



STATE OF NEW JERSEY

In the Matter of Amy Ebert
Morris County, Department of Public
Safety

DECISION OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2021-1247
OAL DKT. NO. CSV 03014-21

ISSUED: MARCH 24, 2022

The appeal of Amy Ebert, Public Safety Telecommunicator, Morris County, Department of Public Safety, removal effective November 14, 2019, on charges, was heard by Administrative Law Judge Gail M. Cookson, who rendered her initial decision on February 15, 2022 reversing the removal. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on March 23, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

The Commission makes only the following comments. The ALJ's initial decision was thorough and well-reasoned and most of her findings and conclusions were based on his assessment of the credibility of the expert witnesses. In this regard, upon its *de novo* review of the record, 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 u. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

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

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

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Amy Ebert. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C. 4A:2-2.12*. An affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C. 4A:2-2.10* and *N.J.A.C. 4A:2-2.12*, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as

to back pay or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF MARCH, 2022



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 03014-21

AGENCY REF. NO. 2021-1247

**IN THE MATTER OF AMY EBERT,
MORRIS COUNTY, DEPARTMENT
OF LAW AND PUBLIC SAFETY.**

Andrew Moskowitz, Esq., for appellant Amy Ebert (Javerbaum, Wurgaft, Hicks,
Kahn, Wilstrom & Sinins, attorneys)

Stephen E. Trimboli, Esq., for respondent Morris County (Trimboli & Prusinowski,
attorneys)

Record Closed: February 11, 2022

Decided: February 15, 2022

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves the removal of appellant Amy Ebert (appellant), a Public Safety Telecommunicator, also referred to as a 9-1-1 Dispatcher, employed by respondent Morris County, Department of Law and Public Safety (County or respondent), on disciplinary charges. The allegations are that appellant is psychologically unfit for duty as a dispatcher for the County, pursuant to N.J.A.C. 4C:2-2.3(a)(3) (inability to perform duties), and that she reported false information or failed to report unfavorable information

in her pre-employment fitness for duty examination, pursuant to N.J.A.C. 4C:2-2.3(a)(6) (conduct unbecoming).

By Preliminary Notice of Disciplinary Action dated October 24, 2019, the County advised appellant of the above-referenced charges. It also suspended her immediately without pay. A departmental level hearing was held on November 19, 2020. By Final Notice of Disciplinary Action dated January 21, 2021, these charges were sustained resulting in her removal effective November 14, 2019.

The appellant timely appealed this determination on January 28, 2021, and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL), where it was filed on March 24, 2021, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The plenary hearings were held at the OAL on the following dates: October 5, October 6, December 3 and December 9, 2021. The post-hearing briefs were received at the OAL on February 11, 2022, and the record closed on that date.

FACTUAL DISCUSSION

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

Appellant Amy Ebert¹ is a thirty-year-old female who had been employed with Morris County as a Dispatcher since 2014. Appellant graduated high school in 2009, after which she enrolled in the DeVry Institute but found the program incompatible with her interests. She then attended Union County College and received her Associate Degree in Criminal Justice. Appellant is still working to complete her bachelor's degree. Ebert was hired by the County as a Public Safety Telecommunicator, a civilian position

¹ While appellant did not testify first and does not carry the burden proof in this proceeding, I present her background first for the ease of following the narrative by the reader.

also referred to as a 9-1-1 Dispatcher ("Dispatcher"), in January 2014. Appellant found that she loved this job because of the challenges and the "hustle bustle," as well as providing her an opportunity to help people.

Appellant reviewed her annual evaluations, commendations and minor counseling actions in her career. She also acknowledged that her evaluation in 2017 assessed her performance to be unsatisfactory. However, she availed herself of the Employee Assistance Program that was recommended to her. This was her first time undergoing any professional mental health therapy and it led her to Dr. David Miller and Andrea Caudle, LCSW. Ebert has found working with a therapist and a psychiatrist to have helped her a lot in her own personal struggles. She stated that she thinks this personal work was reflected in a much-improved evaluation in 2018. In addition, she was recognized in April 2019 for having had ten commendations on her record in the preceding year and just months before her referral for a fitness for duty examination.

