STATE OF NEW JERSEY

In the Matter of Joseph Guido,
Lodi, Board or Education

CSC DKT. NO. 2020-1098
OAL DKT. NO. CSV 16006-19

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 12, 2022

The appeal of Joseph Guido, Custodial Worker, Low Pressure License, Lodi, Board of Education, removal, effective August 26, 2019, on charges, was heard by Administrative Law Judge Thomas R. Betancourt (ALJ), who rendered his initial decision on September 1, 2022. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of October 12, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ'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 Joseph Guido.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 12TH DAY OF OCTOBER, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
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 16006-19
AGENCY DKT. NO. 2020-1098

JOSEPH GUIDO,
Appellant,
vs.
LODI BOARD OF EDUCATION,
Respondent.

John R. Klotz, Esq., for appellant

Mark A. Wenczel, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorney)

Record Closed: June 24, 2022 Decided: September 1, 2022

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Joseph Guido, appeals a Final Notice of Disciplinary Action (FNDA), dated October 3, 2019, imposing a penalty of removal, effective August 28, 2019, on sustained charges as follows: N.J.A.C. 4A:2.2.3(a): 6. Conduct unbecoming a public employee; 7. Neglect of duty; 8. Misuse of public property; and 12. Other sufficient cause.

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 November 13, 2019.

A prehearing conference was conducted on December 4, 2019, and a prehearing order entered on the same date by the undersigned.

A hearing was held on March 1 and March 4, 2022. The record was kept open for counsel to submit written summations. Written summations were received on June 22, 2022, on behalf of Appellant; and, on June 24, 2022, on behalf of Respondent. The record closed on June 24, 2022.

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 removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Christine Vanderhook testified as follows:

She is the principal of Wilson Elementary School. She has been employed by the Lodi Board of Education for 18 years.

On July 31, 2019, she was working in the guidance office as her office was having some work done. Her desk and computer were moved. On that date she saw Appellant at the end of the day when she was preparing to leave. She went into the main office. This was between 3:00 p.m. and perhaps 3:20 p.m. When she entered the main office she saw Appellant at her secretary's computer. This was unusual as

custodians use of a computer is not part of their job description. Also, if they need to use a computer they are to use one in the school computer lab.

Dr. Vanderhook did not discuss the use of the computer with Mr. Guido. She thought it better to address it with Mr. Luna, the head of maintenance and then speak with Appellant at a later time. She then left the building.

She returned to work the next day, August 1, 2019. Her secretary only works 10 months. In the summer principals are responsible for checking the answering machine and voice messages. She logged onto her secretary's computer as her computer was able to be used. She logged into Genesis, the computer data base the District uses. As soon as she logged on to Genesis a pop up showed showing a scantily clad young woman. She x'ed out the pop up. She continued to use the computer and another pop up occurred of the same sexual nature. She then contacted Mr. Mykietyn, the director of technology, who advise her to not touch the computer again.

Mr. Mykeityn arrived and removed the computer. She had no pop up issues prior or after this incident.

The school computer lab is located on the bottom floor. It contains rows of computers for student use. Students are brought there by teachers. They access the computers with a password, which is written on chalkboard.

Appellant had access to the computer lab.

She never spoke with Mr. Luna as Mr. Mykietyn had taken over the investigation.

Cross Examination

Most of her duties are administrative. She confirmed that she did not speak with Appellant when she observed him at her secretary's desk and computer.

She had intended the next day to speak with the head of maintenance. She did not have the opportunity to do so as the pop up occurred.

She stated she received a copy of a letter from the previous superintendent regarding a suspension of Appellant.

Re-Direct

Dr. Vanderhook identified the letter she received regarding the suspension of Appellant.

Christopher Mykietyn testified as an expert in computer science and technology as follows:

He is the director of technology for the Lodi School District. He has been employed since 2011. He is responsible for managing the entire system and directing employees under him. He went on to describe some of his duties.

In the summer typically the computers are wiped out and reset so that they would have all the latest security updates. This was done in the summer of 2019. It is done in stages and usually done by the end of July.

