



STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Richard Morales,
Newark School District

CSC Docket No. 2020-2060

Request for Reconsideration

ISSUED: MARCH 13, 2020 (SLK)

The Newark School District, represented by Bernard Mercado, Esq., requests reconsideration of the attached decision rendered on January 15, 2020, that modified Richard Morales' removal to a 30 working day suspension and diversity training.

By way of background, Morales, a Supervising Plumber, was removed on charges of conduct unbecoming a public employee, insubordination, and other sufficient cause. Specifically, the appointing authority asserted that Morales made comments and engaged in conduct that demeaned, threatened or humiliated subordinate employee plumbers, he misused his authority by taking plumbers off a job and, on another occasion, removed plumbers from a job deliberately to "teach a lesson" to a Newark School District administrator, which resulted in sewage backing up in a school, and was insubordinate in using inappropriate language with threats of defiance against his superior officers and by ignoring a command to not interact with employees during a time when some of his duties were being reassigned. Morales appealed his removal to the Civil Service Commission (Commission) which transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. In his Initial Decision, the Administrative Law Judge (ALJ) recommended modifying the removal to a 30 working day suspension. In its decision, the Commission accepted and adopted the Findings of Facts and Conclusion as contained in the ALJ's Initial Decision as well as his recommendation to modify the removal to a 30 working day suspension. Additionally, the Commission ordered that the appointing authority send Morales

to diversity training. *See In the Matter of Richard Morales* (CSC, decided January 15, 2020).

In its request for reconsideration, the appointing authority states that the Initial Decision from the OAL was sent to the Corporation Counsel of the City of Newark, which is a separate public entity than the Newark School District. Therefore, the appointing authority never had the opportunity to submit exceptions.

Concerning its exceptions, the appointing authority presents that Morales was recorded, and openly admitted, to making statements to subordinate workers that constitute threats, sexually demeaning remarks and overall disparaging comments in nature against both subordinate employees and the appointing authority's Board, including directing a worker to intentionally allow an equipment failure to occur which would have created a health and safety hazard to children. Specifically, Morales was recorded saying threats and sexually demeaning remarks referencing two other subordinates, issuing a directive to allow a sewage back up to occur instead of fixing the problem, stating an inappropriate sexual comment to a subordinate, making comments that undermined the Board's authority, and made a disparaging comment about the way a subordinate looked. The appointing authority asserts that the ALJ incorrectly recommended that Morales's removal be modified to only a 30 working day suspension based on his belief that Morales was joking and did not have a prior disciplinary history. It argues that regardless of Morales's intent, these statements justify removal. The appointing authority argues that in a prior case, the Commission has upheld removal where an employee made threatening comments to his supervisor and co-worker and then claimed he never intended to fight. In that matter, the Commission noted that no prior disciplinary history was necessary to remove an employee where the actions are so serious that public safety concerns warrant removal. Further, despite the ALJ's recommendation to reduce the discipline merely because the victims were not present when Morales made remarks against them, the appointing authority cites a matter where the Commission held that an employee did not have to even be on duty to commit the unbecoming conduct and did not even have to make the threats directly to the intended targets and that such threats and use of profane language justified removal. Additionally, the appointing authority cites other cases where the Commission emphasized that threats necessitate termination, especially when made by a supervisor.

Moreover, it argues that the ALJ incorrectly found that Morales did not order the intentional failure of school equipment on one occasion which caused a sewage overflow and safety hazard to children, when Morales was explicitly recorded on a prior occasion giving the same ominous directive. The appointing authority argues that the Commission has consistently held that a public employee's destruction of public property standing alone is sufficient to warrant termination without the need for any prior discipline. The appointing authority contends that the ALJ's

recommendation deviated from the Commission's established "law" by recommending that the removal be reduced to a 30 working day suspension. Further, it argues that the reduced penalty undermines public policy which does not tolerate supervisors making threats or disparaging remarks about the sexuality, appearance or manners of subordinate public workers. The appointing authority believes that Morales's admitted statements contradict State and federal law that prohibit a hostile work environment or harassment in the workplace. It argues that, at minimum, any penalty less than a six-month suspension indicates that the Commission is open to tolerating and accepting such obviously unacceptable conduct in the work place.

In reply, Morales, represented by Anthony Pope, Esq., contends that the appointing authority has misconstrued and misrepresented its claim that Morales admitted to the alleged conduct in this case. While Morales admitted to making the statements that were recorded, these statements were not threats nor meant to be sexually demeaning or disparaging. Instead, Morales made these statements in jest or hyperbole to motivate his subordinates and the ALJ agreed and found at no time did these statements pose a threat. Additionally, contrary to the appointing authority's assertion, the ALJ found that Morales's action regarding a pump posed little risk of flooding as the appointing authority's main witness failed to mention that the pump in question was a backup pump and leaving the pump constantly running over the weekend with no water going through it was a fire hazard. The ALJ also found some of the testimony against Morales not credible, that there were gaping holes in the appointing authority's witnesses' testimony and Morales did not make sexually harassing statements or disparaging comments about appearance in the context of the statements. Further, the ALJ found that Morales was not insubordinate to his superiors as he did not make a statement directed to a superior. Additionally, the ALJ noted that in the past there had been a fair amount of bad jokes in the plumbing shop and that the public would expect such language in a plumbing shop while not interacting with the public. He presents that the ALJ was in the best position to judge the credibility of the witnesses and found most of the allegations were unsubstantiated. While the appointing authority might not agree with the ALJ's findings, it cannot rewrite what happened and claim that Morales admitted to the actions in question when that it not the case.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding.

In the instant matter, the appointing authority has met the standards for reconsideration. The appointing authority states that the ALJ's Initial Decision was not sent it and was sent to the wrong public entity. Therefore, it did not have a chance to timely file exceptions. As there is no evidence that contradicts the appointing authority's statement, the Commission shall grant reconsideration on that basis and shall consider the appointing authority's exceptions that have been submitted.

