STATE OF NEW JERSEY

In the Matter of Paul Smith
Passaic County, Preakness Healthcare Center

CSC DKT. NO. 2020-2352
OAL DKT. NO. CSV 05068-20

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: JULY 2, 2021 BW

The appeal of Paul Smith, Nurses Aide, Passaic County, Preakness Healthcare Center, removal effective February 21, 2020, on charges, was heard by Administrative Law Judge Thomas R. Betancourt, who rendered his initial decision on June 3, 2021. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of June 30, 2021, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Paul Smith

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 30TH DAY OF JUNE, 2021

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 05068-20
AGENCY DKT. NO. 2020-2352

IN THE MATTER OF PAUL A. SMITH, PASSAIC COUNTY, PREAKNESS HEALTHCARE CENTER.

Seth M. Gollin, Esq., Staff Attorney, AFSCME New Jersey Council 63, for Appellant, Paul A. Smith pursuant to N.J.A.C. 1:1-5.4(a)6

Leslie S. Park, Esq., First Assistant County Counsel, for Respondent, Passaic County, Preakness Healthcare Center

Record Closed: May 28, 2021 Decided: June 3, 2021

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Paul Smith, appeals a Final Notice of Disciplinary Action (FNDA), dated February 25, 2020, imposing a penalty of removal on four sustained charges as follows: Charge #1) Conduct unbecoming a public employee; #2) Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment; Charge #3) Other sufficient cause: Violation of County Personnel Policy – workplace violence; Charge #4) other sufficient cause: Violation of County Personnel Policy – Discrimination and Harassment.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on June 2, 2020.

A prehearing conference was conducted on August 5, 2020, and a prehearing order entered on the same date by the undersigned.

A hearing was held on January 6, 2021 and January 13, 2021. The record was kept open for counsel to submit written summations. Written summations were received from both parties on May 28, 2021, whereupon the record was closed.

ISSUES

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

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Lucinda Corrado testified as follows:

She is the Executive Director of Preakness Healthcare and has been since 2006.

She became aware of an incident between Appellant and Lily Lenox, another nurse at the facility. She was informed that Appellant was yelling at Ms. Lennox in front of a resident, and that Ms. Lennox felt physically threatened and called security. She was advised of this by John Reno, security administrator.

In November of 2019 Ms. Lennox sent her an email setting forth what transpired with Appellant; and, that Appellant was making advances toward her. Ms. Lennox did not want to work with Appellant. He was making explicit sexual statements to her.

She referred the matter to Human Resources. She did not interview any employee involved with the matter. The typical procedure is to refer a complaint of sexual harassment to Human Resources.

She became aware that two more female employees made similar allegations against Appellant.

Ms. Corrado was not aware of any statements by Appellant stating he was a whistleblower. She became aware of this from Appellant's statements. She did not conduct an investigation.

She is aware that the County retained an outside attorney to conduct an investigation. She had nothing to do with the investigation.

She became aware of the outcome of the investigation and that the victims were substantiated by it.

John Reno testified as follows:

He is the assistant to the executive director and has been since 2016. He is a retired police officer, having retired as Chief of Police in Wanaque, and was hired initially by Preakness as a consultant to work on security.

One of his responsibilities is to conduct internal investigations. He would not conduct an investigation into an allegation of sexual harassment. That would be turned over to Human Resources. He was aware of the allegations against Appellant, having received a copy of the email to Ms. Corrado.

He had no involvement in the investigation of Appellant. He did not instruct witnesses regarding the investigation.

Chanda Curtis testified as follows:

She is the director of Human Resources for Preakness and has been for the past three months. She was not employed at Preakness when this matter arose.

She is aware of the County workplace violence policy and anti-harassment policy. She has reviewed those documents. She identified those documents and stated they have been in effect since 2015. She also identified an acknowledgement of receipt of those policies, signed by Appellant on August 6, 2015. Ms. Chandra also identified certain training certificates received by Appellant for, among other things, Workplace Violence/Conflict Resolution and Harassment/Sexual Harassment.

The County's policy on a substantiation of sexual harassment is zero tolerance and will result in termination.

Ms. Chandra was recalled on the second day of hearing to review and confirm Appellant's disciplinary history, which was marked into evidence as R-8, replacing a previous version of R-8.

Lily Lenox testified as follows:

She is a Licensed Practical Nurse and is employed by Preakness. She works the third shift, 11:00 p.m. to 7:00 a.m., and has done so for twenty-two years. She is currently assigned to unit 1-200. She has worked in this unit for more than ten years.