Mr. Mykietyn described what a firewall is and what it does.

Dr. Vanderhook's secretary's computer was wiped by the end of July, probably the end of June. He was contacted by Dr. Vanderhook on August 1, 2019, regarding the appearance of the pop ups on the computer. She sent him a photo of the pop up, prompting him to visit her office. He saw the pop up, logged out of the computer and logged back in as himself as he has additional rights on the computer. He believed the pop up was an ad for strip poker with a graphic of a scantily clad woman.

After he logged in he looked in Windows that shows him the profiles of what have recently been updated. This is what is shown in R-2, which is a record of who accessed the computer and at what times. He termed it a user log on history.

What stood out to him on the user log on history was that someone used the wilstudent log in on the computer. This is a generic log in the students use in the computer lab. He thought it curious as no students were in the building at the time.

Someone logged in with this password on July 29 at 3:26 pm. This was the first time the computer had been accessed since being wiped clean. It was logged out the next day when Dr. Vanderhook logged in. She logged off the following day, July 31, at 3:30 p.m.

He logged in as wilstudent at 10:36 a.m. to look around. He pulled up Internet Explorer to look at browser history, which is shown in R-3. It was clear from the browser history that someone had accessed some pornography videos, as well as the Kansas City Chiefs and Dinar Guru, a site for Iraqi currency.

On R-3 there is video.fc2.com, which looked to him to have titles for pornographic videos. Mr. Mykietyn wondered how this could get pass the firewall. He was able to determine that the fc2 is a generic file sharing site that does have significant non-obscene content. This is why the firewall did not block it. However, fc2 has a sub site with pornographic content. This is how it got passed the firewall. Mr. Mykietyn has since closed access to this.

Mr. Mykietyn then reviewed file access detail of the files listed in the browser history contained in R-4. The site was visited on July 29, 2019 at 3:40 p.m.

The Superintendent advised him that he had to confirm the sites visited were pornographic, which he did. He also had to make sure they did not contain child pornography, as that would require the police being notified.

Having confirmed that someone accessed Ms. Swavero's computer on July 29, 2019 at 3:26 p.m., he then reviewed the video camera surveillance for that date and time. Mr. Mykietyn noted that computer access cannot be remote. Someone had to be at the computer to log in.

He then reviewed video footage, R-15A, for July 29, 2019, which showed the hallway by the front door of the main office. This is where Dr. Vanderhook's office and secretary are located. At 2:27 p.m. he saw the air conditioning contractor look in the office and leave. The cameras only record in response to motion.

At 3:01 p.m. Appellant goes into the main office. At 3:03 p.m. he turns off the light in the main office. At 3:25 p.m. Appellant goes back into the main office. The light does not go on at this time. At 3:44 p.m. the light goes on. At 3:45 p.m. Appellant exits the office. There is no other footage after 3:45 p.m.

Mr. Mykietyn then reviews video footage of the parking lot contained in R-15B, which shows Appellant walking to his vehicle at 3:47 p.m.

Mr. Mykietyn then reviewed an opened/closed report from the alarm company, R-6, that shows the alarm was armed at 3:45 p.m. on July 29, 2019.

He then reviewed a log of the time period between July 29, 2019, at 3:26 p.m. to 3:44 p.m. contained in R-5, which showed activity under the wilstudent profile. This also shows the fc2 access. R-5 is a secondary backup report to R-3.

When he spoke with Dr. Vanderhook she had said she saw Appellant at the computer on July 31, 2019.

Mr. Mykietyn compiled the information and brought it to the Superintendent at the time, Dr. Fedina. It was clear to Mr. Mykietyn from the evidence he gathered that Appellant accessed the computer during that time.

Mr. Mykietyn explained the wilstudent log in use by students. He also explained that it was not normal for a custodian to be on a computer, unless they were doing training. Training use of a computer would typically need a special accommodation, book a room and help them get set up on the computers.

He opined that the pornography on the computer was there due to use by a human, and not caused by a virus or malware.

Based upon his review he opined with a reasonable degree of computer science and technology certainty that pornography was accessed on the computer in question on July 29, 2019, and that he is confident that Appellant is the one who accessed those sites.