Regarding the merits of the case, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 N.J. 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor*, 158 N.J. 644 (1999) (quoting *State v. Locurto*, 157 N.J. 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A. 52:14B-10(c); Cavalieri v. Public Employees Retirement System*, 368 N.J. Super. 527 (App. Div. 2004). Nevertheless, upon review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. With regard to the standard for overturning an ALJ's credibility determination, *N.J.S.A. 52:14B-10(c)* provides, in part, that:

The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record.

See also N.J.A.C. 1:1-18.6(c); Cavalieri v. Public Employees Retirement System, 368 N.J. Super. 527 (App. Div. 2004). The Commission finds that in this case, this strict standard has not been met.

In this matter, the ALJ found that most of Morales's comments towards subordinate employees were in jest, at no time posed a threat, could not be considered sexual harassment based on the context and relationship of the parties, and/or were unsubstantiated and uncorroborated hearsay. Further, the ALJ found that although Morales advised a subordinate to leave a back-up pump unplugged while waiting for a part which would not arrive until after the weekend and that if the area flooded to blame it on someone else, there was little, if any, risk of flooding

under the circumstances and there was no harm caused by the decision. Additionally, the ALJ found that a claim that Morales ordered a subordinate not to work on a repair to teach an administrator a “lesson” was unsubstantiated, that there was no evidence that Morales directly supervised the tradesman in his shop in violation of a directive, and that Morales’s comments about employees “downtown” was not directed toward any superior and, therefore, not insubordination. The only charge that the ALJ upheld was a finding that Morales’s actions were unbecoming a public employee when he referred to a plumbing partner as “Jose’s bitch.” As the ALJ was in the best position to determine the credibility of the witnesses, the Commission does not find the ALJ’s determinations arbitrary, capricious or unreasonable in the context that these comments were made where it was essentially undisputed that there were not clearly established protocols for language to be used by plumbers or their supervisors, and there were no negative consequences based on appellant’s directives. Accordingly, there is no basis to disturb the ALJ findings. In its decision, the Commission noted that there was no indication that the appointing authority investigated this matter under any discrimination policy or regulations it had in place, and it recommended, that in the future, such matters be investigated as such policy proscribes.

Regarding the 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 also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In assessing the penalty in relationship to the employee’s conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual’s disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a “fixed and immutable rule to be followed without question.” Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

In this matter, the Commission notes that Morales does not have any prior disciplinary history. Further, in the context that Morales’s comments were made in a plumbing shop where past practices allowed for bad jokes and inappropriate language and there is no evidence that there had been any training or otherwise any guidance that such language would not be tolerated in the plumbing shop, the Commission does not find that Morales’s substantiated behavior was so egregious in nature to warrant removal or even a six-month suspension. Instead, in the context of these circumstances, the Commission finds that a 30 working day suspension is appropriate along with diversity training for the one sustained charge. With respect to the appointing authority’s arguments that the Commission’s decision

undermines public policy and conflicts with prior Commission decisions, as the Commission does not find that Morales committed the alleged acts except for the one sustained charge, the Commission's decision to reduce the penalty did not conflict with public policy nor prior Commission decisions.

ORDER

Therefore, the appointing authority's request for reconsideration is granted. However, the Commission reaffirms its January 15, 2020 decision modifying the removal to a 30 working day suspension and diversity training.

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 12th DAY OF MARCH, 2020



Deirdre L. Webster Cobb
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(App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this matter, while the penalty was modified, charges were sustained and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12*, counsel fees must be denied.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. Accordingly, the Commission modifies the removal to a 30 working day suspension. Additionally, the Commission orders that the appellant undergo diversity training upon his reinstatement. Pursuant to *N.J.A.C. 4A:2-2.10*, the appellant is entitled to receive mitigated back pay, benefits and seniority from the conclusion of the 30 working day suspension until the actual date of reinstatement. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties are encouraged to make a good faith effort to resolve any dispute as to back pay. However, under no circumstances should the appellant's reinstatement be delayed based on any dispute regarding back pay.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of 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 15TH DAY OF JANUARY, 2020

Deirdre L. Webster Cobb

Deirdre L. Webster Cobb
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Attachment



**State of New Jersey
OFFICE OF ADMINISTRATIVE LAW**

INITIAL DECISION

OAL DKT NO. CSV 05299-19

AGENCY REF. NO. CSC 2019-2707

**IN THE MATTER OF RICHARD MORALES,
NEWARK PUBLIC SCHOOL DISTRICT.**

**Anthony Pope, Esq., for appellant, Richard Morales (The Anthony Pope Law
Firm, attorneys),**

**Bernard Mercado, Esq., for respondent, Newark Public School District
(Kenyatta K. Stewart, Corporation Counsel, attorneys)**

Record Closed: November 6, 2019

Decided: December 18, 2019

BEFORE ERNEST M. BONGIOVANNI, ALJ:

STATEMENT OF THE CASE

Richard Morales (appellant/Morales) challenges the Final Notice of Disciplinary Action (FNDA) dated March 1, 2019 which determined that Morales engaged in conduct unbecoming a public employee, insubordination, and other sufficient causes, warranting removal of Morales from his office of plumbing supervisor.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13 to the Office of Administrative Law, where it was filed on April 17, 2019. The hearing was held on September 26, 2019 and the record left open until October 21, 2019 for the parties to submit written summations, which was extended to October 28, 2019 by request of counsel for petitioner. Paper rather than electronic submissions were requested, so the record was again extended until the receipt of petitioner's summation, received November 6, 2019.