Appellant testified that it was in June 2019 that her therapist recommended that she try to obtain a full-time day shift assignment rather than the rotating shifts she had found added to her stress. Her therapist thought such a change would provide her the chance to taper off of medications she was on for anxiety or depression. Appellant felt that the night shift was a toxic environment because of the personalities of the supervisors and her colleagues. She described incidents when she was yelled at with the words including "fucking liar" and "fucking bullshit," as well as being called out for very minor procedural transgressions, and retaliated against by persons throwing out her food, etc. Appellant, in fact, had filed a complaint about the night shift being a toxic environment. She felt the conditions on that shift were not conducive to safe and effective service to the public.

In order to change shifts outside the annual request period when her seniority would probably have probably secured her that right, appellant would need to locate a colleague who was willing to take her night shift. Appellant said she did find a co-worker to be her "night shift buddy" but the department didn't honor it.

Ebert explained from her perspective certain other issues that came up and caused her to be reprimanded. One incident was unique and unusual when an arrested burglar managed to escape and was reported as "lost." This had everyone, including the officer reporting it, laughing about it. When appellant discussed it the next night with a different officer, she was reprimanded for improperly disclosing private information. She believed that it really had to do with the embarrassment of someone higher up.

A couple of months later, on August 20, 2019, appellant was called to report to Allison Stapleton. When appellant asked if she was in trouble and should ask for a union representative to be present, Stapleton said she was not. She said appellant was asked to come down so they could discuss her complaint. The meeting lasted about two hours, during the last ten minutes of which appellant admitted that she got upset because she was being told of an unnamed colleague who had "concerns" about her. It was as a result of that that appellant was referred for a fitness for duty examination.

Appellant met with Dr. Schlosser of the Institute of Forensic Psychologists (IFP) for approximately thirty minutes. He stated that her reason for being there was not the co-worker's unsubstantiated statement but the letter her psychiatrist had written several months earlier supporting her request to obtain a full-time day shift assignment as a mental health accommodation.

Allison Stapleton testified for the County. She is the Director of Employee Resources for Morris, a position she has held for six years. She oversees four divisions: Risk Management, Personnel, Medical Services, and Labor Relations. Stapleton identified the disciplinary notices relevant to this matter. She also stated that appellant had requested an accommodation to day shift assignment with a supporting letter from her therapist, dated June 17, 2019. Stapleton explained that the practice on such requests is to discuss it first with the impacted department and then forward it to Medical Services for an evaluation as to the reasonableness of any proposed accommodation in light of the diagnosis. On appellant's request, her department could not find an accommodation, so the matter never went to Medical Services.

Stapleton stated that she made the referral of appellant to IFP for a fitness exam, in consultation with the Personnel Director. She had met with appellant after a co-worker reported that appellant had told her that she was in the hospital for a miscarriage. Appellant had been authorized to take some bereavement leave although Stapleton seemed unclear whether it was for the miscarriage or appellant's grandmother. Stapleton claimed that she called appellant in to talk in order to make sure she was okay to return to work. She claimed that appellant was crying about family issues, her miscarriage, and possibly some other health issues. In her estimation and also based on co-worker concerns, Stapleton determined that appellant was too stressed to be able to handle 9-1-1 calls. She also said that appellant had been having difficulty with her work calls and that she seemed to be talking about those calls to persons who did not need to know about them. After Dr. Schlosser completed his evaluation of appellant, the County received his findings both verbally and in writing. Stapleton drafted the disciplinary notice with an immediate unpaid suspension as a result of his report.

On cross-examination, Stapleton admitted that she had not reviewed appellant's evaluations or commendations prior to her referral to IFP. She made no determination that Ebert was a threat to herself or to others. Stapleton did review the disciplinary history but acknowledged that performance issues or discipline are not usually grounds for a fitness for duty examination. Ordinarily, an employee's social issues with a partner or boyfriend would also not be grounds for a psychological fitness exam. Stapleton did not know who prepared the packet sent to IFP on appellant or what it contained. She was also secondarily advised by Dr. Schlosser that appellant had been untruthful in her pre-employment IFP evaluation. Stapleton then prepared appellant's termination because a Dispatcher must be truthful in order to be capable of performing all duties, including potential court testimony.

