon to her supervisors and her undisputed testimony is that she had no intention of ever reporting it.

On October 2, 2017, the Veterans Home served a Preliminary Notice of Disciplinary Action on McClendon seeking removal for an altercation that occurred in the dining hall on April 27, 2017, wherein McClendon was accused of using an expletive. Mrs. Glenn was a witness to the April incident and had been compelled to give a written statement.

The October 6, 2017, exchange between McClendon and Mrs. Glenn in the hallway, outside the kitchen, involved a discussion about Mrs. Glenn's written statement from the April incident and whether she had accused McClendon of cursing.

On May 24, 2018, the Veterans Home issued a FNDA (R-A) for the October 6, 2017, incident wherein it alleged as follows:

On 10/16/17 at approximately 11:00 a.m., you waited outside the main entrance to the food service kitchen for a co-worker who had just reported to work. You approached this co-worker and began questioning her about a statement she provided for a disciplinary investigation into an incident that resulted in removal charges against you. Several days later, you approached this co-worker's husband, who is also an employee, in front of the facility's Cafe and in the presence of other employees. You began questioning him about his wife's statement and said that you got "in trouble" because of her, and that you were "disappointed."

The FNDA listed the following sustained charges: N.J.A.C. 4A:2-2.3(a)(6) - conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12) - other sufficient cause, including violating sections C25 and E-1 of the New Jersey Department of Military and Veterans Affairs Corrective and Disciplinary Booklet.

Testimony

Respondent

Derick I. Glenn (Glenn), was the senior activity therapist at the Veterans Home. Glenn is married to Mrs. Glenn, who is also employed by the Veterans Home.

On November 16, 2017, at the request of Maryann Brown (Brown), the Director of Personnel for the Veterans Home, Glenn provided a written statement about an exchange he had with McClendon. As directed, Glenn wrote that he was approached by McClendon while eating at a café on the premises of the Veterans Home. (R-E.) McClendon appeared to be upset and he questioned Glenn about his wife's written statement from an April incident that caused him to be disciplined. Id. Glenn wrote that he told McClendon that he did not appreciate him speaking about his wife; after which, McClendon told him that he was going to question Mrs. Glenn about her statement. Id.

After refreshing his recollection by reading his statement, dated November 16, 2017, Glenn believed his exchange with McClendon occurred in early November 2017. Glenn also recalled that prior to Brown asking him about his encounter with McClendon, he was first approached by William Dantine (Dantine), the cook in the facility's kitchen, who asked him whether he had been approached by McClendon.

Glenn described his encounter with McClendon by stating that as he was walking by the café, McClendon approached him and told him he was disappointed with Glenn's wife for writing something about him in a statement. He recalled that McClendon was visibly upset and concerned about what his wife had allegedly written.

On cross-examination, Glenn responded that his encounter with McClendon occurred several weeks before he wrote his November 16, 2017, statement to the Director of Personnel. His encounter with McClendon occurred during business hours in front of Johnny Ray's Café, a luncheonette located on the premises of the facility, frequented by staff and residents. The café was crowded, making it possible that their conversation was overheard by other patrons. Glenn recalled McClendon's demeanor as being upset but

not threatening. McClendon did not act in a way that signaled a need for Glenn or any other patron in the area to call for security. The encounter was brief, lasting less than five minutes. Glenn expressed that he did not feel intimidated, harassed, or offended. He described McClendon as being disappointed by what he believed Mrs. Glenn had written about him. The specifics of Mrs. Glenn's statement were never addressed. Glenn did not feel it was appropriate for McClendon to talk with his wife about her April statement.

On re-direct examination, Glenn stated that the look on McClendon's face, conveyed to him that McClendon was visibly upset. McClendon did not press Glenn for any response but asked him about what his wife had written.

On re-cross examination, Glenn stated that he worked at the facility with McClendon and they shared about a dozen conversations with each other that had nothing to do with his wife's statement at issue herein.

William Dantine, is a head cook three with the Veteran's Home; he held that position for approximately four years. On October 23, 2017, Dantine was informed that there had been a discussion between McClendon and Mrs. Glenn and a conversation between McClendon and Mr. Glenn. After confirming with Mrs. Glenn that she had spoken to McClendon, he called Brown in Administration to ask whether it was egregious enough to warrant an action against McClendon. Dantine believed that three or four employees told him about the exchange between Mrs. Glenn and McClendon. He was unable to recall any names.