Cross Examination

He did not have documentation of the purge of computers. R-2 shows the full history of the log ins and there is nothing prior to July 29, 2019. R-3 is the browser history. Dates, times and specific websites are shown on R-4. A comprehensive history is not included in the exhibits. R-5 is a list of some of the files that were downloaded.

He did not recall the exact date the computer was purged. Had he done the purge after July 29, 2019, the information on R-5 would be purged.

Mr. Mykietyn then reviewed P-1, which is a browser history of the computer in question. Someone in his department produced it. It may have been him, or someone else. P-1 goes back to March 16, 2019.[1] The file tsyndicate.com appears on P-1 on July 16, 2019 at 11:07 a.m. It is an ad server. The use that accessed this is wilstudent.

He does not know who the user was that date. Obscene pornographic words were typed by someone for the ad server.

[1] What was provided to the undersigned as P-1 by Appellant's counsel only contains dates spanning July 11, 2019 through July 18, 2019. The file itself can be found in the flash drive marked R-15. For purposes of writing this Initial Decision it is inconsequential.

Mr. Mykietyn explained what he was reviewing is a record of things that have been downloaded by the page you are on. Ad servers collect key words someone typed and save things called cookies. Cookies are used to conduct a search term to speed up content it thinks you are interested in. He did not know of this prior to July 29, 2019, as no one had reported any pop ups at the time.

From looking at P-1 it is only the person using the wilstudent account who has been accessing this stuff. There was never an opportunity to find out what was happening until Dr. Vanderhook reported the pop ups.

The file fc2 appears on July 11, 2019 at 12:47 p.m. It appeared as if someone was searching for fc2. This hole in the firewall was closed in early August. Also, on July 11, 2019, at 8:43 a.m. there appear a string of pornographic words. He again explained how an ad server works.

P-1 shows that the computer was not purged. He thought it was. Whether the computer was erased would have no bearing on his opinion. It is not relevant.

He agreed that the firewall was not successful in blocking fc2.

wilstudent is the profile for the students at Wilson School. P-1 shows other dates and times where inappropriate material is accessed. The only user is wilstudent. There are no students in the building when this material was accessed.

Mr. Mykietyn focused his investigation on July 29, 2019.

R-3 does not contain dates and times. R-4 has that information. R-5 gives you the URL for a specific date and time. R-5 is limited to one day, July 29, 2019.

The full browser history, P-1, shows files that were downloaded, which is different from pages visited.

It is difficult to determine how the pop ups got installed on the computer. To do so one would have to evaluate the websites visited to see which are malicious. He did not do this.

Redirect Examination

Mr. Mykietyn explained what a script file is. R-4 shows the activity on Ms. Swavero's computer on July 29, 2019. The only way this could be accessed would by typing at the computer or clicking a hyper link.

He again stated his opinion that Appellant accessed pornography on Ms. Swavero's computer on July 29, 2019.

He did not review the PNDA prior to it being given to Appellant.

Re-Cross Examination

R-4 is a photograph he took with his cell phone of the computer screen. He could have printed it out as well. R-4 shows a dialogue box.

Michael Cardone testified as follows:

He is the principal at Thomas Jefferson Middle School presently. Previously he was principal at Roosevelt School from 2012 to 2019.

Appellant worked the 3:00 p.m. to 6:00 p.m. at Roosevelt School and then would work from 6:00 p.m. to 11:00 p.m. at the Wilson School. He does not recall the years that this was the case.

Mr. Cardone reviewed the job description for a custodian at Wilson School, R-7, and stated it had the same obligations.

Custodians were not permitted to use computers. If they had to do training they were instructed to go to the computer lab. Custodians were told they were not allowed to go on teachers' computers. They are not allowed to have their own password. There is a general password for students to use that is posted in the computer lab.

Cross Examination

There is a password for the students. Teachers have their own password. Administrators have their own password.

He is able to gain access through wi-fi if Mr. Mykietyn gives him access. Once given access he no longer needs to request permission again. He can also gain access from his cell phone.