BACKGROUND

Morales challenges his removal as a Plumbing Supervisor by respondent, the Newark Public School District ("Board"). A myriad of charges were leveled against him based on complaints of some of his subordinate employee plumbers, mostly focused on his personal inappropriate treatment of, and language employed while dealing with, plumbers under his supervision. It is alleged the comments and conduct demeaned, threatened or humiliated them. Additionally, two of the charges allege that he misused his authority by taking plumbers off a job and, on another occasion, removing plumbers from a job deliberately to "teach a lesson" to a Newark Schools administrator, which resulted in sewage backing up in a school. Finally, it is asserted he was insubordinate in using inappropriate language with threats of defiance against his superior officers, and by ignoring a command to not interact with employees during a time when some of his duties were being reassigned. All of the above behavior resulted in charges of Conduct Unbecoming a public employee, Insubordination, and Other sufficient charges, resulting in Morales' termination (R-1)

EVIDENCE

The following facts were stipulated: Morales was a plumbing supervisor employed by Newark Schools District, beginning November 11, 2016 and throughout the 2017-2018 school year. He began working for the District on November 24, 2008 as a steamfitter.

The Board's Witnesses

Jason Ballard, assistant school business administrator and chief operating officer testified that he is responsible for the oversight of the school district's facilities, transportation, food services, security and procurement departments. In overseeing the facilities department, he is in charge of repair and construction which includes oversight of the district's plumbing and plumbing employees. Ballard testified that while each supervisor and employee is "required to be professional" while on duty,

The one distinction though is, you know typically in the plumbing type areas, things are a little lax, you know in terms of how they communicate...often times profanity may be used as a way to discuss a particular issue that's taking place on the job, Like, you know, I can't believe this bleep happened...

Notwithstanding this lax atmosphere, Ballard said, employees should not discuss another's employee's appearance. Further, supervisor's in particular should avoid such talk as it could border on harassment or sexual harassment. They are not allowed to threaten any other employee. They should avoid making any derogatory remarks about their own superior officers and follow all their directives.

From March through May of 2018, Ballard became aware of a number of complaints and problems within the plumbing shop, i.e. "a lot of discourse, a lot of in fighting, and a lot of finger pointing." He briefly described some of the allegations against Morales, as detailed more fully by other witnesses that followed him. Based on the complaints against Morales, he said, after a meeting with Labor Relations, and with other members of the Facilities Department, Labor Relations decided to terminate Morales. Ballard believed their decision was correct because Morales as a supervisor was held to a higher standard of conduct, and that Morales' behavior constituted conduct unbecoming of a supervisor.

Under cross examination, Ballard stated that prior to and after Morales was promoted to Plumbing Supervisor, he was not required to take any supervisory training. Moreover, he admitted there is no specific policy against cursing in the plumber's shop or while they are out in the field. Significantly, he said, "I'm not aware of any guideline just how much profanity can be used." As to the specific words such as "bitch" that Morales applied to a plumber, he thought them inappropriate but had no opinion as he had not adjudged Morales guilty of that. He said he doesn't "automatically believe" these charges and he simply referred them out to the Labor Relations department.

Jason Lundstrum, a plumber for Newark Public Schools was the lead witness in detailing complaints against Morales. He worked under Morales' supervision for at least two years. He discussed a grievance (R-1E) he filed against Morales on December 8, 2017. His grievance detailed an incident in October 2017, when, at a plumber's meeting discussing day plumbers possibly taking night duty, Morales said Lundstrum was "too white for the night shift," that he was "80 pounds soaking wet and looks like a crack addict." However, Lundstrum did not attend that meeting and instead, he claimed, learned of these offensive remarks from other plumbers who had. These remarks were not recorded elsewhere, nor did any other witness testify to that remark. Another time that November while reviewing Lundstrum's driving credentials, Morales said laughingly to Lundstrum that Lundstrum's driver's license picture made him "look like a terrorist." (R-1H, Track 5) This comment was made in front of other plumbers.

Lundstrum discussed another incident which resulted in his filing another grievance (R-1F) in May of 2018. He said that on August 29, 2017, while discussing when he should go back to work after some time off because of a physical malady, Morales told him instead to wait until after the weekend, to "go home "f*** your girlfriend or whatever and come back when you are real good." (R-1H, Track 1) Lundstrum's grievance stated he thought that constituted "sexual harassment", and that Morales and he aren't "buddies." Lundstrum remarked that he was "horrified" by Morales' comment and that he did not take it as a joke. He said that Morales' offensive comment was recorded just as "anytime he [Morales] is talking now is being recorded."

Finally, Lundstrum described another incident where he was helping another plumber with a sewage injection pump. The pump which he said ways at least 250 lbs. had to pulled out if a pit to be examined. The entire job was "so wrong on so many levels" Lundstrum said, in part because Lundstrum was on light duty. The two found that the float device was not working properly so it continually ran and didn't shut off. Lundstrum testified that he called Morales told him of the problem but that there were no parts to fix it. Lundstrum also recorded part of the conversation which followed. (R-1H, Track 2).

Morales: You are going to leave that unplugged once its drained?¹

Lundstrum: Yes once it goes down, we'll unplug it, and we'll just the custodian to keep an eye on it -if it comes back up, plug it in.

Morales: I'm thinking we shouldn't say shit just leave it unplugged and I can always say "Shit someone must have unplugged it. If it floods, I'll blame it on someone that unplugged it...you know by then we'll have the float.

Lundstrum: Alright.

Morales: Just drain it down, leave it unplugged, we don't know anything.

Lundstrum felt "horrified" by Morales suggestion as little children could be exposed to raw sewage as the pump was 20 feet away from a hallway where they walked. However, he didn't object to it nor argue about it.

On cross examination, Lundstrum testified that at the time of the injection pump incident, he was on light duty and was not supposed to lift anything over 15 pounds. He admitted that Morales had not told him to help lift the 250 lb. weight but felt he was assigned to the job and couldn't let his fellow plumber lift it by himself. He also admitted that the sexual remark made by Morales about his girlfriend was made in the context of Lundstrum's request to come off light duty and that he laughed when Morales made the comment, although it was an "awkward" or "nervous" laugh. Finally, he

admitted that Morales was laughing when he said Lundstrum's picture made him look like a terrorist.

