STATE OF NEW JERSEY

In the Matter of Lisa Sanes,
Hoboken, Department of
Administration

CSC DKT. NO. 2021-126
OAL DKT. NO. CSV 07534-20

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: OCTOBER 12, 2022

The appeal of Lisa Sanes, Keyboarding Clerk 2, Hoboken, Department of Administration, removal, effective June 29, 2020, on charges, was heard by Administrative Law Judge Margaret M. Monaco (ALJ), who rendered her initial decision on August 23, 2022. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (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.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter. The Commission notes that the ALJ's findings and conclusions in upholding the charges and the penalty imposed was based on her thorough assessment of the record and were not arbitrary, capricious or unreasonable. In this regard, the ALJ specifically provided many reasons for her determination that the appellant's testimony was not credible, ultimately indicating that:

> Succinctly stated, I found appellant's testimony to be riddled with inconsistencies, lacking internal consistency, inherently improbable, and not "hanging together" with, and discredited and overborne in significant respects by, other evidence in the record. A canvas of the totality of the evidence casts substantial doubt on the accuracy, reliability, and believability of appellant's version of the events.

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 appellant 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.

Further, the Commission notes that the infractions in this matter are clearly worthy or removal from employment. The appellant's brazen actions had the potential to jeopardize the health and safety of others and cannot be minimized in any way. Suffice it to say, the Commission agrees with the ALJ, who stated that the:

> Appellant's irresponsible, reckless and inexcusable conduct in entering City Hall after testing positive for COVID-19, and "while battling COVID-19," and knowing she was not permitted to enter the building without medical clearance, endangered the health and safety of others and cannot be countenanced. Appellant's unauthorized actions were antithetical to the proper functioning of the City and the rules the City implemented to keep employees and the public safe. Appellant's failure to acknowledge or appreciate the inappropriateness and severity of her misconduct serves as further support for the conclusion that appellant is unsuitable for her continued employment with the City.

Accordingly, the Commission finds that the removal imposed is neither disproportionate to the offense nor shocking to the conscience.

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 Lisa Sanes.

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 07534-20
AGENCY DKT. NO. 2021-126

IN THE MATTER OF LISA SANES, CITY OF HOBOKEN, DEPARTMENT OF ADMINISTRATION.

David F. Corrigan, Esq., for appellant Lisa Sanes (The Corrigan Law Firm, attorneys)

Brian J. Aloia, Corporation Counsel, for respondent City of Hoboken

Record Closed: August 9, 2022 Decided: August 23, 2022

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Appellant Lisa Sanes appeals her removal from employment as a keyboarding clerk with respondent, the City of Hoboken (the City). The City took this action based upon the charges of insubordination, conduct unbecoming a public employee, and other sufficient cause, stemming from an alleged incident that occurred on May 4, 2020.

PROCEDURAL HISTORY

The City issued a Preliminary Notice of Disciplinary Action (PNDA) dated May 12, 2020, informing appellant of the charges of insubordination, conduct unbecoming a public employee, and other sufficient cause issued against her. The charges were based on the following incident set forth in the PNDA:

> On April 27, 2020, you emailed Caleb Stratton and advised him that you tested positive for COVID-19. All employees that have tested positive for COVID-19 have been directed to stay home and quarantine. On April 27, 2020 [sic],[1] Caleb Stratton directed you to stay at home and quarantine until your symptoms improve . . . . Additionally, City Hall has been closed to the public since March 16th.
>
> On May 4, 2020, you entered City Hall and advised security that you were there to retrieve your personal belongings from your office. Once you retrieved your belongings from your office, you then proceeded to the City Clerk's Office to file an OPRA request, which is considered official business. Because you are COVID-19 positive and on sick leave, you should . . . not have been in City Hall, and were not there to conduct City business. You deliberately and recklessly disregarded stay at home orders while unnecessarily creating a hazard within our workplace and our community.

After a departmental hearing, the City issued a Final Notice of Disciplinary Action (FNDA) dated June 29, 2020, sustaining the charges, and providing for appellant's removal effective June 29, 2020. Appellant filed an appeal, and the matter was transmitted to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held, via Zoom, on February 23, February 25, and July 2, 2021. After the conclusion of the testimony, the record remained open for the receipt of transcripts of the hearing and post-hearing submissions. The parties filed briefs in support of their respective positions and the record closed upon receipt of the last submission.

