

imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 90 working day suspension to a 60 working day suspension. The Commission further orders that appellant be granted 30 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned 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. Pursuant to *N.J.A.C. 4A:2-2.10*, the parties shall make a good faith effort to resolve any dispute as to the amount of 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 20TH DAY OF JANUARY, 2021



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
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Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT NO. CSV 02158-20

AGENCY REF. NO. CSC 2020-1917

**IN THE MATTER OF MARQUISE MONTANEZ,
HUDSON COUNTY DEPARTMENT OF
ROADS AND PUBLIC PROPERTY.**

William P. Hannan, Esq., for appellant, Marquise Montanez (Oxfeld Cohen, PC),

Daniel Sexton, Assistant County Counsel, for respondent, Hudson County Department of Roads and Public Property (Office of the County Counsel, attorneys)

Record Closed: October 14, 2020

Decided: November 30, 2020

BEFORE ERNEST M. BONGIOVANNI, ALJ:

STATEMENT OF THE CASE

Appellant, Marquise Montanez (appellant/Montanez) challenges the Final Notice of Disciplinary Action (FNDA) of January 7, 2020 which determined that Montanez engaged in conduct unbecoming a public employee, neglect of duties, insubordination,

insufficient to performing duties, falsification of timesheets, lewd and offensive actions, and other sufficient causes, warranting a ninety-day suspension from his position as a Building Maintenance Worker (BMW) with the Hudson County Department of Roads and Public Property (the Respondent/County).

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 February 13, 2020. A hearing was held on September 22, 2020 and the record left open until October 14, 2020 for the parties to submit written summations, which were received on October 14, 2020 at which time the record was closed.

BACKGROUND

The issue in this case is whether there is sufficient credible evidence to sustain the charges of conduct unbecoming, neglect of duty, insubordination, insufficient to perform, falsification of timesheets, lewdness, or other sufficient cause, and if sustained, whether a penalty of a ninety-day suspension is warranted.

SUMMARY OF RELEVANT TESTIMONY

The Respondent's Case

The County called one witness, Ms. Kim Riscart Cardella (Ms. Cardella), who testified as follows: She is the Director and Unit Chief in charge of the Administration building, which among other things, houses courts and offices of the Superior Court of New Jersey, Hudson County, as well as adjacent properties. As such, her duties include overseeing maintenance of this property and grounds. She's held this position for 19 years. Part of her job includes administration of disciplinary proceedings against employees, such as Montanez.

Montanez is a BMW who works at the Administration Building located at 595 Newark Avenue, Jersey City (Admin. Bldg.). He is one of 45 such workers there. Montanez was hired on February 19, 2019. He completed his work orientation involving studying the County handbook and two days of training. He was assigned to the 8th Floor of the Admin. Bldg., on the 3 p.m. to 11 p.m. shift. As a BMW, Montanez was tasked with general cleaning, sweeping, vacuuming, moping, emptying garbage, and polishing, and in winter, snow removal.

Prior to the issuance of the present charges, Montanez had a history of two warnings, first a verbal warning for his being out of uniform on August 13, 2019 and another, a written violation for the next day being on the 7th floor of the Admin. Bldg., when he was assigned to the 8th Floor. The written warning referenced a memo, personally given to Montanez on March 21, 2019, which said, in pertinent part, "All staff are to be on the floors they were assigned. No one is to be on a floor that was not assigned to them by the Supervisor." During Montanez's shift, the BMWs were entitled to two 15-minute breaks, one at 4:00 to 4:15 p.m. and one at 9:30 to 9:45 p. m. and a lunch hour from 6:15-7:15 p.m. Montanez signed a copy of a memo on lunch and break policy in May 2019.

The present charges were brought after a review of video recordings of the Admin. Bldg. that started on September 11, 2019. On that day, the County Assignment Judge Baristo issued a notice to staff about a security breach which occurred on the two previous days. On those days, there were incidents of inappropriate use of the building property where an employee or employees were suspected of writing slang expressions on a board that was located on the 2nd Floor of the Family Crisis Unit. While Montanez was never charged with conduct relating to this incident, video confirmed that Montanez was on the second floor of the Admin. Bldg. at 9:25 p.m. on September 9, 2019 and again at 8:22 p.m. on September 10, 2019. Therefore, he was twice on the second floor when he was assigned to the 8th Floor.

Ms. Cardella personally began reviewing video because of reports that employees were not signing in and out properly and floors were not being completely cleaned. One such video showed Montanez on September 19, 2019, at 8:29 p.m. lounging with his shoes off and feet on the desk belonging to the Sheriff's Office. Ms. Cardella found that in addition to inappropriate lounging when Montanez was supposed to be doing his duties, he was making improper use of property of the County offices. Another video showed Montanez out of uniform on October 11 at 8:16 p.m. The employees are issued uniforms which they are to wear while on duty at all times, in the interest of security. However, while on duty, Montanez was wearing his street clothes, with black sweats and a black jacket. The Admin. Bldg. is monitored 24/7 by the Sheriff's office and the uniforms help identify maintenance employees as opposed to other visitors or employees on site.