At one point he provided Appellant with a password. It was the same password provided to students.

Re-Direct Examination

The password was provided by pointing it out on the blackboard.

Robert Brown testified as follows:

Mr. Brown is the former interim business administrator. He started on April 2019. He previously served as a business administrator for 29 years and retired on December 31, 2013. He worked in Lodi three days per week from April 1, 2019, through June 30, 2019. On June 30, 2019 he became a five day per week employee.

He did not know anyone in the Luna family.

Mr. Brown went on to describe his duties as business administrator, which included overseeing the maintenance of buildings and grounds. He would meet with the

director of facilities, who was Anthony T.J. Luna, Jr., at least two, maybe three times per week.

Near the end of July 2019 it was brought to his attention that there was a strong possibility that Appellant went on a computer and engaged in unauthorized web usage. This was brought to his attention by Mr. Luna. He then spoke with Mr. Mykietyn and asked him to look into this. He asked Mr. Luna to look at the security camera recordings. He also spoke with the interim superintendent, Dr. Fedina.

Mr. Brown met with Mr. Mykietyn and Mr. Luna. Mr. Mykietyn showed him what he found. Mr. Luna showed him the security camera recordings. Dr. Fedina was also at the meeting. He reviewed Appellant's personnel file at this time, which included a letter, F-8, placing him on unpaid leave for taking certain food items from the cafeteria. He advised Dr. Fedina that Appellant should be terminated.

Mr. Brown then reviewed Board policy 4281R regarding Inappropriate Staff Conduct, which was marked as R-9, which he reviewed at the time of making his recommendation to Dr. Fedina. He also reviewed Board policy 3321 regarding acceptable use of computers, marked R-10.

Dr. Fedina agreed with his recommendation. He then reviewed R-1, the PNDA, which he signed.

After he met with Dr. Fedina, Mr. Luna and Mr. Mykietyn, Mr. Brown held a meeting with Appellant in accordance with the provisions of the Labor Agreement between the District and the custodians union, marked R-13. Present at the meeting were Appellant, Mr. Brown, Mr. Luna, Dr. Fedina and the union representative.

At the meeting he provided Appellant with the PNDA and a letter. Appellant was advised with the information that led to the charges. Appellant completely denied that it happened.

The Board held a hearing on September 16, 2019, with all Board members present. The matter was presented to the Board, including testimony from Dr. Vanderhook, Mr. Mykietyn, Mr. Luna, Dr. Fedina and Mr. Brown. Six of the nine Board members were eligible to vote on the matter and all voted to terminate Appellant's employment.

Mr. Brown then reviewed the FNDA, which he signed. A copy of the FNDA was forwarded to Appellant.

Cross Examination

Mr. Luna offered his opinion that Appellant should not continue in the employ of the District. Mr. Brown recommended to the Superintendent that Appellant be terminated. Mr. Brown knew that Mr. Luna was Appellant's immediate supervisor during the time Appellant was employed by the District.

Kathryn Fedina testified as follows:

Dr. Fedina became employed as the Interim Superintendent by the Lodi Board of Education on July 18, 2019. She did not know anyone on the Lodi Board of Education prior to being interviewed for the position. She did know former superintendent Frank Quatrone professionally.

She became involved in the matter with Appellant when Mr. Mykietyn and Mr. Luna went to her office to advise her there was a problem. This was on August 1st or 2nd, 2019. They advised that the principal at Wilson School attempted to log on to a computer and there were pop ups for a pornographic site. The principal, Dr. Vanderhook, contacted Mr. Mykietyn, who confirmed what was on the computer. He then determined it was Appellant.

She then spoke with Mr. Luna, who advised that there was a prior issue with Appellant and that there was a letter in his file. Dr. Fedina retrieved the letter. She then

looked for the policy regarding inappropriate behavior. She reviewed the policies regarding Inappropriate Staff Behavior and Acceptable Use of Computers.

Dr. Fedina then spoke with Dr. Vanderhook. She also spoke with Mr. Brown.

She set up a meeting with Appellant. Dr. Fedina reviewed the letter and PNDA, R-1, that was given to Appellant at the meeting.