The County also presented the testimony of Michael Peoples who is the Director of the Emergency Communications Center (ECC), which is within the Department of Law and Public Safety. He has served in that position for over a decade after more than twenty years in other law enforcement positions within and outside the County. He provided an overview of the emergency dispatch services and the different level of services towns engage them for. The ECC receives almost 100,000 calls annually with a resulting

800,000 or more computer-aided dispatch (CAD) events recorded. He also described the table of the organization within the ECC, including a floor staff of approximately seventy-eight Dispatchers. Generally, there are an average of thirteen Dispatchers per shift, with each person working two days on and two days off. There are steady day and steady night shifts with a schedule of 7 to 7; there are occasionally power shifts that run 3 p.m. to 3 a.m. Those who do not have a steady shift rotate between day and night, as obviously the shifts need to be fully staffed and balanced. In the fall of each year, he receives shift preferences and sets up the assignments. Mid-year changes can be addressed after consideration for seniority and a voluntary reciprocal swap, but Peoples stated that he prefers to avoid them.

Peoples also described the training a Dispatcher receives in response to my questioning. It takes at least four months to train a new hire, with academic component taking the first four to five weeks, followed thereafter by shadowing trained Dispatchers on the floor. There are also three levels of certifications that a Dispatcher must take and pass: 9-1-1 calls, police, and then fire/EMT.

Peoples agreed with her direct supervisor's assessment that appellant had met and, in some cases, exceeded the requirements of her position. He also agreed that she had excelled in the categories of effectiveness under stress, attitude, and conduct. Peoples testified to numerous instances from May to December 2018 in which he and others recognized Ebert for her excellent work performance. In addition, on April 11, 2019, appellant received a recognition flag for ten (10) instances during the period from May 2018 to April 2019 in which she demonstrated outstanding performance.

Both sides presented experts in the field of psychology to address the issue of appellant's alleged psychological unfitness for duty. The County presented Dr. Lewis Z. Schlosser, Ph.D., of the Institute of Forensic Psychology. Appellant presented Dr. Robert B. Sica, Ph.D., the principal of his own firm, Neuropsychology Rehabilitation Services, LLC, Neptune, New Jersey.

Dr. Schlosser has been a counseling psychologist for almost fifty years. He has been a managing partner at IFP since 2018 and part of the firm for a total of about ten

years. Dr. Schlosser has undertaken thousands of evaluations in his career, and at least one thousand fitness examinations, including his time with the New York City Department of Corrections, which overlapped with his employment at IFP. He was Board Certified in 2017 in Police and Public Safety Psychology and I so qualified him as an expert in that field.

Dr. Schlosser discussed the difference between a pre-employment evaluation, which is a suitability assessment, and a fitness for duty examination, which is looking for the presence or absence of a psychological condition or impairment that impacts job performance. In this case, appellant was interviewed, given several standard tests, and some self-report forms, the latter including, but not limited to, the Beck Depression Inventory, the Personal Problem Checklist for Adults, and an internal IFP "Why Are You Here?" form. Dr. Schlosser testified that his report referred to and relied upon the 2013 pre-employment report of his now-retired IFP colleague Dr. Gallagos. He also spoke with her treating therapist who, along with appellant, reported her recent pregnancy and miscarriage. Dr. Schlosser was of the opinion that appellant manipulated the information she presents in order to get what she wants. Dr. Schlosser focused on her inconsistent reports of her family history in 2013 and 2019, even though he acknowledged that Dr. Gallagos might not have asked her about childhood discipline and parental anger issues.

Dr. Schlosser stated that appellant was also given the Minnesota Multi Phasic Personality Inventory (MMPI-2-RF) and the Personality Assessment Inventory (PAI), two standard instruments for assessing psychopathology. On both, he found that appellant tested as mildly defensive with none of the scales elevated. He considered that to be inconsistent with the request for a day shift accommodation and her chronic anxiety, which in turn was inconsistent with her statement that she was fine and wanted to keep her job.

On cross-examination, Dr. Schlosser conceded that appellant might not have been aware of her anxiety and depression in 2013. He had no way of knowing whether she had had therapy prior to 2018. Dr. Schlosser tried to refer to the positive entries on her record as just a "data point;" but on further questioning, he could not recall what documents he had been provided by the County and he never listed those in his report.