Another video reviewed by Ms. Cardella showed Montanez on October 17, 2019 at 7:35 p.m. lounging at the Sheriff's desk with his shoes off and a hairbrush next to him. During the next three hours, Montanez only got up to vacuum the floor for 28 minutes, before returning to lounge at the desk. The video also showed Montanez exiting the building at 10:39 p.m. although he was supposed to be on duty until 11:00 p.m. Further, the sign in-sign out sheet that day shows that Montanez wrote down 11:00 p.m. as the time he signed out. Another sign out sheet, for October 24, 2019 showed that Montanez didn't sign out at all that day. On that same day, another video showed Montanez at 8:27 p.m. again lounging at the Sheriff's desk with his feet up on the desk while using his phone for an extensive period of time. Ms. Cardella stated that during part of the video, Montanez engaged in lewd behavior by touching himself under his pants while looking at and talking into the phone.

When asked to summarize the basis for the charges, Ms. Cardella testified as follows:

Conduct unbecoming: On multiple occasions, Montanez was found out of uniform and/or on a floor or floors to which he was not assigned. That caused a security

breach. Further he inappropriately used public property, the sheriff's officers' desk for lounging, again on more than one occasion.

Neglect of Duty: Videos clearly showed that Montanez was not performing the essential duties of his job-general cleaning, moping, sweeping, emptying garbage, vacuuming, and the like, but instead was lounging while on duty. Further, Montanez was not signing out properly and at least on one occasion was clearly seen leaving the building at 10:39 p.m. when he was on duty until 11:00 p.m.

Insubordination: On more than one occasion, Montanez was observed being on a different floor other than the 8th floor to which he was assigned, after having been given a written warning that this conduct was an unacceptable infraction.

Lewdness: On October 24, 2019, Montanez was observed with his hand in his pants, seemingly touching himself-or "pleasuring himself" while on the phone and lounging at the Sheriff's desk.

Ms. Cardella was not asked specifically which conduct by Montanez constituted "Inefficient (sic) to Perform Duties", Falsification of Timesheets/theft of services, or Other sufficient cause, although Montanez is charged with those infractions as well as the others commented on.

The Appellant's Case

The appellant called one witness, himself. He testified as follows:

Montanez, age 23 at the time of the charges, was previously employed by the County Parks Department as a seasonal worker. Some time after being employed as a permanent employee at the Admin. Bldg., he began to believe he was being targeted for racial reasons by his employer. For example, one of his supervisors, Rusty, although Hispanic, according to Montanez "forgets where he came from." As a result of

this unfairness to him based on his race, he would like to return to the Parks Department but has been unable to do so. The entire series of charges against him stemmed from the first incident where he got a warning in August 2019 for being out of uniform. The County had issued him ten uniforms none of which fit on the pants, as they could not go around his waste and would sag, so he took to wearing his own pants, until he got newly tailored uniforms. However, he admitted that when he was out of uniform in October 2019, he was not wearing the newly tailored uniform pants but wearing street clothes including sweats and a jacket. Also, although Montanez claimed he was singled out for conduct, he did not dispute that "Rafeal," another employee who appeared on the same video with Montanez, also received disciplinary action around the same time as him, for being on a different floor than the one assigned to him.

As to the charges of lounging while on duty, Montanez maintained that he always completed all his tasks before lounging during work time. No one ever complained that his 8th floor, to which he was assigned along with one other employee on the same shift, was not cleaned. He was able to, and did, actually finish all his duties before his lunch break at 6:15. Sometimes he would get started early before 3:00 p.m., with the understanding that he could leave before 11:00 p.m. He remembered specifically that on the days (September 9, 10, 19, and October 11, all in 2019) when he was charged with lounging or being on the wrong floor, he had completed all his tasks on the 8th floor before that time. As for being on floors such as the 2nd 4th and 7th floors, where he was found to be instead of the 8th floor, he was at least on one occasion, looking for his supervisor so that he could get permission to leave his 8th floor in order to help a fellow employee on another floor. He stated however, that even without explicit permission by his supervisor, after two months or so of being on the job, it was explained to him that all the BMWs work as a "team" and that he could help out other employees on other floors when he had no further work to do on his own floor without explicit permission to do so.