At the meeting in attendance were Mr. Wenczel (Board Attorney), Mr. Brown, Appellant and his representative. He was given the letter and PNDA. Dr. Fedina asked him if he understood what was happening. All Appellant said was "I didn't do it." The meeting was held on August 19, 2019.

On September 16, 2019, the Board held a meeting regarding Appellant and took testimony. She recommended to the Board that Appellant be terminated. The Board voted to terminate Appellant.

Cross Examination

Dr. Fedina confirmed that she knew Mr. Quatrone professionally prior to being hired as Interim Superintendent for Lodi.

She did not know T.J. Luna prior to applying for the position.

She did not know that Mr. Luna's brother was elected mayor of Lodi in 2018.

She was not aware that wives of Mr. Luna and Mr. Mykietyn were secretaries in the Lodi school district. She was also not aware that one of the Board members, Nancy Cardone, had a son who was a principal in the District. She became aware of this once employed.

She was employed as Interim Superintendent for four months. She left towards the end of November 2019.

Dr. Fedina confirmed that she saw Appellant enter the main office and turn off the lights when she reviewed the camera footage.

Dr. Fedina also confirmed that there is an office in the main office for the principal.

Re-Direct Examination

Dr. Fedina reviewed R-2 and noted that it has a date of July 29, 2019, and a time of 3:26 p.m.

Dr. Fedina worked with Mr. Luna during her time as Interim Superintendent. She never received any information that Mr. Luna asked anyone to do anything inappropriate. She called him agreeable and personable.

Mr. Luna told Dr. Fedina that it was her decision whether to terminate Appellant.

Appellant's Case

Joseph Guido, Appellant, testified as follows:

He is a resident of Lodi, New Jersey and has been for forty-four years. He became employed with the Lodi school system in April or May of 2010 on a part-time basis. In September of 2010 he became a full-time employee.

Mr. Guido was initially hired as the night custodian. He split his time between Roosevelt School and Wilson School. His supervisor was Anthony T.J. Luna. He was Mr. Guido's supervisor the entire term of his employment with Lodi.

Prior to 2018 he had not been disciplined.

In approximately 2014 he was moved to Wilson School.

At times Mr. Luna would have Mr. Guido perform tasks that were not part of the job description as noted on R-7. He did not question Mr. Luna as he did not want to cross him and get on his bad side. He did not get on Mr. Luna's bad side until 2018.

He knows Mr. Mykietyn. He and Mr. Luna were best friends. Their wives worked together. They were best friends.

Lodi held a mayoral election in 2018. Mr. Luna's brother, Scott, was a candidate for mayor. Prior to this Mr. Luna's father was mayor. Mr. Luna wanted Mr. Guido to put up election signage and to have him and his family vote for Scott Luna. Mr. Guido would receive extra overtime in return. Mr. Luna testified at the Board hearing regarding Mr. Guido's termination that he provided $10,000 worth of overtime to Mr. Guido.

Mr. Guido did not comply with all of Mr. Luna's demands. Mr. Luna was very upset by this. As a result, Mr. Guido stated he was suspended for taking food from the cafeteria.

Mr. Guido explained that the lunch ladies would always have extra things at the end of the day that would be thrown out. They would always offer something at the end of the day after he was done cleaning the cafeteria. It was not just him, but also the other custodian. This was common practice for 8 years. He then learned charges were filed against him for taking food. Mr. Guido confronted Mr. Luna who told him he could have the lunch lady fired as it was not part of the job, or Mr. Guido could accept a five day suspension without pay.

Mr. Guido accepted the five day suspension without pay. He had never been disciplined prior to this.

Thereafter his relationship with Mr. Luna changed. Mr. Guido was wondering what was going on.

Mr. Guido then reviewed P-2, an email RICE notice from Mr. Quatrone to Mr. Guido, dated June 23, 2019, which set a Board hearing date for June 26, 2019. Mr. Guido attempted to contact Mr. Luna regarding this, but received no response. Mr. Guido then sent Mr. Luna an email dated June 30, 2019. He received no response to that as well. He spoke with Mr. Luna on July 1st or 2nd and was told "Alls you have to know is that you betrayed the wrong person" and "you think we're done with you" and "we'll have you fired one way or another".