Ms. Lenox began working at Preakness prior to Appellant being hired. The first time she recalled speaking with Appellant he asked if she was Jamaican, to which she replied she was. He then said, using a Jamaican dialect, that he performs a certain sexual act.

At some point Appellant was assigned to her unit. Appellant was always saying inappropriate sexual comments. She went on to describe some of the comments. Appellant never touched her in any manner.

Appellant's sexual comments were daily. She was afraid to be alone with him because most of his conversations had sexual connotations.

One time Appellant startled her in a patient's room when he came out from behind a curtain. There were two patients in the room, and neither were his patients. She did not question Appellant as to why he was in the room.

Ms. Jallah, who works at Preakness, told her Appellant came up to her, lifted up his shirt and unzipped his pants, and asked her if she wanted to "see it". She did not witness this.

She had asked Appellant to shave a patient. Appellant went to the patient's room and returned ranting and cursing at her. He asked her if she inquired of the patient if he wanted to be shaved. She was frightened.

Ms. Lenox ultimately wrote an email to Ms. Corrado and requested not to work with Appellant. She did not speak with Ms. Corrado about the email. She was called by Human Resources and was interviewed. She was also interviewed by an investigator. She did not speak with anyone at Preakness regarding the matter.

She has never before written anybody up. She tries to resolve things.

Justina Jallah testified as follows:

She is a Certified Nurse's Assistant (CNA) at Preakness. She works the third shift, 11:00 p.m. to 7:00 a.m. She is assigned to unit 1-200. She was working this unit in November of 2019. She has worked in this unit for eleven to twelve years.

Appellant was assigned to this unit twice. He was removed and then returned in December 2018. From the beginning of his second time working this unit her relationship with Appellant was not too good. He would make sexual advances and try to tap her on her backside. He made contact with her backside. He cursed at her using Jamaican slang phrases. She is not Jamaican. She is African. She knew the phrases

to be Jamaican slang. He would make comments on the body types of women he preferred to engaging in sexual relations with. He would comment on her backside and other private areas. He commented on sexual acts.

On January 3, 2019, Appellant exposed his penis to her. She told him to stop. He replied that it would be his word against hers. She ceased speaking with him thereafter.

In November 2019 she received a call from Human Resources. She was told by Ms. Corrado that her name was mentioned in an investigation. She met with Human Resources and met with Ms. Solomon, the then director of Human Resources. She did not speak with anyone at Preakness regarding the reason she went to Human Resources. She later met with another person who was investigating sexual harassment.

She never reported any incident between herself and Appellant. Appellant had told her no one would believe her. It would be his word against her word. She was afraid to do so.

She does not recall the dates of the incidents between herself and Appellant.

Appellant would make sexual comments almost every day.

Kareth Foster-Stewart testified as follows:

She is a CNA at Preakness. She has worked there since 2015. She has worked with Appellant. She described Appellant as rude and derogatory.

As an example, she stated Appellant told her not to wash her underwear so he could smell it. She would try and avoid him in the hallway as he was always making comments. He would say he would like to f- - k her. He never touched her, but did attempt to touch her backside. She blocked him with her hand.

Appellant would speak to her using Patois, a Jamaican language. He would tell he, in vulgar terms, that he wanted to have sex with her.

She told off Appellant in the parking lot and that ended his behavior towards her.

She did not report any incident with Appellant.

Appellant would make comments to her one or two times per week, depending on which floor she was working, as she was a floater.

She believes Ms. Jallah told Human Resources about her interactions with Appellant. Ms. Jallah did tell her about Appellant exposing his penis to her. She told Ms. Jallah about Appellant's underwear comment. She does not know when Ms. Jallah told her about her incident with Appellant.

She was never interviewed by Human Resources. She was interviewed by the investigator.

Sharon McLean testified as follows:

She is a CNA at Preakness. She works the third shift, 11:00 p.m. to 7:00 a.m. She is assigned to unit 1-200. She was working there in November 2019, starting in this unit the year prior.

She has worked with Appellant. Appellant touched her more than once. Once he slapped her on the backside. She told him she did not like this. He did it again a second time. Again she told him she did not like it. She does not recall how close in time these two incidents were; perhaps a couple of weeks apart.

She described Appellant as having a "filthy mouth". He would always say something sexual. This was a constant thing, seeming almost daily. She worked with him every day. She felt uncomfortable.