Montanez did not dispute that he was aware he was using the Sheriff's desk for lounging. He also stated that during the incident when he was observed sitting at the

desk for nearly three hours, his supervisor told him that the floor was unclean and should be vacuumed. Rather than argue with him, he said, he got up and vacuumed during the next 28 minutes, as shown on the video, before returning to the Sheriff's desk. As for signing out stating he was leaving at 11:00 p.m., when he was observed on video exiting the building in his street clothes at 10:39 p.m., Montanez stated he was only going out for a smoke. When asked if it takes 20 minutes to smoke a cigarette, Montanez replied that in any event, he and the other employees regularly or "always" left at about 10:45 p.m. for the evening. Finally, as to the lewdness charge, Montanez stated he was aware that he and other employees were on video and that he would never "pleasure himself" while on duty and in the Admin. Bldg. Actually, during the October 24 video, he was merely scratching himself because he has eczema on his legs and the uniform bothers 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).

In this case, I found Ms. Cardella's testimony to be direct and unmotivated by any illegitimate reason. Her testimony was largely factual rather than opinion and was amply supported by video and documentary evidence. While Montanez was a somewhat sympathetic witness, partly because of his youth and inexperience as an employee, his testimony was self-serving, and at best not credible, if not completely, incredible. He called no witnesses nor documented any contrary evidence, including not calling any co-employees or supervisors to support his excuses for not being on the correct floor, for lounging, or for leaving early. He stated he was coming in earlier than 3:00 p.m. so he could leave earlier but all the sign in-sign out sheets presented at the hearing showed him signing in at 3:00 p.m. The accusation of his being singled out for discipline was not supported and in fact contradicted by the unchallenged evidence that another BMW was similarly charged with not staying on his assigned floor. He contradicted himself about the reason for being out of uniform. Given his general recollection of events, I do not believe he could specifically remember on the occasions in question that he was finished with work before he began lounging or idling with his time. Further his excuse for lounging while on duty was undercut by his own admission that on the occasion when he was viewed vacuuming in a 28 minute hiatus from lounging at the Sheriff's desk, he had been told specifically by his supervisor that the floor was not cleaned and needed to be vacuumed. This contradicts his story that he was always finished with cleaning before the times he was observed lounging. Finally, his story that he was "always" finished with cleaning by time his lunch break at 6:15 p.m. is incredible in that it assumes the average BMW can perform all his tasks in three hours of an 8-hour shift.

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. Montanez, hired as a permanent employee by Hudson County at the Department of Roads and Public Property, is a Building Maintenance Worker and received his orientation and training several months before the alleged offenses occurred.
2. The essentials of all Ms. Cardella's testimony were supported by video, photographic and documentary evidence, the authenticity of which was not disputed.
3. All the evidence supports the facts that Montanez was trained through his employee orientation, by the employees handbook, from subsequent memoranda that he personally received, from verbal and written warnings, and by six months experience by the time the conduct occurred, so that he knew he was assigned to the 8th Floor of the Administrative Building, that he could not go off his floor without explicit permission from his supervisor; he also knew what his duties were and that he was to perform those duties on his assigned floors, except during two 15 minute break times and a one hour lunch during the 3:00 p.m. to 11:00 p.m. shift. Yet the evidence clearly showed Montanez on occasions to be lounging and idling on the phone and with his feet up on a desk during times he should have been cleaning.
4. The uncontested evidence also showed that Montanez was off his assigned 8th Floor and was instead at times on the 2nd 4th and 7th floors without any evidence other than his own word, which on this point is not credible that he had permission explicit or otherwise from his supervisor.
5. It was uncontested that Montanez was out of uniform on more than one occasion.

6. Montanez was not authorized to use the Sheriffs Desk, which was a Security station, while lounging at the desk while on the phone and brushing his hair.
7. Montanez left his post early at 10:39 p.m. on October 17, 2019 despite signing in at 3:00 p.m. and signing out as if he left at 11:00 p.m.
8. Montanez was observed on video lounging at the Sheriff's desk for a period of time, on his phone and at times with his hand in his pants.

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). Ennslin 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). The evidence needed to satisfy the standard must be decided on a case-by-case basis.

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)).

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. 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), the 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.”

“Neglect of duty” has been interpreted to mean that an employee “neglected to perform an act required by his or her job title or was negligent in its discharge.” In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), njlaw.rutgers.edu/collections/oal/. The term “neglect” means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). “Duty” means conformance to “the legal standard of reasonable conduct in the light of the apparent risk.” Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

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.”

The clear preponderance of the credible, relevant and competent evidence establishes that Appellant is guilty of the charges of neglect of duty, conduct unbecoming, and other sufficient cause. The neglect of duty offense was clearly shown by the appellant's persistent lounging and idling when he should have been working. On one such occasion, he was even remonstrated for not working while on video. Further, he admitted leaving early nearly every working day at 10:45 p.m. Montanez committed conduct unbecoming a public employee by signing out at 11:00 p.m. when he left the Admin. Bldg. at 10:39 p.m. and by using property belonging the Sheriff's Department in order to lounge.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), <http://njlaw.rutgers.edu/collections/oal/final/>. Other sufficient cause 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.