Lundstrum also admitted it that he was written up more than once for infractions by Morales and thought the number of them were "unreasonable." At least one, he said was "ridiculous." Nevertheless, he claimed to have no "bias" against or "animosity" toward Morales. In addition to his own grievances, he said he was offended by "misogynistic, homophobic, Islamophobic and racial comments" Morales made to other workers. He had personally heard Morales use the phrases "faggot" and "bitch ass." However, because those words weren't used against him, he didn't report them although, he said he should have. He reasoned, "It's 2019 and we're calling people faggots at work?" He also claimed that while he had heard other plumbers curse while at work, he never heard them say "faggot" or "bitches."

Jose E. Rodriguez is another plumber who had worked under Morales. On December 5, 2017, he filed a grievance (R-1C) against Morales. His complaint was based on statements made at a plumbers' meeting, which Rodriguez did not attend, where Morales, according to other plumbers who had been there, remarked that "wanted to punch him (Rodriguez) in the face." Morales also referred to Rodriguez's plumbing partner as Rodriguez's "personal bitch." (R-1H, Track 3) His grievance characterized Morales's statement as a "terroristic threat" which caused him "undue stress, trouble sleeping and anxiety." In his testimony, he added he "became a little depressed" over this incident and "ended up going to a psychiatrist" who put him on medication.

On cross examination, Rodriguez admitted that Morales was no longer his supervisor at the time Morales made the threat to punch him. Rodriguez had been

¹ Lundstrum testified that Morales told him to "unplug it"; however, the recorded conversation indicates that Lundstrum suggested he unplug it, as the beginning of the recorded conversation shows that Morales was questioning or confirming what Lundstrum had just said.

transferred from his normal plumbing duties to work on a special project known as the "crystal project" and was working exclusively on construction and installation of water fountains. He stated he was also made aware that at the plumbers meeting, Morales had said Rodriguez could be working in "flip flops" because the job was so easy. He noted that Morales had, when he worked under him, criticized him for taking too long to complete work. Rodriguez also testified he signed a criminal complaint against Morales, which was dismissed by the court. He also stated that while he had filed no lawsuit or tort claim, he and a group of plumbers have met with Genova and Burns, a law firm.

Vernon Jenkins, another plumber who worked under Morales, testified regarding a job he performed on Monday, October 16, 2017 under Morales' supervision. The previous Friday, he said, a plumber had turned off all running water to a trailer, which younger students use for classes, at the Hawthorne Avenue School (Hawthorne/school). (A-3).

According to Jenkins, on Monday, at approximately 8:30 a.m. he arrived at Hawthorne and learned that the problem at the trailer was a sewage line. The head custodian told Jenkins that the plumber who had been dispatched there on Friday couldn't repair the problem without overtime being authorized and that executive director Paul Egu had denied the overtime. Therefore, the plumber simply shut off the water. Jenkins testified he turned the water on, flushed the toilets, ran the sinks and saw feces, urine, and toilet paper come up from the floor drain. Jenkins explained to the head custodian they would get a machine out to rectify the problem. Jenkins called Morales and gave him his assessment of what needed to be done. However, Morales told Jenkins he was made aware of this problem already and that to "teach Egu a lesson," Jenkins should leave the water on and go to another job. Jenkins was upset because the children could be exposed to a health hazard, but he left and went to another job at a high school. Later in the day however, Jenkins and his partner returned and fixed the problem. By that time, however, there had been sewage back up in the trailer, as Jenkins anticipated. He was upset about it because he grew up in

Newark and was once a young pupil there just like the children he was concerned about.

On cross examination, Mr. Jenkins testified that although the incident he testified to occurred two years ago, he had previously not written any report of this allegation and reported it to no one. He was shown a copy of a text message (M-2) to Richard Morales, at 1:40 p.m. on the incident date which stated "The sewer job is done at Hawthorne. The Eel can be picked up." He admitted he authored that text. He explained that the machine, actually known as the "Eel" that a machine, was needed to perform the work at the Hawthorne school. Jenkins admitted that when Morales dispatched him and his partner back to Hawthorne, Morales stated the "Eel and the tires are on the way" and that Jenkins agreed that both items had actually been needed to perform the job.

Robert Trinidad, another plumber whom Morales had supervised, testified to incidents that occurred in late December 2017-early January 2018. At a meeting of employees, called by their employer, Trinidad was informed that Morales was no longer their "foreman" and that they were not to have any further contact with them nor he with them. However, around the end of January, he had an occasion to see Morales at a job site. Trinidad had been with Vernon Jenkins most of the previous day Hawthorne on a sewer job. Their practice is to punch in at the same site they punched out at on the previous day, which had been Hawthorne. Trinidad thought it "awkward" to see Morales punching in a Hawthorne just before he had, because Morales had not been there the previous day. As Trinidad walked to his car to park it in a proper parking space, Morales approached him, and after saying "I don't know if I can trust you fucking guys" Morales went on a "rant" and said it was "bullshit" what was happening to him and that he would "come back." Morales' "tone" made Trinidad "scared." He said he was aware of "the threats that he had made to other employees," although he later admitted these "threats" were "rumors." He said he and the other plumbers were made to sign a statement that they would have no contact with Morales "for their own protection." However, he admitted, this statement was not signed at the plumbers

meeting with their employer but at a meeting some of the plumbers had at the law firm of Genova and Burns.

Morales' Witnesses

William Polk is the Director of Project Control for Newark Public Schools, a position he has held since May 15, 2015. He testified that he hired Morales as the plumbing Supervisor for the District. Morales was at first the acting supervisor before becoming permanent. He rated Morales a "very good" supervisor. He believed productivity of that department was up 40-50% owing to his supervision. He agreed that in order for productivity to be up, "the plumbers have to work harder."

He said that at some point some of the plumbers came to him with their complaints against Morales because as director of project control, all trades report to him. Polk recalled an incident when Jason Lundstrum complained to him about injuring his knee during the injection pump incident (previously described by Lindstrom in his testimony.) Polk asked why Lundstrum was lifting a heavy weight when he was on light duty. Lundstrum replied because Morales assigned him to the job and lifting it was part of the job. Polk reasoned that since Lundstrum knew he was on light duty he should not have lifted the wait. Lundstrum replied "I'm not going to sit there and let Vernon [Jerkins] do all the work."