One time he tried to grab her "private part".

She did tell her co-workers of this: Justina Jallah and Lily Lenox. She did not tell anyone else. She did not want to get Appellant in trouble. She knew what he was doing was wrong.

She was called to Human Resources in November 2019. She spoke with Ms. Solomon and told her that she was touched by Appellant and what he said to her.

Prior to meeting with Ms. Solomon she did not speak with anyone about it. Afterwards she did speak with co-workers who were also interviewed.

She was also interviewed by the investigator about one month later. Prior to meeting with the investigator she did not discuss the matter with anyone. No one told her what to say to the investigator.

Eric Bernstein testified as follows:

He is an Attorney at Law in the State of New Jersey. He concentrates in the areas of Labor and Employment Law, Government Law, Land Use Law and First Amendment Law. He was retained by the County of Passaic to conduct an investigation involving Appellant. His firm prepared a report, dated February 7, 2020, and a supplemental report dated February 18th, 2020. A third report was done on February 21, 2020.

Mr. Bernstein went on to explain the methodology used in preparing his reports. He interviewed the employees who had complaints about Appellant. His firm found that, in all cases, the complainants were justified. As part of the interview process he would make determinations as to credibility.

A request was made to interview Appellant. No response to said request was received. Appellant was not interviewed.

Ms. Corrado was not on the receipt list for the reports generated.

Appellant's Case

Paul Smith, Appellant, testified as follows:

He began working at Preakness in May 2012. He is a CNA. He was first assigned to unit 1-400, which is a dementia – Alzheimer unit. He worked as a floater for a time. He was assigned to unit 1-200 in 2015 or 2016. He was removed after being accused by a resident of doing something, which were not sustained. He was returned to 1-200 in January 2019. He worked there until his termination.

He characterized, laughing, Ms. Lenox' testimony as "so false", calling it a "blatant lie".

As to specific allegations made by Ms. Lenox, Mr. Smith denied the same, either not recalling it ever happened, or calling it a lie.

He denied Ms. Lenox' testimony that he surprised her in a patient's room when he came out from behind a curtain. He stated he always had a good relationship with her. He stated he tried to counsel them, to educate them.[1]

Regarding the incident where Ms. Lenox asked him to shave a patient. The patient told him he did not want to be shaved, as he shaved himself. He then went to Ms. Lenox to educate her on patient's rights. After this is when all the accusations against him came out.

He stated he was only trying to educate them that he was going to report them to the state.

He also told John Reno Geoffrey Mugalu, another employee, that he was going to report Preakness to the state. He could not recall when the meeting with John Reno

[1] It appears he is speaking about his accusers during this portion of his testimony.

and Geoffrey Mugalu took place. It occurred a couple of days after he was suspended. He stated he told them he has evidence of certain things that are not right.

Regarding the testimony of Ms. Jallah he termed it a lie. He termed their relationship as friends. He stated he would bring her food from his wife. He denied making any sexual comments. He stated he was not interested in Ms. Jallah.

He called the allegation by Ms. Jallah that he tried to pat her backside a lie.

He called the allegation by Ms. Jallah that he exposed his penis a lie.

He denied making sexual comments.

Regarding the testimony of Ms. Foster-Stewart where he told her not to wash her underwear, he said it never happened. He also said she did not tell him off in the parking lot.

He went on to state that he stopped talking to the four women because of controversy that was taking place in the workplace. He stated he cursed them out. He stated Preakness wanted to get him for nothing as he is an outspoken person.

He stated that the testimony of Ms. Foster saying he used Patois when speaking to her was a lie.

He stated the women are carrying grievance against him because of another co-worker. He stated a lot of people got jealous of his relationship with him and the co-worker, a young lady.

He denied that he ever touched Ms. McClean inappropriately, that he slapped her bottom. He called it a lie. He stated she still owes him money. He loaned her money to get things done. He termed a "total lie" the allegation that he tried to grab her private area.

He stated Preakness was out to get him because he was outspoken. He stated a previous suspension for sixty days was due to a supervisor lying about him.

He stated he told Ms. Solomon the reason for the allegations against him is because he is a whistleblower. He never reported anything to the State.

He was suspended for cursing during the shaving incident. He did not do anything wrong. He was simply educating Ms. Lenox.