At Brown's direction, Dantine prepared a hand-written statement that he gave to the Director of the Department, Neal Granato. (R-G.) Dantine recalled speaking to Mrs. Glenn one or two days before he wrote his statement on November 12, 2017. Mrs. Glenn told him that McClendon met her at the entrance to the kitchen when she was arriving for work and questioned her about her statement and accused her of lying. She told Dantine that McClendon intimidated her. When Mrs. Glenn was relaying what occurred to Dantine, she appeared to still be visibly shaken by her encounter with McClendon.

The incident that was the subject of Mrs. Glenn's written statement involved a heated exchange that occurred in April 2017, in the kitchen between Dantine and McClendon. Mrs. Glenn was a witness to the exchange.

On cross-examination, Dantine admitted that his statement is based on what other employees told him; he had no personal knowledge of the events described. (R-G.) Dantine used quotation marks in his statement only to reflect the statements he overheard from others. He overheard kitchen staff talking but could not remember the names of the employees to whom he was attributing the statements. Not knowing if this information was based on rumors, Dantine went to Mrs. Glenn to investigate whether the rumors were true. Dantine testified that Mrs. Glenn told him McClendon intimidated her, but he did not write anything in his statement about intimidation.

While stating that he had no animosity towards McClendon, in April 2017, Dantine was involved in a heated exchange with McClendon wherein McClendon allegedly questioned his authority and accused him of abusing his power. That was the only incident that Dantine could recall.

On re-direct examination, Dantine believed that it was his obligation to report to his supervisor what Mrs. Glenn told him about her encounter with McClendon. Dantine explained that the quotation marks in his statement refer to the statements Mrs. Glenn told him. (R-G.)

On re-cross examination, Dantine clarified that he wrote in his statement that Mrs. Glenn told him that McClendon accused her of changing her statement because "Neal" made her change it. (R-G.) "Neal" referred to Neal Granato, Director at the Veteran's Home.

Michelle Glenn, is an eight-year employee with the Veteran's Home where she works in the kitchen as a food service handler. Mrs. Glenn works the 11:00 a.m. to 7:30 p.m. shift. She is familiar with McClendon because they both worked in the kitchen and their shifts overlapped.

On October 6, 2017, Mrs. Glenn reported to work a few minutes before 11:00 a.m. and encountered McClendon as she was about to enter the kitchen. He was standing outside the kitchen door. She described his voice as loud and she felt as if he was scolding her. McClendon wanted to know what she put in her previous statement about an event that happened in April 2017, because he had been charged with using profanities. McClendon told her that their boss, Granato, said she wrote it on her statement. McClendon said it was her fault, if he gets fired. Mrs. Glenn told him that she was not permitted to discuss her statement, but she said it was not true. She was upset by McClendon's accusations against her.

Mrs. Glenn stated that she heard from other co-workers that McClendon was talking about her behind her back and saying that she was a liar and a backstabber. She felt that the personal attacks were unjust because she never wrote that McClendon cursed in her statement about the April incident. It really bothered her that McClendon was making her out to be a bad person and attacking her character.

After McClendon confronted her in the hallway, she did not report it. Weeks later, Mrs. Glenn was summoned to the office of the head of personnel, Brown, who told her that somebody reported an incident and she needed to write a statement. Brown directed Mrs. Glenn to write a statement about her encounter with McClendon.

Prior to talking to Brown, Dantine approached Mrs. Glenn because he heard about her encounter with McClendon. He wanted to know how she felt. After talking to Dantine, Mrs. Glenn was summoned to Brown's office and told to write a statement about the incident with McClendon. (R-F.)

Mrs. Glenn stated that it was never her intention to get McClendon fired. The situation was stressful, and she felt like she was being bullied. Mrs. Glenn stated she wanted to give McClendon her April statement so he would know the truth, but she held back because she had been warned about discussing her statement. When McClendon told her that his information came from Neal, she did not believe him. By using Neal, Mrs. Glenn thought that McClendon was trying to gain leverage over her so she would admit what was in her statement.