Mr. Polk also testified that some of the statements attributed to Morales such as "you look like a terrorist" should be understood in the context of the way the plumbers talk to each other. However, he said that Morales recorded comment at a plumbers meeting (J-1) that "this could open up a can of worms with the assholes downtown" was "inappropriate."

Richard Morales testified. He has licenses for plumbing HVAC Work, backflow prevention and recently certified as a facilities manager. He began work for Newark city schools in 2008 as a steam fitter and became acting supervisor of all steamfitters, and

eventually for all sheet metal, roofing and HVAC workers. Until the hearing on the current charges, he had never been "written up" on any charge. He had been acting supervisor of plumbers for a time before his formal appointment in 2016.

Regarding the water shutoff and sewage back up at the Hawthorne school, Morales testified that he learned on Monday morning about the problem by text messages of Mike Campbell (A-8). He waited about an hour, then contacted Vernon Jenkins around 8 a.m. because he knew he and another plumber were at the Weequahic school nearby. He dispatched Jenkins to Hawthorne. Once Jenkins got there, he told Morales they would need the "Eel", a large drill with cables used for clearing stoppages, which is usually left at the Technology school across town from where Jenkins was. Morales told Jenkins he would call to have the Eel brought to Hawthorne and to meanwhile go back to Weequahic to finish a job there. Jenkins returned to Hawthorne soon after the Eel (also referred to as the "snake") arrived at about 11. At 1:40 p.m. Jenkins texted to him that the Hawthorne job was complete, and the Eel could be picked back up.

Morales said that all of the plumbers who testified against him had been written up by him prior to their bringing charges against him. Jenkins, for example, had been written up for incompetence. The allegation made by Jenkins that Jenkins was told by Morales to leave the water on and let a back up occur was completely false. He said that the comment made to Lundstrum to go home and "f***" your girlfriend or whatever was made in the context of Lundstrum being on "light duty" and his concern in not returning Lundstrum too quickly to regular duty. As for the comment made when checking for motor vehicle licenses, he said the plumbers often made jokes at the other's expense like you "look like a terrorist." For example, Morales, who is Puerto Rican, was kidded by one of the plumbers with the joke "get me a knife -Puerto Ricans always have knives." He denied ever saying to anyone that Lundstrum "looked like a crack addict."

Regarding his recorded statement that he wanted to 'punch [Jose Rodriguez] in the face, his comment was made in the context of being somewhat critical of a directive that had been given when he (Morales) was on leave due to his daughter being diagnosed with cancer. When he returned to work, he learned that Rodriguez had been put on a "water team" of four to six plumbers who were doing nothing except install water fountains. Morales considered that a waste of manpower and at the meeting where he disparaged Rodriguez and his other team members, it was in the context of complaining that the other plumbers were all "busting their asses" instead of having a special job that could be done even while wearing "flip flops." He was just joking and certainly had no intention on "punching" him in the face, anymore than he would mean truthfully saying "so hungry I can eat a horse." He considered Rodriguez to be "the sweetest guy in the world" and never had any altercation with him before or after this incident.

Regarding talking to plumbers after he was reassigned, Morales noted he had been told by Paul Egu only to keep away from the plumbers who had brought charges against him, not to stay away from all plumbers. Trinidad was not a plumber who had brought charges against him.

Finally, regarding the incident where Lundstrum was out repairing the pump, Morales explained it in detail. First, he said, the incident occurred at 3 o'clock on a Friday afternoon and school was ending for the weekend soon or had already ended. The pump was located at the Arts High School at the lower area where kids play gym. The problem there was women throwing tampons in the toilets. Morales said it was the backup pump that was running all the time, not the primary pump, which was functioning. If the pump was left plugged in while it was not actually pumping water, it would be a fire hazard. That was why he thought it best the pump remains unplugged until they got the float they needed to repair the backup. There was no real danger to anyone at the school as the primary pump was working. The tank involved was a 700 gallon tank that doesn't take in rain water. The plumbers drained it completely. Even if the primary pump also failed, it was impossible for it to flood by Monday or Tuesday

when it would be fixed. Morales did admit the statement if it floods, he'd blame it on somebody else, but it was just a bad joke.

As to the higher standards expected of supervisors regarding language and behavior, Morales noted that he's never been given or ordered to take any training as a supervisor. On his own, however, since these allegations were made against him, he has taken and completed a course for Managers on "Preventing Discrimination and Harassment." He has come to understand that his excessive cursing with and teasing of other employees is unacceptable, although he points out that this is the language he learned during his seven years in the plumbing department. As evidence, he produced a one hour recording of a plumber's meeting, (J-2), during which meeting, he made the comment of punching Rodriguez which he contended shows that tough language and a jokey atmosphere pervades their meetings. He expressed remorse that Rodriguez heard the comment about punching him in the face, that he never meant to do it; so, it was never meant for him to hear it either. He apologized to Rodriguez. He did note, however that all the plumbers who complained of his actions had been written up by him. Rodriguez for example had been taken off of a job for going too slow. Jenkins was written up for incompetence. Morales explained that before he became the plumbing supervisor, the department never had any supervisor. Regarding his language, prior to the disciplinary charges, no administrator over him such as Paul Egu, or Jason Ballard had ever cautioned him or even mentioned his language to him, much less asked him to make any changes or go for training to modify his language or behavior. Regarding the motivations of the witnesses against him, Morales elaborated further. First, the men had never had any supervisor before him. Further, he explained:

[E]verything that's going on with me , I know it's a way for them to squirm out of work. All I was, was a productive supervisor. I know what that is. This is trying to get rid of the supervisor that made you work. Had Jason Ballard came to him these complainants, immediately Jason Ballard would have come to me and said, "yo Rich what's going on? These guys say you are cursing or doing this. Immediately I would have stopped.