He stated that in Mr. Bernstein's report forty-eight or forty-nine women accused him and only four women came forward. Their testimony is false. They told lies to get him out.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

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

I found the four individuals that made allegations against Appellant credible. Not one of them complained prior to Ms. Lenox reaching her breaking point and emailing Ms. Corrado to not work with Appellant any further. That act was the catalyst leading to the investigation and the other three individuals being interviewed. This is how their allegations came to light. Not one of them had a vendetta against Appellant. Not one of them sought to have him removed. Not one of them were in concert with Preakness against Appellant.

Lily Lenox was direct and strong in her recollection of how Paul Smith treated her. She did not stray from her allegations. She had simply had enough and decided to contact Ms. Corrado.

Justina Jallah was likewise direct and strong in her testimony. She was quite sure as to what had happened.

Kareth Foster-Stewart was also direct and strong. Nothing about her testimony led me to think she was fabricating what happened.

Sharon McLean was also quite credible. She was straightforward in her answers.

Paul Smith was not credible. He continually laughed when asked about the allegations. He made blanket denials and termed all lies. He attributed the entire matter to Preakness wanting to get him because he was outspoken and a whistleblower. This is belied by the fact he never blew the whistle. He never reported Preakness to the State regarding anything. Further, his references to violations were non-specific and never brought forth. The idea that he was targeted is farcical. Simply put, he was not believable.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Paul Smith was employed by Preakness as a CNA.

2. Lily Lenox is employed by Preakness as a Licensed Practical Nurse.

3. Justina Jallah is employed by Preakness as a CNA.

4. Kareth Foster-Stewart is employed by Preakness as a CNA.

5. Sharon McLean is employed by Preakness as a CNA.

6. During the course of their employment Lenox, Jallah, Foster-Stewart and McClean all worked with Smith.

7. During the course of his employment at Preakness Smith would engage in a continuing pattern of inappropriate sexual comments directed toward Lenox, Jallah, Foster-Stewart and McClean.

8. Lenox could no longer endure Smith's behavior and sent an email to Corrado to complain of his behavior and to request she no longer work with him. (R-4)

9. Said email was the catalyst to start an investigation into Smith's workplace behavior.

10. During the course of his employment at Preakness Smith twice slapped McClean on her backside.

11. During the course of his employment at Preakness he exposed his penis to Ms. Jallah.

12. During the course of his employment at Preakness he attempted to touch Foster-Stewart on her backside.

13. During the course of his employment at Preakness he attempted to grab the private area of McClean.

14. During the course of his employment at Preakness Smith received a copy of the County Policy on Workplace Violence (R-6).

15. During the course of his employment at Preakness Smith received a copy of the County Policy on Sexual Harassment. (R-7)

16. Smith acknowledged receipt of the Employee Manual. (R-6)

17. During the course of his employment at Preakness Smith received training in Workplace Violence/Conflict Resolution. (R-7)

18. During the course of his employment at Preakness Smith received training in Harassment/Sexual Harassment. (R-7)

19. Smith was served with a PNDA, dated November 11, 2019. (R-1)

20. Smith was served with an amended PNDA, dated January 6, 2020.

21. Smith was served with a FNDA, dated February 25, 2020, providing for his removal, effective February 21, 2020.

22. Not once during the course of his employment at Preakness did Smith ever report anything to the State of New Jersey regarding possible violations at Preakness.

23. Smith is not a whistleblower.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears

the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

In the instant matter The PNDA against Appellant contained four charges. After a disciplinary hearing on February 10, 2020, all four of those charges were sustained, as set forth in the Final Notice of Disciplinary Action:

> Charge #1) Conduct unbecoming a public employee;
>
> Charge #2) Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
>
> Charge #3) Other sufficient cause: Violation of County Personnel Policy – workplace violence;
>
> Charge #4) other sufficient cause: Violation of County Personnel Policy – Discrimination and Harassment.

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

As to the charges of conduct unbecoming a public employee, Respondent has met its burden of proof by a preponderance of the credible evidence. Lenox, Foster-Stewart, McClean and Jallah were all credible in their testimony. Smith's blanket denials and calling them liars was baseless and not credible. Cleary sexually harassing fellow employees constitutes conduct unbecoming a public employee.

Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment. N.J.A.C. 4A:7-1.1(e) states: Sexual harassment is a form of prohibited gender discrimination that will not be tolerated. The County has met its burden as to this charge. I have already determined that Smith engaged in sexual harassment. Further discussion is not required.

The County has also carried its burden as to the two remaining charges of other sufficient cause: Violation of County Personnel Policy – workplace violence; and Violation of County Personnel Policy – Discrimination and Harassment.