Dr. Schlosser agreed that there was no evidence of psychopathology from her MMPI and PAI tests, yet he predicted that her future would likely include more episodes and incidents. In response to my own questioning, Dr. Schlosser acknowledged that appellant reported that she has improved with therapy and that her anxiety and depression were under control.

Dr. Sica was qualified as an expert in Psychology. He is Board Certified in Clinical Psychology and has been on the medical faculty at several New Jersey teaching hospitals. Dr. Sica has worked with brain injured patients and has a subspecialty in neuropsychology, which studies the biological integrity of brain systems. He has undertaken clinical or forensic examinations for insurance companies, litigation and some fitness for duty cases. He conducted his interview of appellant for approximately two hours on December 24, 2019, with follow-up testing a few weeks later.

Dr. Sica concluded that there was nothing unusual in appellant's psychological profile. She had some anxiety and some hostility but those did not rise to the level of incapacitating her. She was taking advantage of working with a treating mental health professional and was on some common medications. In reviewing the IFP report by Dr. Schlosser, Dr. Sica noted that they both arrived at similar findings and that IFP had only found her mildly defensive. Even IFP had no evidence of any psychopathology. Dr. Sica explained that one cannot use a broad brush to opine that any anxiety necessarily disqualifies a person from a high stress job because it depends upon the job and the individual's coping skills and triggers. He has evaluated many people in high stress jobs, such as doctors and lawyers, who are fully-functioning notwithstanding some anxiety, a condition endemic in our society.

On cross-examination, Dr. Sica detailed what he had had access to for his examination. He admitted that he did not speak with her treating mental health professionals. Dr. Sica also indicated that appellant differentiated problems she had on the job from her anxiety and depression in personal arenas of her life.

In sum, on the basis of the factual record and the expert opinions presented, I regard the expert opinion of Dr. Sica to be entitled to greater weight in these proceedings

than that of Dr. Schlosser. The clinical evaluations both revealed that appellant's responses were valid and fell within the normal range on the test scales, but Dr. Schlosser wanted to discount his own testing results. Neither psychologist found appellant to be suffering from any psychopathology or debilitating mental disorder, yet Dr. Schlosser predicted future performance issues that were not supported by past performance issues. Dr. Schlosser relied heavily on a comparison to the IFP suitability determination and materials from 2013, and tried to discount his own "mild" test findings.

While it was the opinion of the County witnesses and psychological expert that appellant suffers from debilitating anxiety and depression, and that she failed to report same during her pre-employment fitness examination, I **FIND** based upon all the expert and lay testimony and documentary evidence that appellant is not psychologically unfit to serve as a Dispatcher; nor that she did not falsify her personal information. There was no competent evidence, let alone a preponderance of such evidence, that Ebert was emotional on the job, interacted with the public in a stressed and/or inappropriate manner, or was a danger to herself or the public. To the extent Stapleton relied upon an undisclosed employee's observations or comments, two reprimands on appellant's then-recent performance, and the last ten minutes of a meeting with appellant just prior to the fitness referral, I **FIND** that those were exaggerated and, as admitted to by Stapleton, not a proper basis for said referral. Even if her therapist's request for her to be placed on day shift as an accommodation was a proper basis for the referral², the findings set forth above refute that appellant was unfit for duty.

ANALYSIS AND CONCLUSIONS OF LAW

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad

² I note that appellant's desire for a steady day-shift assignment likely had more to do with the personalities on the night shift and her perception of a hostile workplace than a need for an accommodation. In any event, as found on the basis of the entire record and both experts, the personality stressors of the workplace did not impact her ability to handle the EMT and 9-11 stresses of the calls she was handling. She thrived on those, as evidenced by most of her evaluations and her many commendations.

tenure protection. 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 states that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline and termination of public employees.

N.J.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The burden of proof is always on the appointing authority in disciplinary matters to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The employee's guilt of the charge(s) must be established by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the 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). Credibility, or, more specifically, credible testimony, in turn, must not only proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). All issues are redetermined de novo on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In this matter, there are two allegations that were presented by the County and heard at this time: (1) psychological unfitness for duty; and (2) inability to perform the job duties. As set forth above, both relate to psychological fitness for duty examinations prepared by the IFP. It is charged that appellant lied in her first pre-employment evaluation and that later she was found unfit. The charge of not being truthful is wholly related to her failure to be self-aware of the source of her feelings as anxiety and depression at that younger age. Moreover, it was established by the preponderance of the credible evidence that Dr. Gallagos might have recorded his interview with appellant

inaccurately or incompletely, and apparently did not ask some questions that only later might have been relevant.