[1] Annastacia Seguinot, a legal secretary with the City, prepared the PNDA while working from home and explained that the date should have stated April 28, 2020.

FACTUAL DISCUSSION

At the hearing, the City presented testimony by Daisy Amado, Michael Kraus, Caleb Stratton, and Annastacia Seguinot. Appellant testified on her own behalf and offered testimony by Jason Freeman. Based upon a review of the testimony and the documentary evidence presented and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following pertinent **FACTS**, and accept as **FACT** the testimony set forth below:

Appellant commenced employment with the City on April 13, 1995. Appellant worked as a keyboarding clerk in the Department of Administration at the time of her termination.

Jason Freeman (Freeman) is the City's business administrator. Commencing in or around February 2020, and in May 2020, he served as the acting business administrator and shared that responsibility with Caleb Stratton. At that time, Freeman held the title of director of operations and served as the director of the Department of Administration in that role.

Caleb Stratton (Stratton) has been employed by the City for nine years and serves as the City's assistant business administrator.

Michael Kraus (Kraus) has been employed by the City for over six years and serves as the City's personnel officer.

Daisy Amado (Amado) has been employed by the City for nine years as an executive assistant in the Business Administrator's office.

As a result of the pandemic, City Hall was closed to the public commencing March 16, 2020, and all non-essential employees, which included appellant, were directed to work from home. In this regard, on March 13, 2020, the Mayor sent an e-mail to City employees, including appellant, which advised:

> Beginning this coming Monday, March 16, all City Hall employees that can complete their work-related tasks from home are asked to do so. Questions on specific expectations and responsibilities should be made directly to your department director.
>
> . . .
>
> This policy will be in effect for two weeks and the Administration will be reevaluating after 10 days to determine if the plan needs to be extended or adjusted.
>
> . . .
>
> While at home, please . . . avoid contact with others if you feel sick[.] [R-1.]

On March 25, 2020, Freeman sent an e-mail to City employees, including appellant, which advised that "City Hall will continue to remain closed to the public from March 30th to April 3rd [and] [w]ork from home, staff reductions and social distancing policies remain in place." (R-1.) The e-mail further directed:

> This communication is an opportunity to reinforce that if you are sick, please stay home and contact your doctor or Teledoc (info attached). If you have taken a COVID-19 test, stay home until you receive your results. Under both cases above, please alert your supervisor immediately. This directive is not a recommendation, it is a requirement.

The attached information, titled "Protect yourself and your family from COVID-19," instructs, "Avoid close contact with people who are sick and . . . if you get sick, stay home to avoid spreading the virus to others." (R-1.)

Stratton became aware that appellant was reporting to City Hall after the pandemic started and directed his executive assistant, Amado, to notify appellant that she should not report to City Hall and she should work from home. On March 31, 2020, Stratton sent an e-mail to Amado indicating that it had come to his attention that appellant was reporting to work. (See R-2.) Stratton informed Amado that he "would like to have her not go to City Hall," and instructed, "Can you ask her what she would need to work from home, or just not be in City Hall. Non-essential staff should not be reporting." (R-2.) After receiving

the e-mail, Amado called appellant on the telephone. Appellant admits that she reported to work at City Hall on March 30 and 31, 2020, and she received a telephone call from Amado on March 31, 2020 "questioning why [she] was in the building" and inquiring what she needed to work from home. Based on that conversation, appellant understood that she should not report to City Hall for work and should work from home. Appellant informed Amado that she needed a laptop so she could work from home, and appellant was told that the City would work on getting her a laptop. Amado informed Stratton by e-mail on March 31, 2020 that she had just spoken with appellant, who indicated that "she just needs to be set up on a laptop so she is able to work from home," and Stratton responded by e-mail stating, "We'll have to respectively request that she be patient as we work through those issues." (Ibid.) Appellant left City Hall after speaking with Amado and began working from home.

On April 1, 2020, Freeman sent an e-mail to City employees, including appellant, which in pertinent part directed:

> Please remember -- if you are sick, please stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases above, please alert your supervisor immediately. This directive is not a recommendation, it is a requirement.
>
> Additionally, City Hall will continue to remain closed to the public from April 1st through April 12th. Work from home, staff reductions and social distancing policies remain in place . . . . If there are specific items that need to be addressed in the office, please contact your supervisor and/or department director for instructions. [R-1; emphasis in original and added.]