On cross-examination, Mrs. Glenn stated that McClendon called her over to him as she was about to enter the kitchen. She voluntarily walked over to him and agreed to speak with him. They conversed about what McClendon believed she put in her April statement. Mrs. Glenn had no idea where McClendon had gotten the information about the falsehoods he believed were in her statement.

In her November 18, 2017, written statement about the October 6, 2017, encounter with McClendon, Mrs. Glenn wrote that McClendon asked her if she wrote that he was cussing in her statement about the April incident. She told him no. (R-F.) When McClendon told her that Neal, their boss, told him that she wrote it, she questioned why Neal would say such a thing. (R-F.)

During her direct testimony, Mrs. Glenn stated that McClendon was loud, scolding, and yelling but she did not include any of that information in her November 2017, written statement. (R-F.) Mrs. Glenn explained that she only wrote the facts, not her feelings. She stated that the harassment did not stem from just the incident in the hallway; she felt harassed by the environment in the kitchen. Mrs. Glenn acknowledged that there was no physical or threatening encounter with McClendon, and she was free to walk away and end the conversation at any time. They were in a public space and with the start of the new shift, the hallway was busy. She was sure their co-workers could hear their conversation, but no one stopped. Everyone was just going about their own business.

According to Mrs. Glenn, if she had wanted to hurt McClendon, she would have filed an immediate report. She never reported the October 6, 2017, encounter with McClendon, it was her supervisor who made her write a statement three or four weeks after the event. Brown called her into her office, handed her a form, and asked her for a statement. Mrs. Glenn recalled that she gave Brown her written statement the next day.

Mrs. Glenn had been told by her supervisors not to discuss her statements. Because Neal is a supervisor, Mrs. Glenn could not fathom why he would discuss her April statement with McClendon.

Mrs. Glenn confirmed that there was a lot of rumors in her workplace. She also stated that when she learned from her husband that McClendon had approached him about her April statement, she was upset that her co-workers would think she wanted to get McClendon fired. The next day, Mrs. Glenn approached McClendon and told him to stop talking about it. Mrs. Glenn believed that McClendon had crossed a line going to her husband and not letting it drop.

On her November 18, 2017, statement Mrs. Glenn wrote, "I told him there are a lot of other things I could get him in trouble for that are worse than cussing, if I were that type of person." (R-F.) On the statement, the above text was bracketed with two stars. Id. Mrs. Glenn stated that she did not highlight that sentence with a bracket and stars and had no idea who wrote on her statement.

Mrs. Glenn confirmed that Dantine approached her and asked whether the rumors were true. The atmosphere in the kitchen was upsetting to her. Nothing was ever directly said to her, but she felt that she was being targeted and accused of something she did not do.

Mrs. Glenn described her relationship with McClendon as co-workers and she considered him to be a good employee.

On re-direct, Mrs. Glenn stated that she worked the lunch shift with McClendon because their shifts overlapped. McClendon would make general comments in her presence about "back stabbing people" and "liars." She felt that he was directing these comments at her. She stated that she never reported anything but only gave statements when she was directed to do so by her supervisors.

Neal Granato (Neal or Granato) is the food service director at the Veterans Home, responsible for overseeing and operating the food service department. He supervised both McClendon and Mrs. Glenn. McClendon worked under his supervision for approximately five and one-half years.

He learned of the October 6, 2017, incident from Brown. She informed him that Dantine, the head cook, advised her that McClendon had approached both Mr. Glenn and Mrs. Glenn about Mrs. Glenn's April 2017, statement. Granato proceeded to collect statements from Mr. and Mrs. Glenn and he instructed them not to talk about their statements while the investigation was on-going.

Granato stated that he never discusses statements written by employees with other employees. Said statements are intended to be confidential until a hearing.

According to McClendon's timecard, McClendon checked out of work at 11:03 a.m. on October 6, 2017. (R-H.) McClendon's usual shift is 6:00 a.m. until 2:30 p.m. Once an employee finishes his or her shift, they are supposed to leave the premises. The Employee Code of Conduct at paragraph 21 provides as follows:

Employees who have completed their tour of duty/shift assignment are not permitted to remain on the worksite, unless they are functioning in a volunteer capacity or have been assigned to be at the facility by their immediate supervisor. Off-duty employees are not permitted to visit on-duty employees or loiter.