With respect to the dominant charge of psychological unfitness to be a Dispatcher, I note that the Civil Service regulations do not provide guidelines or standards for the removal of an employee on a charge of psychological or mental unfitness. There are rules that relate to the removal by the appointing authority from the eligibility list of a prospective appointee on such grounds. In that instance, the regulations set forth that such an adverse appointment action must be supported by professional reports. In the absence of any more specific regulation, I look to these for initial guidance:

Professional reports submitted by either of the parties shall include the following:

1. The professional's signature, type of license (including the type of license or educational degree of any person contributing to the report), address, and the date;
2. The length of the examination or interview;
3. A specific diagnosis or statement of behavioral pattern or the specific reasons for a recommendation;
4. A finding as to the qualifications of the appellant for effective performance of the duties of the title; and
5. All tests that have been administered (for example, EKG, EEK, X-ray, M.M.P.I., Rorschach and T.A.T.) and all raw data, protocols, computer printouts and profiles from these tests.

[N.J.A.C. 4A:4-6.5]

Our courts have also had the opportunity to address the issue of disqualifying a candidate on the basis of psychological unfitness. In In re Vey, 124 N.J. 534, 544 (1991), the New Jersey Supreme Court did not require a diagnosis of a mental disorder as the basis for an appointing authority disqualifying a candidate on the basis of psychological unfitness. Nevertheless, the Court made it clear that the standards would be more exacting if the agency was relying upon a constellation of unremarkable personality traits as opposed to mental dysfunction. As set forth in Vey:

Although the case before us is not an employment-discrimination case and does not raise questions of disproportionate impact of the testing criteria, the difficulty here is that a gap exists between the evidence of the identified personality traits and the condition of unfitness that has to be met under the regulation. The use of the specific personality traits ascribed to this candidate as predictors of job performance has not been validated. It may be that such validation would not be required if the test disclosed a recognized mental disease or defect. Such a person might meet the criterion of the regulation that speaks of disqualification because the candidate is "psychologically unfit." The record does not disclose whether that language in the regulation refers to commonly-recognized categories of mental disorder. See State v. Pitts, 116 N.J. 580, 608, 562 A.2d 1320 (1989) (noting mental disorders recognized by the American Psychiatric Association in DSM III-R: Diagnostic and Statistical Manual of Psychiatric Disorders 226-28 and 251 (3d ed. Rev. 1987)). In this case, however, the record describes a variety of seemingly unremarkable personality traits with a conclusion that they demonstrate a below-average potential on the part of appellant. In psychological reviews of applicants, evaluators may use language containing euphemisms that are well understood by others in the field to convey a diagnosis of mental dysfunction. If that is so, then the diagnosis must be clearly stated because courts are simply unable to review agency action if there is a coded way of communicating significant medical findings.

If, on the other hand, the evaluator simply notes various personality traits, then there ought to be some validation that the described personality traits do in fact correlate to job performance.

* * *

The record does not disclose the basis for equating the described personality traits with the projected job performance. Nor does the record disclose to us a finding of a recognized mental disorder. The findings recite the presence of personality traits, but there is no evidence of a correlation between such nonpathological test results and actual job performance. If a trait is to be deemed disqualifying to the extent that it demonstrates psychological unfitness, there must be evidence in the record of both the trait itself and the trait's correlation with the standard of psychological unfitness. That correlation may be demonstrated in any of the

familiar ways for establishing the validity of such psychological tests.

[Id. at 542-44 (emphasis added)]

The Court also discussed what it meant by “validity” and how an appointing authority could demonstrate it:

“Validity is predictive power: the more accurately a test predicts an employee's job performance, the more valid it is. Empirical validity * * * is established by a direct statistical correlation between test scores and performance ratings and is not necessarily obvious from inspection of the test questions.” Comment, Psychological Aptitude Tests and the Duty to Supply Information: NLRB v. Detroit Edison Co., 91 Harv. L. Rev. 869, 873 n.31 (1978).