Mr. Guido reviewed P-3, his email to Mr. Luna.

Mr. Guido was concerned as he felt targeted.

He was approached by Kenny Roche regarding a meeting at the Board office. Mr. Roche was asked to pick up Mr. Guido and go to the meeting. Mr. Roche is another custodian and his representative. At the meeting Mr. Brown, Dr. Fedina, Mr. Luna, Mr. Wenczel were present, as were Mr. Guido and Mr. Roche. At the meeting he was told of the computer being used to access inappropriate material. Mr. Guido responded that it was someone else as he did not use a computer that day. No one showed him the evidence.

He received a PNDA, which stated he evaded a firewall. Mr. Guido stated he does not know what a firewall is.

As to computer access at the Lodi school system Mr. Guido was provided a password by Michael Cardone, which he was told he could use from his phone. He had no need to access a computer. The only time he needed to access a computer was for training.

Mr. Guido saw the video played for July 29, 2019, during this hearing. He explained that work was being done on Dr. Vanderhook's office and there were workers in the building. His job is to clean up after the workers when they are done for the day. Mr. Guido described his cleaning duties. If there are computers on a desk he will wipe them off.

Mr. Guido explained that he turned the lights off in the main office when he entered on July 29, 2019, as he was cleaning in Dr. Vanderhook's office. When he left he turned the lights back on to turn off the air conditioning and then turned the lights off again.

Mr. Guido denied ever sitting down as stated by Dr. Vanderhook in her testimony. She did not say a word to him. He had a good relationship with her.

Cross Examination

Mr. Guido was represented by Mr. Klotz at the Board hearing in September 2019. Mr. Klotz was provided with all the information presented to the Board, which is what was presented at this hearing.

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).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

Dr. Vanderhook testified in a direct and straightforward manner. She stated what she saw unequivocally. I deem her credible.

Mr. Mykietyn too was credible. His testimony regarding the use of the computer, the time and dates used, and how accessed, was delivered in a clear and convincing manner. That he was unaware that the computer in question was not wiped clean, as he previously testified it was, does not, in my mind, change my assessment of his credibility. His response to not knowing was given without hesitation. Nothing about his demeanor, or the way he responded, would lead me to think he was anything but truthful.

Likewise, I found Mr. Cardone credible. He answered directly and without hesitation. Nothing about him would cause me to believe he was being untruthful.

Mr. Brown was also credible. He too answered directly and without hesitation.

Dr. Fedina was credible as well. She responded professionally and directly. She testified as to how she arrived at her decision to recommend the termination of Mr. Guido without hesitation.

I found Mr. Guido's testimony problematic. Much of what he stated seemed contrived and designed to explain away his actions. It simply did not ring true. I do not find him credible.

RESIDUUM

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E.101(a)(3). DeBartolomeis v. Board of Review, 341 N.J. Super.80, 82 (App. Div. 2001). N.J.S.A. 52:14B-10(a) and N.J.A.C. 1:1-15.1(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable (N.J.R.E. 802) unless it falls within an exception enumerated in N.J.R.E 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

[A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it. [Id. at 51]

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

In accordance with the residuum rule, I accepted the hearsay evidence in the form of Appellant's testimony regarding Mr. Luna. However, no competent evidence was presented to corroborate the same. Accordingly, no weight can be given to the

same. Mr. Guido told a tale of conspiracy to get him. Almost all of which is based upon what he stated he was told by Mr. Luna. None of it is corroborated with competent evidence. What Mr. Guido wants is for the undersigned to infer that he was set up and that he did not do what is alleged. Most of what Mr. Guido stated in his direct examination testimony is given no weight as it is based on uncorroborated hearsay.

FINDINGS OF FACT

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

1. Joseph Guido, Appellant, was employed by the Lodi Board of Education, commencing in 2010 as a part time employee. In September of 2010 he became a full-time employee.