[R-I.]

On cross-examination, Granato stated that he was tasked with investigating the situation with McClendon and he reviewed the Code of Conduct. After refreshing his recollection by reviewing Glenn's statement, (R-E), Granato recalled that he did not have direct contact with Glenn. Brown received the email statement from Glenn, dated November 16, 2017. Id. Mrs. Glenn's statement, dated November 18, 2017, was written on the Facility Reporting Incident Data & Analysis Yield (FRIDAY) form. Granato recalled that he provided her with the form to complete. On November 29, 2017, Granato sent a letter to McClendon asking him to provide a statement about the incidents that occurred in October, first with Mrs. Glenn and a few days later with Glenn. (R-C.)

Petitioner

Durell McClendon is a food service worker. He started working for the Veteran's Home in 2013. His shift was from 6:00 a.m. until 2:30 p.m., but on October 6, 2017, McClendon ended work at 11:00 a.m. to pick up his daughter from school.

McClendon was involved in an incident in April 2017, in the dining room with Dantine, the cook, and another food service worker. Discipline from that incident was served on McClendon on October 2, 2017. After receiving the disciplinary notice, McClendon went to Granato for an explanation. Granato told him that someone had said McClendon used profanity in the dining room. The only other people who wrote statements about that incident were Mrs. Glenn and Dantine. McClendon stated that he did not curse in the dining room during the incident in April, but Dantine did.

The video (R-L) was played during McClendon's direct testimony. McClendon described what he saw on the video. He identified Mrs. Glenn, who became visible on the screen at 10:56 a.m. walking in the hallway; she turned left and entered the ladies' bathroom. The camera that is recording is positioned in the hallway outside of the kitchen door; its viewing area shows the hallway, the entrance to the employee breakroom, and the door to the kitchen. There were employees walking in and out of the doors and going to and from the breakroom. McClendon identified himself at 10:58:55 a.m. standing outside of the kitchen door talking with co-workers. He identified four staff members in the area where he was standing. Because he was leaving early that day, he was passing time until he could clock out at 11:00 a.m. He was not in a hurry because he did not have to pick up his daughter until 11:30 a.m. McClendon was just standing against the wall engaging with other staff members. The time clock was located around the corner from where McClendon was standing. The time on the video recording clock was 10:59:41 a.m. It was against policy to clock out before your designated time, so McClendon had to wait until 11:00 a.m. before he could clock out. Mrs. Glenn came back into view at 11:00:24. At 11:00:33, Mrs. Glenn was seen waiving to co-workers in the breakroom. McClendon is standing directly across the hall from her. At 11:00:37, the video shows McClendon and Mrs. Glenn talking to each other. At 11:00:56, two employees walk pass them to enter the kitchen. Mrs. Glenn remained outside the kitchen talking to McClendon.

At 11:00:59 a.m., Mrs. Glenn stepped closer to McClendon who did not move but remained standing with his arms crossed. McClendon described himself as relaxed and stated that they were talking about the April incident. There was no audio recording, but McClendon testified that he asked Mrs. Glenn whether she wrote that he cursed on her April statement.

McClendon stated that the accusation that he was the one who cursed in the dining hall took him by surprise. After the April 2017 incident, McClendon recalled having a conversation with Mrs. Glenn about why Dantine was cursing at him.