On April 9, 2020, Freeman sent an e-mail to City employees, including appellant, which in pertinent part directed:

> Please remember -- if you are sick, please stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases above, please alert your supervisor immediately.

> Additionally, City Hall will continue to remain closed to the public from April 10th through April 19th. Work from home, staff reductions and social distancing policies remain in place . . . . If there are specific items that need to be addressed in the office, please contact your supervisor and/or department director for instructions. [R-1; emphasis in original and added.]

On April 27, 2020, appellant tested positive for COVID-19. After her doctor's appointment at approximately 2:00 p.m., appellant sent an e-mail to Freeman and Stratton at 4:09 p.m., which advised, "today I was tested for Covid19 and the results came back Positive." (R-3.) Appellant requested, "Kindly advise, if I need to provide you with any paperwork." (Ibid.)

On April 28, 2020, at 9:45 a.m., Stratton sent an e-mail to appellant and Freeman, with a copy to Amado and Kraus, which states:

> I'm sorry to hear that. Yes, please provide the results summary to Michael Kraus . . . and self-quarantine until your symptoms improve. You are entitle[d] to paid sick leave through the Families First Coronavirus Response Act [FFCRA]. Michael Kraus is available to help you with those details. [R-3; emphasis in original and added.]

On April 28, 2020, at 9:59 a.m., appellant sent an e-mail to Stratton and Freeman, with a copy to Amado and Kraus, that included a letter from Riverside Medical Group (Riverside), which indicates that appellant had an office visit on April 27, 2020, and the result of her COVID-19 test was positive. (R-3.) The Riverside letter further directed that "the patient must remain in isolation for 7 days from onset of symptoms and must be 72 hours symptoms free prior to returning to work."

On April 28, 2020, at 10:14 a.m., Kraus sent an e-mail to appellant, with a copy to Amado, Stratton, and Freeman, in which he wished appellant "a speedy recovery" and advised that he assumed that appellant was "no longer working from home and are solely focused on [her] recovery[.]" The e-mail further instructed:

> The FFCRA that [Stratton] mentioned provides for paid sick leave for 10 working days. Your time sheet should reflect regular hours beginning today through either when you have recovered and are no longer experiencing symptoms for 3 days or May 11th. As an FFCRA code has not been set up in prime point please enter the note "COVID-19 Employee" as a note on your timesheet for these days.
>
> If you are unable to return to work, or work from home, on Tuesday, May 12th you would need to use your accumulated sick, vacation, personal or other time to continue receiving pay from the city.
>
> Please call me . . . if you have any questions . . . . [R-3; emphasis added.]

Appellant was placed on leave under the FFCRA and received full pay.[2] She was on leave under the FFCRA from April 28, 2020 through May 11, 2020. Kraus explained that appellant could have returned to work before May 11, 2020 if she was symptom free for three days. Appellant was no longer eligible for the leave if she recovered sooner than the ten days, and appellant had an obligation to notify the City if she recovered so she could return to work. Kraus explained that having COVID-19 was like any other illness; if you are sick, you stay out of work, and once you recovered, you returned to work. Appellant acknowledged knowing that sick time is only supposed to be used when an employee is actually sick and unable to work. She also acknowledged that, when an employee is out of work on sick leave, the employee is responsible to notify the City when

[2] Congress passed the FFCRA (Pub. L. 116-127, 134 Stat. 178) on March 18, 2020 "to address the challenges facing employees and the general public as a result of the emergent COVID-19 pandemic." Haney-Filippone v. Agora Cyber Charter Sch., 538 F. Supp. 3d 490, 493 (E.D. Pa. 2021). Division E of the FFCRA, titled the "Emergency Paid Sick Leave Act" (the EPSLA), which became effective on April 2, 2020 and expired on December 31, 2020, required covered employers to provide paid sick leave to employees unable to work due to designated COVID-19 related reasons. In this regard, Section 5102 (a) of the FFCRA directs that "[a]n employer shall provide to each employee employed by the employer paid sick time to the extent that the employee is unable to work (or telework) due to a need for leave because: (1) [t]he employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19[;] (2) [t]he employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19[;] (3) [t]he employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis[;] (4) [t]he employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2)[;] (5) [t]he employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions[; or] (6) [t]he employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor." Pursuant to Section 5102(c), "[p]aid sick time provided to an employee under this Act shall cease beginning with the employee's next scheduled workshift immediately following the termination of the need for paid sick time under subsection (a)."

they are better and can return to work. The record is bereft of evidence that appellant notified anyone during the ten-day period that she was feeling better and able to return to work.