2. Appellant was a full-time employee at the Wilson School in the Lodi school district starting in approximately 2014.

3. Dr. Christie Vanderhook was the principal of the Wilson School. On July 31, 2019, she noticed Appellant sitting at her secretary's desk using her computer. She did not say anything to Appellant at the time.

4. On August 1, 2019, Dr. Vanderhook logged on to her secretary's computer as her office was being worked on as her computer was not available. When she did so a pop up appeared that was of a sexual nature. Thereafter another pop up of a sexual nature happened. (R-2)

5. She contacted Mr. Mykietyn, the Director of Technology, who came, logged Dr. Vanderhook out and logged himself in. He reviewed the computer and removed the computer.

6. Mr. Mykietyn did an investigation into what happened with the computer. He determined that on July 29, 2019, that someone using the wilstudent log in accessed the computer in question on July 29, 2019, between 3:37 p.m. and 3:44 p.m. and accessed pornographic materials. (R-2)

7. Mr. Mykietyn took a photograph with his cell phone of the use history for July 29, 2019, on August 1, 2019. (R-3 and R-4)

8. The wilstudent username and password are in the Wilson School's computer lab and written on the blackboard. Appellant had access to the computer lab, and used the same to complete required training.

9. The hallway in front of the main office is monitored by surveillance camera, which are triggered by movement. (R-15A)

10. Mr. Mykietyn reviewed the surveillance footage for July 29, 2019, which showed Mr. Guido enter the main office, where the computer in question is located, at 3:01 p.m., turn off the lights at 3:03 p.m., leave the main office and shut off the lights, then return to the main office at 3:25 p.m. Mr. Guido remained in the main office until 3:45 p.m. when he exited. (R-15A)

11. The surveillance footage does not show any other person enter or exit the main office during this time. (R-15A)

12. Surveillance footage of the parking lot shows on July 29, 2019, shows Mr. Guido leave the school at 3:47 p.m., after setting the alarm at 3:45 p.m. (R-15B and R-6)

13. Mr. Mykietyn was not aware that the computer in question was not scrubbed during the summer of 2019, as all computers are scrubbed during the summer. There was, unknown to him, a file showing usage of the computer in question that should not have existed had it been scrubbed. (P-1)

14. The existence of P-1 does not negate what Mr. Mykietyn discovered regarding the use of the computer in question on July 29, 2019. (R-2, R-3, R-4 and R-5)

15. The file used to access the pornographic material is video.fc2.com, which was not blocked by the firewall used by Lodi. This is a file sharing site that offers other, non-pornographic materials, which is why the firewall did not flag it.

16. Joseph Guido was the only person who had access to the computer in the main office used to access pornographic materials on July 29, 2019. He was the only one in the office at the time the materials were accessed. No other individual entered the main office before or after on July 29, 2019. (R-15A)

17. Joseph Guido did, in fact, use the computer in the main office on July 29, 2019, to access pornographic materials between 3:37 p.m. and 3:44 p.m.

18. Dr. Kathyrn Fedina was the Interim Superintendent at the time. After conferring with Robert Brown, the Interim Business Administrator, Mr. Mykietyn and Mr. Luna, Appellant's supervisor, she determined that a recommendation to the School Board to terminate Mr. Guido should be made.

19. A meeting was held on August 19, 2019, with Dr. Fedina, Mr. Brown, Mr. Wenczel, the Board attorney, and Mr. Guido and Kenneth Rocha, the union representative, to discuss the charges. Mr. Guido denied having done anything. He was given the PNDA and a cover letter by Mr. Brown. (R-1)

20. The District maintains policies on Inappropriate Staff Conduct, 4281R, and Acceptable Use of Computer Networks, 3321. (R-9 and R-10)

21. Mr. Guido would have been aware of these policies.

22. Mr. Guido's actions on July 29, 2019 clearly violate both District policies.

23. Mr. Guido had one prior disciplinary action wherein he was suspended for five days for taking food from the cafeteria. (R-8)

24. Dr. Fedina recommended to the Board that Mr. Guido be terminated for his actions.

25. The PNDA is inaccurate in that it states the evidence against Mr. Guido was obtained on July 29, 2019, when the actual date was August 1, 2019. This is a mere error and does not affect the PNDA. Mr. Guido received proper notice of the charges.