When the clock on the video showed 11:01:20, Mrs. Glenn had moved so they were standing shoulder to shoulder talking. McClendon stated that Mrs. Glenn told him that she was questioned four to five times and that the supervisors were trying to use her to get McClendon in trouble. McClendon never asked her to rewrite her statement and never made any threats against her. When the clock shows 11:01:47, there are still other people in the hallway and one worker identified as "Libby" in the breakroom behind them, as McClendon and Mrs. Glenn continue to stand next to each other and talk. At 11:01:55, Mrs. Glenn is seen making gestures with her arms. McClendon stated that she was telling him that she did not put anything about cussing in her statement. At 11:02:11, Mrs. Glenn backs away, across from McClendon, towards the kitchen door to make room for an employee pulling a pallet. McClendon moved toward Mrs. Glenn to get out of the way of the man pulling the pallet. By 11:02:18, McClendon was seen back leaning against the wall across from the kitchen door and Mrs. Glenn is seen walking inside the kitchen. At 11:02:27, Mrs. Glenn is no longer visible on the video. The kitchen door is shut at 11:02:29. At 11:02:32, McClendon is seen peeking through the plastic windows of the kitchen door. He stated that a different co-worker identified as "Oriany" had been making faces at him through the door. Staff members are walking in the hallway and going in and out of the kitchen. At 11:02:55, McClendon is seen walking in the kitchen; he stated that he was talking to Oriany. McClendon stated that he stayed in the doorway for only a second before leaving to clock out. At 11:03:04, McClendon is shown walking down the hallway away from the kitchen. After clocking out, McClendon proceeded out the door and did not go past the kitchen on his way out of the building.

McClendon stated that he never raised his voice to Mrs. Glenn and never made any threatening comments. His intention in talking to her was to make sure she did not state he cursed so he could potentially use her as a witness at his disciplinary hearing for the April incident. There was nothing out of the ordinary about his conversation with Mrs. Glenn. After their conversation, he was relieved by her statement. His relief lasted about a month until he was told on November 28, 2017, to give a statement about the October conversation.

On November 29, 2017, Granato handed McClendon a typed written letter and told him that he had to write a statement about what happened between McClendon and Mrs. Glenn on October 6, 2017, and a statement about what happened between McClendon and Mr. Glenn a few days later. (R-C.) McClendon filled in his statement on the form and gave it to Granato. (R-D.) In the statement, he wrote that he asked Mrs. Glenn if she heard him curse and she told him no but that she got called upstairs to the supervisors' offices about three or four times to discuss the April incident. McClendon wrote that he found it odd that none of the supervisors tried to speak with him when he was the one facing removal. He also wrote that Mrs. Glenn told him she did not know why he was facing removal charges.

McClendon stated that he wrote things in his statement in reaction to the email he received from Granato. (R-C.) After being directed to write the statements, McClendon and Mrs. Glenn were separated at work; they were intentionally assigned different areas of the facility so they would not be working together.

McClendon stated that while eating in the café with Brian, a food service worker, and Lynn, a certified nurse assistant (CNA), Glenn passed their table. Brian, who was also facing discipline for the April incident, asked Glenn if his wife had anything to do with their disciplinary actions. The conversation took place in a public space that was occupied by other patrons. McClendon stated that no one raised their voices.

McClendon stated that he sometimes stayed after his shift ended to talk to his union representative. Granato told him that he could only talk to his union representative

during his breaktime or after his shift ended. Sometimes he stayed for a few minutes just to talk to his co-workers.

McClendon was not aware of any prohibitions that prevented him from talking to someone about statements they wrote or asking someone to be a witness in a disciplinary matter. He knew of no policy or procedure that prevented him from speaking to Mrs. Glenn about his disciplinary hearing.

McClendon considered his relationship with Dantine to be friendly but that it changed after the April incident.

Granato was not present during the interaction between McClendon and Mrs. Glenn or the interaction between McClendon and Mr. Glenn.

On cross-examination, McClendon stated that he was told someone had said he was cursing in the dining room during the April incident. McClendon believed it could only have been one of two people, Mrs. Glenn or Dantine. He did not want to confront Dantine, so he asked Mrs. Glenn. He felt comfortable asking Mrs. Glenn. Dantine is not McClendon's immediate supervisor but he has supervisory authority over him as the cook.

McClendon spoke to Mrs. Glenn at the very end of his shift on October 6, 2017, after he had completed his duties for the day. McClendon's timecard for October 6, 2017, showed that he clocked out at 11:03 a.m. (R-H.)

During cross-examination, the video was started at 10:58:45 and began when McClendon walked out through the kitchen doors. McClendon was asked whether from his position, he could see the other corridor and he stated that he could not. At 10:59:28, McClendon is shown standing at the door of the breakroom, looking down the hallway. Although McClendon was done with his duties, it was still too early to check out and he did not have to pick up his daughter until 11:30 a.m.