These policies are set forth in Exhibit R-5. A fair reading of both clearly demonstrates Smith violated them repeatedly, specifically by his continued sexual harassment and by striking McClean on the buttocks twice.

This forum has the duty to decide in favor of the party on whose side weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence,

which is the standard in administrative proceedings. Atkinson, supra, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Here it is clear that the evidence preponderates in favor of Respondent that Appellant is guilty of the four sustained charges in the FNDA, as set forth above.

What now must be determined is whether termination is the appropriate penalty.

An appeal to the Merit System Board[2] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, 192 N.J. 19, 33-4 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several

[2] Now the Civil Service Commission, N.J.S.A. 11A:11-1

factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

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

The concept of progressive discipline has been used to reduce the penalty of removal in other cases involving a law-enforcement officer who used racist language in public but who otherwise had a largely unblemished employment record. In In re Roberts, CSR 4388-13, Initial Decision (December 10, 2013) adopted, Comm'n (February 12, 2014), <http://njlaw.rutgers.edu/collections/oal/>, for example, an on-duty police officer who, while arresting an uncooperative black suspect, shouted to his K-9 police dog, "Zero, bite that nigger," had his penalty modified from removal to a six-month suspension. The ALJ had found that his misconduct was "plainly aberrational," as his past record only included an oral reprimand for a motor-vehicle accident over the course of seven years of service and several of his minority co-workers credibly testified that he had otherwise treated citizens in an impartial and respectful manner. While the ALJ found that, due to mitigating circumstances, "termination is too severe a penalty," he nonetheless concluded that, despite a past record that included only an oral reprimand, the "fitting" penalty "is the longest suspension which the law allows: six months."

While concept of progressive discipline in determining the level and propriety of penalties imposed requires a review of an individuals prior disciplinary history, a "clean" record may be out-weighed if the infraction had issued a serious in nature. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Carter v. Bordentown, 191 N.J. 474 (2007). Further some disciplinary infractions are so serious that removal is appropriate. Destruction of public property is such an infraction. Kindervatter v. Dep't of Envt'l Protection, CSV 3380-98, Initial Decision (June 7, 1999), http://lawlibrary.rutgers.edu/collections/oal/search.html.

In determining the penalty to be imposed, the court noted that none of the factors justifying mitigation of removal were present. Namely mistake, negligence, or remorse. The Court was compelled to hold that whatever the employee's motive, and regardless of the worth of the computer, she had to be subject to major discipline. While the goal of discipline is to either remove an employee unsuitable for public service or to impose some lesser sanction when the employee may be rehabilitated, the Court held that the extraordinary serious offense in this case could not be mitigated by a prior good-service record as that mitigation is reserved only for lesser offenses.

In the instant matter, Appellant has a substantial prior disciplinary history (see R-8). Smith also signed a Last Chance Agreement. I would note that even without the substantial disciplinary record the only penalty that should be imposed is termination. Smith created a terrible place for his fellow employees by his continued sexual harassment and unwanted touching.

Based upon the above, I **CONCLUDE** that Respondent has demonstrated by a preponderance of the credible evidence that Appellant is guilty of the four sustained charges in the FNDA, and that removal is warranted.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**; and,

It is further **ORDERED** that the Final Notice of Disciplinary Action, dated February 25, 2020, providing for a penalty of removal, effective the February 21, 2020, is **AFFIRMED**.

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.

June 3, 2021

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: June 3, 2021

Date Mailed to Parties: June 8, 2021

db

APPENDIX

List of Witnesses

For Appellant:

Paul Smith, Appellant

For Respondent:

Lucinda Corrado, Executive Director of Preakness Healthcare
John Reno, Assistant to the executive director
Chanda Curtis, Director of Human Resources for Preakness
Lily Lenox, Licensed Practical Nurse for Preakness
Justina Jallah, Certified Nurse's Assistant (CNA) at Preakness
Kareth Foster-Stewart, CNA at Preakness
Sharon McLean, CNA at Preakness
Eric Bernstein, Attorney

List of Exhibits

For Appellant:

None

For Respondent:

R-1 PNDA
R-2 Amended PNDA
R-3 FNDA
R-4 email exchange
R-5 Harassment Policy
R-6 Acknowledge of Policy Receipt
R-7 Certificate of Completeness
R-8 Grievance History
R-9 Investigation Report 2/7/20
R-10 Supplemental Investigation Report 2/18/20