* * *

Particularly in the case of police and fire fighters, courts have had to examine the validity of various tests, including intelligence, agility, and psychological tests.

[Id. at 540]

Vey returned to the Supreme Court after further proceedings were held on remand to develop the record on the points it raised. In re Vey (Vey II), 135 N.J. 306 (1994). While there was some discord in the application of the then-newly announced standard to the facts in Vey, the standard remains viable.

In Vey I, we pointed out that psychological tests, like intelligence or agility tests, are only as good as their correlation to actual job performance. Id. at 540, 591 A.2d 1333. Accordingly, recognizing that there is a degree of mysticism about psychological evaluations, we required that on remand two things be done: (1) that the Panel clarify whether the personality traits of Ms. Vey constituted a recognizable mental disease or defect, and (2) that, if they did not, the employer demonstrate by a professionally-acceptable validation method that the traits or characteristics used to disqualify her were actually related to job performance.

[Vey II, 135 N.J. at 313 (O'Hern, J., dissenting)]

Here, Dr. Schlosser was clearly attempting to rely upon the second option permitted in Vey of correlating appellant's job performance to a constellation of personality traits and not to any recognizable mental defect. However, Dr. Schlosser did not support his conclusions about appellant with any validated method or data, as found above. In Vey, the appointing agency relied upon presumptively valid or unchallenged MMPI-II test results. With respect to Ebert, Dr. Schlosser's evaluation relies almost exclusively upon a perceived, though of questionable origin, difference in the 2013 and 2019 IFP evaluations; as well as his opinion that she manipulates her responses to suit her needs, which were not confirmed by the validated test results.

It is also important to note that with respect to appellant, there was no parade of disciplinary actions of a similar nature or import; there was no parade of peers with whom appellant could not get along; there was no parade of superiors who found appellant insubordinate or with whom they found it difficult to work; there was no parade of inappropriate emotional outbursts or public interactions. Vey can also be distinguished from the within matter insofar as appellant was an established Dispatcher with five years of experience and not merely a candidate for consideration who does not yet have a track record of performance. Furthermore, appellant has been commended and received good evaluations with respect to her handling stressful situations as a Dispatcher. Clearly, she took advantage of her poor 2017 evaluation as an opportunity to seek mental health counseling, which objectively improved her job performance.

A charge of "psychological unfitness for duty" is a very serious basis for taking disciplinary action. I concur with Dr. Sica that such a basis for removal must be premised upon a properly diagnosed severe mental health condition that undermines the employee's ability to function on the job and is not otherwise treatable, with or without a leave of absence for such treatment. In the alternative, based upon Vey, the County must "demonstrate by a professionally-acceptable validation method that the traits or characteristics used to disqualify her were actually related to job performance." Not having done so, and not having presented any other competent evidence to support the position that appellant is unable to perform her job duties as a result of an emotional or mental condition, I **CONCLUDE** that respondent appointing authority has failed to satisfy

its burden of proof that appellant was unfit psychologically to fulfill responsibly and adequately her employment as a 9-11 Dispatcher for the County of Morris as charged.

I am frankly surprised that Dr. Schlosser would ignore the common and obvious reality that appellant did not have insight into or any diagnosis of anxiety, depression or PTSD from childhood until she engaged with treating therapist and psychiatrist in late 2017 or early 2018. Just because appellant has experienced and witnessed abusive parenting would not have automatically made her self-aware of such as a young adult, as Dr. Sica thoroughly explained, until she engaged with treatment. Further, the greater weight of the expert testimony supports the position that appellant does not bring her childhood PTSD to her work as a Dispatcher, and that like many people in our society, she is fully functioning notwithstanding engaging with therapy and use of light anti-anxiety medication. Dr. Schlosser seemed to be more concerned with protecting the reputation of IFP and Dr. Gallagos, and perhaps satisfying their county client, than in objectively evaluating appellant's ability to perform her job successfully, which for the most part she had done for five years.

ORDER

Accordingly, it is **ORDERED** that the charges alleging psychological unfitness for duty and conduct unbecoming, as set forth in the Final Notice of Disciplinary Action of the Morris County Department of Law and Public Safety dated January 21, 2021, against Amy Ebert resulting in her immediate unpaid suspension effective October 24, 2019, and her removal effective November 14, 2019, are hereby **REVERSED**.