McClendon admitted that his conversation with Mrs. Glenn on the morning of October 6, 2017, was about the April 2017 incident. Seconds after Mrs. Glenn entered the kitchen, the video showed McClendon peering in the kitchen door window and briefly entered the kitchen, without closing the door behind him. According to the video, McClendon remained standing in the kitchen doorway from 11:02:58 until 11:03:04.

On re-direct, McClendon confirmed that after Mrs. Glenn entered the kitchen, he did not see her again that day. He opened the kitchen door and stepped in to speak with his co-worker who had been making faces at him through the kitchen door window. McClendon also confirmed that there were other staff present, who were close enough to hear his conversation with Mrs. Glenn.

On re-cross examination, McClendon reiterated that he did not follow Mrs. Glenn into the kitchen. McClendon did not immediately leave after Mrs. Glenn went into the kitchen but stayed for a few seconds longer. During that time, he opened the kitchen door and stepped inside without closing the door because he was talking with a co-worker.

ANALYSIS AND ADDITIONAL FINDINGS OF FACT

To resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness considering its rationality, internal consistency, and manner in which it “hangs together” with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Also, “[t]he 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) (citation omitted).

Respondent offered the testimony of Dantine and Granato; neither witness had any first-hand knowledge. Dantine is an interested party. He was a party to the April

2017, incident where disciplinary charges were brought against McClendon. He instigated this matter by confronting Glenn and Mrs. Glenn and reporting to supervisor Brown. While having no first-hand knowledge, he provided a statement to Brown putting sentences in quotation marks and keeping his informants anonymous. (R-G.) During his testimony, he stated that he contacted Mrs. Glenn to confirm rumors that were circulating in the kitchen. Dantine testified that Mrs. Glenn was shaking and appeared visibly upset when he asked her about the October 6, 2017, confrontation with McClendon. I do not accept his observation about Mrs. Glenn's state of mind as persuasive. Mrs. Glenn testified that the rumors and innuendos occurring in the workplace were more distressing to her than the one incident with McClendon. Moreover, Dantine simply wrote in his statement that "Michelle seemed to confirm what others had told me." Id. He never mentioned anything about her being upset.

Granato was McClendon's and Mrs. Glenn's direct supervisor. His involvement only consisted of collecting statements, but his recollection was faulty. He testified that he requested statements from Mr. and Mrs. Glenn but according to Mr. and Mrs. Glenn, Brown was the supervisor, who requested their statements. Granato was only involved with McClendon and he requested McClendon's written statement on November 29, 2017, which was more than ten days after Brown had received the Glenns' statements. (R-C and D.) Granato testified generally that he never discussed the contents of employees' statements because they are confidential. However, respondent offered no testimony about whether McClendon was informed about a prohibition from talking with other employees about their statements. Mrs. Glenn testified that she was told not to discuss her statement. Mr. Glenn testified that he felt it was inappropriate. Respondent did not introduce a rule, policy, or procedure on this issue.

Based upon due consideration of the testimonial and documentary evidence presented at this hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, and to review the video recording, I **FIND** the following as **FACTS**:

Mrs. Glenn had a two-minute conversation with McClendon in a public hallway outside the kitchen door during business hours on October 6, 2017. McClendon's shift

was ending at 11:00 a.m. and Mrs. Glenn's shift was starting at 11:00 a.m. McClendon asked Mrs. Glenn if she accused him of using profanity in her statement about an April 2017, incident. On October 2, 2017, McClendon was served with a Preliminary Notice of Disciplinary Action for using profanities in the dining hall during an altercation that occurred in April 2017. Mrs. Glenn was a witness to the altercation. McClendon left the area and clocked out of work on October 6, 2017, at 11:03 a.m.

Mrs. Glenn never reported her conversation with McClendon to her supervisor. In the Employee Code of Conduct (R-I) an employee "having knowledge of any unusual incidents or violations of the standards set forth shall report all such matters to their immediate supervisor without delay to ensure a timely administrative intervention."

McClendon had a conversation with Glenn outside Johnny Ray's Café, during lunchtime. None of the witnesses could recall the date of the conversation. The topic of Mrs. Glenn's April statement in relation to pending removal charges against McClendon and another participant were briefly discussed. Glenn never reported this conversation to a supervisor.