Finally, as to the charge of disobeying an order by talking to a plumber after he was reassigned, Morales quoted from the written directive, which stated, in pertinent part: "You will continue to carry out everything that you stated in your email except the direct supervision of the tradesmen in the plumbing shop." Since Trinidad was not at that time, a tradesman in his Morales' plumbing shop, the order did not prohibit Morales from contacting him.

FACTUAL ANALYSIS

CREDIBILITY

When witnesses present conflicting testimony, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. Credibility is the value that a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story considering its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2D 718 (9TH Cir. 1963); see In Re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 474 (1999). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 847, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witnesses, and credibility does not automatically rest on the party with more witnesses. In Re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middleton Twp. V. Murdoch, 73 N.J. Super 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954).

Morales was credible in giving most of his explanations for his actions. Moreover, his explanations were consistent even with some of the testimony against

him, which added to an impression of honesty and openness. Also, the respondent's own supervisory witness, Mr. Ballard admitted to the lax atmosphere at the plumber's shop and by plumbers as to bad language. Another administrator, Polk, stated that Morales increased productivity 40-50% by making the employees work more. This enhanced the further impression that notwithstanding some lapses, Morales was an effective communicator and motivator. The employees who testified against Morales did not really dispute Morales critical testimony, e.g. that Rodriguez was slow on the job at a time that other people in the town were after Morales to get his men to work harder, and which motivated Morales to make critical remarks of Rodriguez. Morales' criticism of Rodriguez and the other plumbers on the special fountains project that they could do the work in "flip flops" was stated openly at the plumbers meeting and no one disputed him. Rather they appeared to agree. Morales' statement that he was not angry when he made the remarks about Rodriguez and flip flops was credible as the comment appeared sarcastic and made to evoke a laugh, and was made in the same exchange about wanting to punch Rodriguez in the face. In listening to the recording, Morales comments appeared to be motivated by trying to get the men on his side. It is doubtful that an honest and reasonable person would have believed Morales had any intention to carry out the "threat" to punch anyone, especially Rodriguez, who was mild mannered, diminutive and age 66.

Most of the testimony from all of the witnesses against Morales had either major credibility problems of bias and interest in the case, and much of their evidence tended not to advance their cause. First, all of them against Trinidad, had been written up by Morales, a fact none acknowledged until cross examination. Further they did not dispute, nor even acknowledge, that until Morales, there was never a supervisor before, and that productively had increased 40-50% in the short time he was their supervisor.

Further, it does appear that there was a coordinated effort among the disaffected plumbers to get Morales fired. For several months it appears some (at least Rodriguez and Trinidad who testified about it) have been meeting with a civil law firm in preparing depositions about Morales. One of his accusers (Lundstrum) began recording

everything Morales said, then began reporting things Morales said or allegedly said to other plumbers (like Rodriguez) to get them to complain too. Another (Jenkins) came forward with a story about 18 months after the alleged incident, having previously told no one about how Morales was going to "teach Egu a lesson" for supposedly refusing to authorize more overtime, by ordering a plug to an injector pump. to remain unplugged. However this witness' credibility was undercut not just by his motive to possibly lie against Morales, for having written him up (in his case for incompetency) but also because he failed to mention during direct that the job he was sent to do couldn't be done without the Eel machine, and that the job was completed a few hours later when the machine was available. Further his story was not corroborated by the custodian at Hawthorne, nor by Egu, who was Morales' superior. Egu was in a good position to know if there were problems between him and Morales and to what would have motivated Morales to make such a rash act of insubordination. Further, Egu would have a good and valid motive to testify against Morales on this point. The fact that he was not called as a witness is some proof that his story would have contradicted Jenkins'. Further, Jenkins, was the plumbing partner, sometimes, of Lundstrum, who was Morales' chief accuser.

Lundstrum lacked credibility. He seemed motivated by animosity, almost hatred, against Morales. He certainly appeared to be a man on a mission against Morales, or even a crusader. He appeared anxious to testify and rehearsed in his choice of words, seemingly wanting to appear uniquely sensitive to problems like "homophobia" and Islamophobia." As for the words used by Morales, I do not believe Lundstrum could reasonably have been offended by Morales looking at his driver's license and saying the picture made him look a "terrorist." People are often teased about their driver's license picture. It was clearly said laughingly and Lundstrum did not appear offended on the recording. Nor is such a comment an indication of Islamophobia, nor did Lundstrum claim to be Islamic. As to the alleged "faggot" comment, Lundstrum gave no details as to when or where this was said, and the statement was not corroborated by any other witness or evidence. Moreover, Morales' rather benign comment (go home, f**k your girlfriend or whatever") was said in the context of letting Lundstrum remain on

light duty for a while longer and was clearly a case of one man talking to another. Further, Lundstrum laughed when Morales said it. Finally, that one comment having been neither preceded with or followed up by any other similar comments could not make a reasonable person believe that Lundstrum was being sexually harassed by it. He also said he was "horrified" by the comment, as he and Morales weren't buddies. Such hyperbole, coupled with Lundstrum's obvious malice against Morales (despite his unconvincing protest that he didn't even have any "animosity" toward the man who he accused of "harassing" him and writing him up for "ridiculous" and unfair reasons) strongly undercut the credibility of his evidence.

Regarding the repair that Lundstrum made under Morales supervision, Morales did tell him to leave a backup pump unplugged and said if it became flooded, he could blame someone for leaving it unplugged. This may have shown poor judgement beyond being a bad joke, as Morales said it was. But Lundstrum failed to mention it was a backup pump, not the primary pump and that leaving a constantly running water pump with no water going through it (the tank had been drained and school was out for the next two days) is, as Morales testified, a fire hazard.

Finally, while Morales' other accuser (Jose Rodriguez) seemed far more benign than Lundstrum, I found not credible Mr. Rodriguez' story that he became "depressed" and needed psychiatric treatment as a result of the "threat" to get punched in the face. He also filed a criminal case against Morales which was dismissed. The fact that he is seeing a civil attorney about it again gives me pause in believing his story that he was affected in the manner he says he was. Further there was no history of any violence or threats toward Rodriguez nor to anyone else by Morales for Rodriguez to reasonably conclude Morales was serious about this comment.