Herein, appellant maintained that Hudson County was engaged in discrimination and against him. all without any evidence, other that his not credible testimony. Further, he blamed supervisors for his failure to do a rather simple function of remaining on his own eth floor to do his cleaning duties. Even if Montanez could be better used on other floors if his floor was truly clean, it cannot be up to him when to decide to leave his assigned post. Here, the other sufficient cause was proven by Montanez often being on the wrong floors when assigned to the 8th Floor.

I cannot find him guilty of lewdness. First, Montanez gave a reasonable excuse to scratch himself under his pants owing to a common skin condition. Second, it is unlikely he would try to "pleasure himself" under these circumstances. Not only was he on camera, other employees or his supervisor could have walked by the open floor by

the Sheriff's desk at any time. Finally, while the County's witness said one could more clearly see Montanez's conduct was lewd by enlarging the video as certain points and freezing the frames, that is not an appropriate way to present evidence, and not a proper way of preserving the record. How can anyone know exactly what evidence the fact finder based his or her observations on if it is left to his or her discretion to enlarge and freeze frame the photographic or video evidence?

As to insubordination, the County theorized that persistently being found on the wrong floor or out of uniform after being verbally, then in writing warned not to do so, constitutes Insubordination. I cannot agree. To accept that definition, any second or subsequent violation would constitute insubordination. That would undercut the legitimate regulatory foundation for having a separate and independent cause of action

As to falsification of timesheets/theft of services, if those charges apply to any conduct it would be leaving early on one occasion at 10:39 p.m. and signing out at 11:00 p.m. I have already found that to be conduct unbecoming, and any further finding under a different charge would be inappropriate. Further I would need to find Montanez's conduct on that single occasion to be more egregious, for example as constituting a deliberate subterfuge, than the charge of conduct unbecoming implies. As to the charge of "Inefficient (sic) to perform duties", the conduct specified in the charges is already covered by the neglect of duties charge. Accordingly, I **CONCLUDE** that Montanez committed the offenses of conduct unbecoming a public employee, neglect of duties and other sufficient cause, and dismiss all the other 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.

Thus, short of removal, the penalty of 90-day suspension imposed on Montanez after the county disciplinary proceeding is one-half the maximum suspension it could impose. As noted, Montanez had two minor disciplinary warnings. This is the first disciplinary finding. The penalty was imposed after findings of Lewdness Insubordination, Failure to perform duties, and falsification of records/theft of Services, with which I disagree. Further I find the 90-day suspension, or half the maximum suspension to be too high a jump from two warnings to be not entirely supportive of the goal of progressive discipline. However, the County was correct in that a minimal suspension would be inappropriate given the sheer number of violations which occurred

in less than two months. Accordingly, I **CONCLUDE** and impose a penalty of 60-day suspension as the appropriate penalty for the Neglect of Duties, Conduct Unbecoming and Other Sufficient Cause offenses. It will adequately encourage the employee to work harder to avoid infractions and at the same time better advance the goal of progressive discipline than the harsher 90-day suspension.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, neglect of duty and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(6) are sustained and all other charges dismissed, and that the action of the respondent imposing a ninety-day suspension on the appellant is hereby **MODIFIED** to a sixty-day suspension.

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

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

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

November 30, 2020

DATE

Ernest M. Bongiovanni

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency:

11/30/20

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Appellant

Marquise Martinez

For Respondent

Kim Rlscart-Division Director

LIST OF EXHIBITS IN EVIDENCE

For Appellant

None

For Respondent

- A- Preliminary Notice of Disciplinary Action, dated November 18, 2020
- B- Verbal warning, dated August 13, 2019
- C- Verbal Warning, dated August 14, 2019
- D- Assignment memo of March 21, 2019
- E- Assignment memo of May 13, 2019
- F- Memo regarding meal and break periods, dated May 8, 2019
- G- Acknowledgment of County Handbook and Orientation Attendance
- H- Personnel Printout
- I- Photo "security breach" of September 9, 2019
- J- Three photos-employee on wrong floor, dated September 10, 2019
- K- Photo of employee lounging, dated September 19, 2019

L- Photo of October 11, 2019, employee out of uniform, wrong floor

M- 1-Photo of employee leaving building at 10:39 p.m.

2-Log noting 11:00 p.m. departure

3-DVD of Video of employee exiting the building

4-Photo of Martinez passing exit hall

5-PPhoto of Martinez passing through exit door

N- 1-Photo of 8th Floor 10:20 p.m.

2-Photo of 8th floor 8:27 p.m.

3-log time stamp on October 25, 2019

4-DVD of October 24, 2019