Dantinne, who was directly involved in the April 2017 incident, approached Mr. Glenn and Mrs. Glenn, separately, to confirm if certain rumors about McClendon were true. They both confirmed that they had been approached by McClendon, who wanted to know if Mrs. Glenn accused him of cursing in her statement from the April 2017, incident. Dantinne reported this information to his supervisor, Brown.

On November 16, 2017, Glenn submitted a statement to Brown. (R-E.) Glenn described McClendon as "upset."

On November 18, 2017, Mrs. Glenn submitted a statement to Brown on the FRIDAY Form. (R-F.) In her statement, she wrote that while standing outside the door to the kitchen, McClendon asked her if she put that he cursed on her statement regarding the incident with Dantinne. He also told her he was up for removal and that their supervisor, Neal, told him she said it. She "told him, it was really none of his business" but she also told him that she never said that he cursed and could not understand why

Granato would say that she did. She had also learned from her husband that he had been questioned by McClendon outside of Johnny Ray's Café. This upset her because she did not want people to think that she wanted to get McClendon fired. When she went back to work, Mrs. Glenn approached McClendon and told him to stop talking about it.

Glenn and Mrs. Glenn testified consistently with their statements. However, Mrs. Glenn added that she was upset by her encounter with McClendon and she felt as if he was scolding her. There was no indication from watching the video that McClendon adopted a menacing or threatening posture or demeanor. In addition, in the video, Mrs. Glenn walks closer to McClendon, she was never seen shying away from him or cowering. Mrs. Glenn also expanded on her feelings to say that it was not this one encounter with McClendon that upset her but the overall rumors being spread in the workplace that were distressing to her.

Neither Glenn or Mrs. Glenn expressed any fear, intimidation, or threats from McClendon.

LEGAL ANALYSIS AND CONCLUSIONS

The appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline, depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

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

Here, the respondent charged appellant with violations of: N.J.A.C. 4A:2-2.3(a)(6) - conduct unbecoming a public employee; and N.J.A.C. 4A:2-2.3(a)(12) - other sufficient cause, including violations of the Corrective and Disciplinary Action Booklet: C-25 – threatening, intimidating, coercing, or interfering with fellow employees on State property; and E-1 – violation of a rule, regulation, policy, procedure, order, or administrative decision.

In his defense, McClendon asserted that he was never told he could not discuss disciplinary statements with his co-workers. He also asserted that he was surprised by the October 2, 2017, disciplinary statement wherein he was accused of using profanity because, after the incident, he discussed Dantine's use of profanity with Mrs. Glenn. It was his intention to talk to Mrs. Glenn and maybe ask her to be a witness in his favor.

The Veterans Home charged McClendon with "conduct unbecoming a public employee" under N.J.A.C. 4A:2-2.3(a)(6). The charge is considered an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic 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." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). 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) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

In this instance, the video surveillance evidence depicted a conversation between two employees in a public space that lasted approximately two minutes. The other employees seen in the video continue to attend to their own business or exchange greetings. There is nothing from the video of the encounter between McClendon and Mrs. Glenn on October 6, 2017, that showed conduct that had any tendency to adversely affect the morale or efficiency of the workplace. Mrs. Glenn did not report the incident

and she testified that she had no intention of ever reporting the incident. After finishing his duties for the morning, McClendon remained in the hallway outside of the kitchen door for less than five minutes before clocking out of work at 11:03 a.m.

Based upon my findings, I **CONCLUDE** that there was nothing about the brief encounter between Mrs. Glenn and McClendon in a public space that could be viewed as violating any implicit standard of behavior or that would harm the moral and efficiency of the workplace.

McClendon and Glenn also had a brief encounter at a lunchtime café. The café was crowded but the encounter did not create a disturbance. Glenn did not report the incident to his supervisor. Based upon my findings, I **CONCLUDE** that there was nothing about the lunchtime encounter between Glenn and McClendon that that could be viewed as violating any implicit standard of behavior or that would harm the moral and efficiency of the workplace.