FINDINGS OF FACTS

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

1. Richard Morales was employed by Newark City schools from 2008 until March of 2019. He started as a steamfitter and eventually became supervisor of the steamfitters. Added to his duties was sheet metal, roofing and HVAC supervision. He began working for the plumbing department in 2014 and became supervisor of plumbing on November 16, 2016, a position held until the FNDA dated March 1, 2019.
2. Morales had no prior disciplinary history.
3. He is accused of, while being Plumbing supervisor, making inappropriate comments to and/or about subordinate employees, including a threat of violence to two of them. He is also charged with intentionally causing a sewage failure, disparaging the authority of the Board and disregarding a directive not to have contact with plumbers. Respondent seeks a determination that said conduct, or a combination of some of it, constitutes either conduct unbecoming, insubordination, other sufficient cause for discipline, or some combination of those three justifications for discipline. They seek Morales removal.
4. Morales made a comment at a Plumbers meeting, that he would, if they were present, punch the employee Jose Rodriguez and his plumbing partner in the face. The comment was an obvious jest and at no time posed a threat to whom it had been directed or anyone else who heard it.
5. At the same meeting he referred to Mr. Rodriguez's plumbing partner as "Jose's bitch." Neither plumber was at this meeting, nor were under Morales supervision at the time, as they were in a separate water fountain project.
6. On another occasion, when employee Jason Lundstrum was asking to be returned from light duty, Morales told him to wait until after the weekend "go home f**k your girlfriend or whatever and come back when you are really good." This comment was

somewhat crude and ill-mannered, but it was not designed to and did not cause any humiliation or degradation to the subordinate employee. No one else heard the remark. I do not believe it could possibly cause the recipient of the comment to be horrified, nor in its factual context and based on the relationship of the parties to constitute the basis for sexual harassment.

7. Similarly, Morales' comment to Lundstrum on another occasion when was checking the status of his driver's license that the photo made "you (Lundstrum) look like a terrorist" was clearly made in jest. Thus, it could not be reasonably interpreted as a smear on Lundstrum or against his reputation. It also was not, contrary to Lundstrum's characterization, "Islamophobic" as terrorism and Islam clearly are not the same thing. Morales did not equate the joke about looking like a terrorist with any reference to Islam or any Islamic person and Lundstrum did not claim to be Islamic.
8. Lundstrum also said he heard from other plumbers that Morales had said Lundstrum shouldn't be on night duty because he is "too white for Newark," "looks like a crackhead" and "weighs about 80 pounds soaking wet." However, this was unsubstantiated and uncorroborated hearsay, not evidence justifying a finding of fact.
9. It was essentially not disputed that there were no clearly established protocols for language to be used by plumbers or their supervisors.
10. Morales admitted he told Lundstrum on one occasion to leave a back-up pump unplugged while waiting for a part needed for the repair which would be done the following Monday or Tuesday. He also told him if the area flooded he's blame it someone else. However it appeared there was little if any risk of the flooding occurring. Further no harm was caused by the decision.

11. Vernon Jenkins, a sometimes plumbing partner of Lundstrum, accused Morales of ordering him to leave an injector pump plug unplugged in the course of doing a repair job and go to another job. Jenkins claimed Morales wanted to teach Director Paul Egu who authorizes overtime a "lesson" and that if the sewage backs up next time he'll authorize it. However, to unclog the sewage problem Jenkins needed a large machine called the Eel, and as soon as the Eel was brought to the Hawthorne site in about two hours Jenkins returned and finished the job. Jenkins testified that by that time, the sewage had bubbled out of the low part of a room adjacent to the plumbing job. Paul Egu, who certainly should have been glad to testify against Mr. Morales if this happened, did not testify, and no reason why he did not was given. Jenkins said the head custodian had all the details about the plumber who was denied the previous Friday the overtime when the job could have been done. But neither this plumber nor the custodian were called as witnesses. There was no documentary proof the overtime was denied, that the sewage overflowed, and no explanation why Jenkins waited until the Departmental hearing about 18 months after this incident or his failure to tell anyone in authority about it. I find this accusation to be unsubstantiated.

12. Morales conversation with the plumber Trinidad after his job change did take place as described by Trinidad and Morales. However, there was no evidence that Morales had been told to avoid any plumbers; rather there was a written statement from his superior officer, Mr. Egu, that Morales was no longer "directly supervising the tradesmen in the plumbing shop." Whether or not Trinidad approached Morales or vice versa, Morales was not engaging in nor attempting to engage in "directly supervising the tradesmen in his shop."

13. Morales made a comment at the recorded plumbers' meeting that he didn't want to "open up a can of worms with the assholes downtown." However, it is not at all clear to whom that comment was directed. It could have been directed to anyone or any department that interacts with Morales' plumbers. Without more, it would be unfair

to conclude this comment was directed at a superior officer. Accordingly, the comment was not, as argued by respondent, an instance of insubordination.

LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6 governs a civil service employee's rights and duties. The act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1 N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n., 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees. Consistent with public policy and civil service law, a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(a). As noted, the Board had adopted, for its non-instructional staff, the Rules and Regulations of the Civil Service Commission and Office of Administrative Law with respect to disciplinary procedures. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. Hearings at the Office of Administrative Law are conducted de novo and determine the appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). Ennslyn v. Twp. Of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) cert. den., 142 N.J. 446 (1995).

In an appeal from a disciplinary action, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, 90 N.J. 550. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must “decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth.” Jackson v. Del Lackawanna and W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Preponderance may be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

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)).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee’s past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. In addition to considering an

employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

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

There is no precise definition for conduct unbecoming a public employee, and the question of whether conduct is unbecoming is made on a case-by-case basis. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), <http://njlaw.rutgers.edu/collections/oal/>.