26. A Board meeting was held on September 16, 2019, to address the charges against Mr. Guido, prior to which he was afforded all the evidence accumulated by the Board. Mr. Guido, through counsel was afforded the opportunity to cross examine all witnesses. At said meeting all eligible voters of the Board voted to terminate his employment. (R-11)

27. Mr. Guido was thereafter served with the FNDA, dated October 3, 2019, which provided for his termination. (R-12)

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, after a hearing before the Board of Education, the four charges set forth in the PNDA were sustained, as set forth in the FNDA:

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

N.J.A.C. 4A:2-2.3(a)7 - Neglect of duty;

N.J.A.C. 4A:2-2.3(a)8 – Misuse of Public Property; and,

N.J.A.C. 4A:2-2.3(a)(12) - Other sufficient cause.

"Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The basis for the charge, using a school computer to access pornography, clearly falls within the above. The District has carried its burden as to this charge.

There is no definition in the New Jersey Administrative Code for neglect of duty, but the charge has been interpreted to mean that an employee has failed to perform and act as required by the description of their job title. Neglect of duty can arise from an omission or failure to perform a duty and includes official misconduct or misdoing, as well as negligence. Generally, the term "neglect" connotes a deviation from normal standards of conduct. In In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977), neglect of duty implies nonperformance of some official duty imposed upon a public employee, not merely commission of an imprudent act. Rushin v. Bd. of Child Welfare, 65 N.J. Super. 504, 515 (App. Div. 1961). Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes official misconduct or misdoing as well as

negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <http://njlaw.rutgers.edu/collections/oal/>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985).

Again, the District has carried its burden as to this charge, one must be in neglect of one's duty if he is looking at pornography instead of performing his job.

Misuse of Public Property is established by simply noting that it is a misuse of a school computer to access pornography. The District has carried its burden as to this charge.

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.

Cleary Appellant's actions violate the implicit standard of good behavior. The District has carried its burden as to this charge as well.

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 a termination from employment 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 Herrmann, 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,

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

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 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 issued is 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 removal is the appropriate penalty without any prior disciplinary action having been taken against Appellant. The act of accessing pornography on a school computer while on duty as a custodian is egregious and should result in termination.

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

ORDER

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

It is further **ORDERED** that the Final Notice of Disciplinary Action, dated October 3, 2019, providing for a penalty of removal, effective August 26, 2019, is **SUSTAINED**.

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.

September 1, 2022
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

List of Witnesses

For Appellant:

Joseph Guido, Appellant

For Respondent:

Christy Vanderhook
Christopher Mykietyn
Michael Cardone
Robert Brown
Kathryn Fedina

List of Exhibits

For Appellant:

P-1 URL browser history
P-2 email dated 6/23/29, RICE notice
P-3 Joseph Guido email to Mr. Luna dated 6/30/19

For Respondent:

R-1 8/19/19 letter with PNDA, and 8/21/19 letter to NJ Civil Service Commission
R-2 Computer Detail Printout – WIL-9235DT (user log on history)
R-3 Photo of Browser history of wilstudent
R-4 Webpage Visit details 7/29/19 – 3:40 p.m.
R-5 Activity log of browser activity on 7/29/19 from 3:26 p.m. to 3:44:29 p.m.
R-6 Wilson School alarm open/close report
R-7 Custodial Job description Wilson School 12:00 p.m. to 8:00 p.m.
R-8 11/21/18 letter from Frank Quatrone to Appellant regarding suspension.
R-9 Board Policy 4281R
R-10 Board Policy 3321
R-11 Board resolution dated 9/16/19

R-12 FNDA

R-13 Labor agreement between Lodi Association of Custodians and Maintenance Workers and the Lodi BOE

R-14 Christopher Mykietyn resume

R-15 USB thumb drive – surveillance videos for 7/29/19

R-16 USB thumb drive – surveillance videos for food rooms