The Veterans Home supported this charge by stating that other employees came forward and reported these encounters, thereby showing a negative impact on morale and an undermining of authority. Those unidentified employees were used by Dantinne, an interested party, as justification for his investigation. Dantinne also stated that he investigated after hearing rumors. Therefore, the basis for the charge is workplace rumors. Based upon my findings, I **CONCLUDE** that rumors from unidentified employees is not enough to support a disciplinary charge against a civil service employee.

Therefore, I **CONCLUDE** that the Veterans Home did not produce sufficient evidence to support the charge of conduct unbecoming a public employee under N.J.A.C. 4A:2-2.3(a)(6) by a preponderance of the credible evidence. The charge is **DISMISSED**.

McClendon was also charged with violation of N.J.A.C. 4A:2-2.3(a)(12) – other sufficient cause. This charge is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. In this matter, the Veterans Home asserts that McClendon violated multiple code of conduct rules. It must be noted, however, that the

FNDA does not make any reference to these violations. While all employees must adhere to the code of conduct, the specific charges against McClendon are a violation of C-25 for threatening, intimidating, coercing or interfering with a fellow employee and with a violation of E-1 for violating a rule, regulation, policy, order, or administrative decision. No specific rule, regulation, or policy were provided.

The definitions of coercion and intimidation are easily understood. As defined by Merriam Webster,¹ to coerce is to compel an act or choice by force or threat and to intimidate is to produce a feeling of fear. The alleged victims of McClendon's actions were Glenn and Mrs. Glenn. Glenn testified that he was not intimidated or coerced by McClendon. Mrs. Glenn testified that she was asked about her statement. She never stated that she was frightened by McClendon; she testified that she was upset. The state of being upset does not equate with a charge of intimidation or coercion. There is no testimony that McClendon threatened the parties or intimidated them into doing something against their will. Therefore, I **CONCLUDE** that the Veterans Home did not produce sufficient evidence to show a violation of C-25.

The charge against McClendon for violating E-1 is a catch all provision for violating any rule, regulation, or policy. In this instance, the Veterans Home contends that McClendon violated the policy against discussing disciplinary statements. This policy has never been identified as a written prohibition. Moreover, Granato testified and he did not state that he warned McClendon about any such discussions. Granato provided McClendon with the FRIDAY form to write his statement and there are no such warnings on the form. Without more specifics, this charge is vague and unsupported by the credible evidence. Therefore, I **CONCLUDE** that the Veterans Home did not produce sufficient evidence to show a violation of E-1.

Therefore, I **CONCLUDE** that the Veterans Home did not produce sufficient evidence to support the charge of other sufficient cause under N.J.A.C. 4A:2-2.3(a)(12) by a preponderance of the credible evidence. The charge is **DISMISSED**.

¹ Found at <https://www.merriam-webster.com/dictionary/commission>, last visited December 15, 2019.

Here, the respondent failed to meet its burden as to any of the charges brought against McClendon under the FNDA, dated May 24, 2018. Therefore, I **CONCLUDE** that no penalty shall be assessed.

ORDER

Accordingly, it is **ORDERED** that the disciplinary action noted in the FNDA, dated May 24, 2018, against McClendon, is hereby **REVERSED** consistent with the decision set forth above. It is further **ORDERED** that McClendon is entitled to be reinstated and due any other benefits or back pay that would have otherwise accrued after May 26, 2018.

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.

December 18, 2019
DATE

Kathleen M. Calem
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency:

December 18, 2019

Date Mailed to Parties:

December 18, 2019

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WITNESSES

For Appellant:

Durell McClendon

For Respondent:

Derick Glenn

William Dantine

Michelle Glenn

Neal Granato

EXHIBITS

For Appellant:

None

For Respondent:

- R-A Final Notice of Disciplinary Action, dated September 22, 2016
- R-B Withdrawn
- R-C November 29, 2017, memorandum from Granato to McClendon
- R-D November 29, 2017, statement from McClendon
- R-E November 16, 2017, statement from D. Glenn
- R-F November 18, 2017, statement from M. Glenn
- R-G November 12, 2017, statement from Dantine
- R-H Timecard
- R-I Employee Code of Conduct
- R-J Employee Code of Conduct Receipt
- R-K Corrective and Disciplinary Booklet
- R-L October 6, 2017, Surveillance Video