In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys. Bd. (June 26, 2001), <http://njlaw.rutgers.edu/collections/oal/>, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. Unbecoming conduct is not precisely defined in N.J.S.A. 11A or N.J.A.C. 4A; see, e.g., In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. The Court noted that the phrase "unbecoming conduct" is an "elastic one that includes any conduct that adversely affects morale or efficiency by destroying public respect for municipal employees and confidence in the operation of municipal services." Id. at 554.

In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), that court stated that a finding of misconduct need not "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." Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6), based on my findings of fact, most of the allegedly course or low remarks would not in and of themselves amount to unbecoming conduct because they didn't "adversely affect morale or efficiency by destroying public respect for municipal employees." Much of the public would expect such earthy language and occasional off-color remarks between plumbers made in their own shop and while not interacting with the public. Regarding the incident with the backup pump, as plumbing supervisor of many schools and facilities, Morales would appear to have the discretion of deciding when and how to repair problems with the manpower and equipment available. Its further understandable he might make a bad joke about it. In any event, poor judgement on one occasion does not constitute a reasonable basis for a determination of conduct unbecoming.

However, as a supervisor, Morales crossed over the line in demeaning Rodriguez and his plumbing partner by referring to the partner as "Jose's bitch." And while this inappropriate comment and the foolish but obviously unserious comment about wanting to punch them in their faces should have had any serious effect on the two who were the subject of the put downs and who were not present when he said them, Morales should have known his words could have been reported-or distorted-by other subordinates to them, and therefore is partly to blame for whatever misunderstanding could have been caused. I therefore **CONCLUDE** the comment to be conduct unbecoming of a supervisory employee. I could not find any other of Morales comments or behaviors to constitute conduct unbecoming and therefore dismiss any other part of the charges alleged to be so.

Insubordination:

I did not find credible the story that Morales was going to teach his superior Paul Egu a lesson, nor did the crude remark about those downtown seem to be aimed at anyone above him. Also as shown clearly by the evidence, Morales did not disregard

any order regarding interacting with plumbers as he was merely directed not to supervise those at the workmen's shop. There was no credible evidence that he was told not to speak at all with all the other plumbers. Therefore, it would not be reasonable to find any his comments and behaviors to amount to insubordination, and therefore **CONCLUDE** there was no insubordination.

Finally, no "other sufficient cause" can be found as no other charge other than those already dealt with in this case was specified or described by conduct other than that which formed the basis for the conduct unbecoming and insubordination charges.

PENALTY

On 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)).

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of the concept of progressive discipline is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to

encourage the development of employee potential. In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine or suspension no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Here, the Board imposed the penalty of termination after finding Morales to be guilty of all the charges constituting both Insubordination and conduct unbecoming. In as much as I have determined there was no insubordination and that the only conduct which could have adversely affected the morale or efficiency of the department, and hence constituted conduct unbecoming were the demeaning comments directed at Jose Rodriguez and his plumbing partner. As Morales has no prior disciplinary history, the penalty of removal, or a substantial suspension are inconsistent with the concept of progressive discipline inherent in the Civil Service Commission ability to increase or decrease the penalty under N.J.S.A. 11A:2-19; In Re Carter, 191 N.J. 474, 484-486 (2007). Moreover, as noted, there were no clearly established protocols for language to be used by plumbers or their supervisors. Further, there was no formal training on appropriate language for such supervisors. However, past practices had established a fair amount of earthy or plain bad language and jokes occur at, and are tolerated in the plumbing shop. Moreover, in eleven years while working for Newark, several as a supervisor or acting supervisor, Morales was never rebuked or reprimanded for his language. Also, on his own initiative, Morales has made an effort for self-improvement by taking a course for managers on recognizing discrimination and harassment.

I **CONCLUDE** by the preponderance of the credible evidence that the City of Newark has failed to establish most of the charges occurred or having occurred constituted conduct unbecoming or insubordination, except the demeaning remarks said of Rodriguez and his plumbing partner. As most of the charges were unproven,

the penalty of removal is clearly inappropriate. Further, I **CONCLUDE** that the penalty of a thirty working days suspension is appropriate.

ORDER

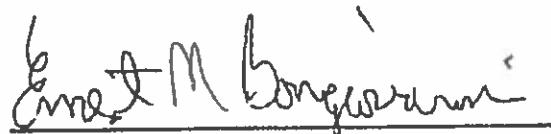
Given my findings of fact and conclusions of law, the Newark Public School District is **ORDERED** to reinstate Morales with pay, including benefits retroactive to the date of removal, and that a penalty of a thirty working days suspension be imposed.

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

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

December 18, 2019

DATE



ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

12/18/19

Date Mailed to Parties:

12/20/19

id

APPENDIX

LIST OF WITNESSES

For Appellant

William Polk
Richard Morales

For Respondent

Jason Ballard
Jason Lindstrum
Jose Rodriguez
Vernon Jenkins
Robert Trinidad

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits

- J- 1E Final Notice of Disciplinary Action, dated March 1, 2019
- J-1G E-mail from Appellant to Executive Director Egu, dated January 26, 2018
- J-1H Audio recordings Tracks 1-5*
- J-2 Plumbers meeting recording

*J-1 E, G, H are duplicates of R-1 E, G, and H

For Appellant

- A-1 Not entered in evidence
- A-2 Text messages of Vernon Jenkins
- A-3 Emergency Work Order, dated October 16, 2017

- A-4 to 6 Not entered in evidence
- A-7 Certificate of Completion
- A-8 Text messages of Mike Campbell
- A-9 Recording of Polk-Lundstrum

For Respondent

- R-1A Final Notice of Disciplinary Action, dated March 1, 2019
- R-1B Maintenance Direct Work Order Report dated August 3, 2018
- R-1C In-take form Complaint of Jose Rodriguez dated December 5, 2017
- R-1D Not entered in evidence
- R-1E In-take Form Complaint of Jason Lundstrom dated December 8, 2017
- R-1F In-take Form Complaint of Jason Lundstrom dated May 4, 2018
- R-1G E-mail of Executive Director Egu and Morales, dated January 26, 2018
- R-1H Audio recordings Tracks 1-5