It is further **ORDERED** that back pay and any other accompanying employment benefits shall be reinstated to appellant Amy Ebert from the date of the commencement of her unpaid status. It is further **ORDERED** that counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

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, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

February 15, 2022
DATE


GAIL M. COOKSON, ALJ

Date Received at Agency: 2/15/22

Mailed to Parties: 2/15/22

id

APPENDIX

LIST OF WITNESSES

For Appellant:

Amy Ebert

Robert B. Sica, Ph.D.

For Respondent:

Allison Stapleton

Michael Peoples

Lewis Schlosser, Ph.D.

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 2014 Annual Evaluation for Amy Ebert

A-2 2015 Annual Evaluation for Amy Ebert

A-3 2016 Annual Evaluation for Amy Ebert

A-4 2017 Annual Evaluation for Amy Ebert

A-5 2018 Annual Evaluation for Amy Ebert

A-6 Statement of David Weinert

A-7 Statement of Sgt. Dan Papa

A-8 Statement of Officer Patrick Meade

A-9 Statement of Officer Ronald Jones

A-10 Guardian Tracking Entries for Amy Ebert

A-11 Report of Robert B. Sica, Ph.D., Consultation of December 24, 2019

A-12 Curriculum Vitae of Robert B. Sica, Ph.D.

For Respondent:

R-1 Preliminary Notice of Disciplinary Action. Dated October 24, 2019

R-2 Final Notice of Disciplinary Action, dated January 21, 2021

- R-3 NJCSC Job Specification Public Safety Telecommunicator
- R-4 Morris County Policy 1-4.08
- R-5 Request for Accommodation, dated June 17, 2019
- R-6 Reference for Fitness for Duty Examination, dated August 21, 2019
- R-7 Curriculum Vitae of Dr. Lewis Z. Schlosser, dated September 12, 2021
- R-8 IFP Report of Dr. Schlosser, dated September 9, 2019
- R-9 Informed Consent Agreement, dated August 22, 2019
- R-10 Interviewer's Report Form, dated August 22, 2019
- R-11 Biographical Summary Form, dated August 22, 2019
- R-12 BIBDI-1, dated August 22, 2019
- R-13 Personal Problems Checklist for Adults, dated August 22, 2019
- R-14 "Why Are You Here?" Form, dated August 22, 2019
- R-15 IFP Report of Dr. Gallagos, dated January 5, 2014
- R-16 Informed Consent Agreement, dated December 23, 2013
- R-17 Amy Ebert Certification, dated December 23, 2013
- R-18 Interviewer's Report Form, dated December 23, 2013
- R-19 Biographical Summary, dated December 23, 2013
- R-20 MCCD Final Disposition Report, dated October 17, 2017
- R-21 Investigation Report, 2019-IA-17, dated April 19, 2019
- R-22 MCCD Incident Report, dated July 30, 2017
- R-23 MCCD Incident Report, dated January 12, 2018
- R-24 MCCD Incident Report, dated October 9, 2018
- R-25 MCCD Final Disposition Report, dated June 7, 2018
- R-26 Investigation Report, 2019-IA-14
- R-27 MCCD Incident Report, dated October 18, 2017
- R-28 MCCD Incident Report, dated May 6, 2018
- R-29 MCCD Incident Report, dated January 21, 2019
- R-30 MCCD Final Disposition Report, dated July 18, 2017
- R-31 MCCD Incident Report, dated July 30, 2017
- R-32 MCCD Incident Report, dated November 22, 2017
- R-33 MCCD Incident Report, dated September 8, 2018
- R-34 MCCD Incident Report, dated June 27, 2017
- R-35 MCCD Incident Report, dated April 25, 2019

- R-36 MCCD Incident Report, dated June 12, 2018
- R-37 MCCD Incident Report, dated November 14, 2017
- R-38 Sick Leave Warning, dated October 9, 2018
- R-39 MCCD Final Disposition Report, dated October 30, 2018
- R-40 MCCD Final Disposition Report, dated September 30, 2015
- R-41 Certification of Records from IFP, dated October 13, 2021