On May 1, 2020, Stratton sent an e-mail to City employees, including appellant, advising that "City Hall will remain closed to the public from May 4th through May 8th [and] [w]ork from home policies remain in place." (R-1.) The email further directed:

> **If you are sick or not feeling well stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases, please alert your supervisor immediately, and do not report to work.**

On May 4, 2020, appellant went to City Hall. At this point, City Hall was not open to the public and it was only open for work by essential employees. Kraus explained that under no circumstances was someone who tested positive for COVID-19 supposed to come into City Hall, and the City was then requiring the employee to be medically cleared by a doctor before returning to City Hall. As of May 4, 2020, appellant was still utilizing sick leave under the FFCRA and had not secured medical clearance from her doctor. Appellant admitted knowing that she needed a doctor's note before returning to work and that she could not report to City Hall for work without medical clearance.

The record includes video footage of appellant at City Hall on May 4, 2020. (R-7 to R-10.) As reflected in the video footage, appellant entered City Hall from Washington Street. The City had security guards stationed at the public entrances on Washington Street and Newark Street. On the video, the security guard (who is wearing a mask) appears to be talking to someone who is not in view. Appellant is first seen on the video at approximately 10:12:22. Appellant is wearing a mask and has a black bag over her shoulder. After appellant is in view, the guard can be seen gesturing with his hand as if he was waiving appellant in. On the video, appellant did not stop to have a conversation with the security guard. Appellant then makes a left turn toward the Clerk's office. (See R-7.) It is undisputed that appellant filed an OPRA request in the Clerk's office. The request sought information regarding another City employee who appellant was able to

bump in connection with the City's layoff. (See R-4.) Appellant's job duties did not include filing OPRA requests.

The next video footage also depicts the Washington Street entrance of City Hall. Appellant appears on the left-hand side of the screen, which is where she would be if she was coming from the Clerk's office. Appellant is seen on the video at approximately 10:21:56 or approximately nine minutes from when she was initially seen entering City Hall. Appellant walks toward and interacts with the same security guard stationed at the Washington Street entrance. Appellant then turns around, walks toward an elevator, and enters the elevator which had another person present. (See R-8.)

Although appellant claimed that the security guard gave her permission to go to the Clerk's office and then to her office on the third floor, this testimony is overborne by the testimony of Stratton and Freeman, who credibly explained the duties and responsibilities of the security officers during this period regarding monitoring who entered and exited the building. The security officers were responsible for ensuring that the public did not enter City Hall. The security guards were not responsible for monitoring City employees and were not provided with a list of essential versus non-essential employees or a list of personnel who were permitted to enter City Hall. City Hall employees were expected to monitor themselves and only enter City Hall if they were allowed to. At this time, the City had requested non-essential employees not report to City Hall.

Appellant proceeded to the third floor of City Hall where her office is located. On the video footage, appellant can be seen entering a room from the hallway, which she identified as her office; exiting the room carrying a plant and with a blue bag on her shoulder in addition to the black bag over her shoulder; watering plants in the hallway; putting the water back in her office; and leaving view carrying a plant and with the black and blue bags. (See R-9.) After leaving the third floor, appellant exited City Hall utilizing the exit on First Street. The entrance on First Street is for employees only and requires the scanning of a card or a FOB to enter. Appellant can be seen exiting the building with the plant, along with the black and blue bags, at approximately 10:37:09 or approximately twenty-five minutes after she is first seen in City Hall. (See R-10.)

On May 6, 2020, two days after entering City Hall, appellant spoke during a virtual City Council meeting. A video of appellant's interaction was admitted in evidence. (R-11.) Appellant is not in view on the video. Appellant can be heard coughing before beginning her presentation, coughing after it was over, and clearing her throat on two occasions when speaking. She also represented to the City Council that she was battling COVID-19. Specifically, during her appearance, appellant states, "As I'm battling COVID-19 and placed on FFCRA leave, I'm here to speak about the injustice, the unfairness and disrespect of the administration and how this administration has treated me during this layoff and during my battle with COVID-19." She later states, "Before I end this, I'd just like to ask how do I pay [for] my medication for all the stress and anxiety you, the administration, have put me through and continue to put me through while battling COVID-19?" Appellant refers to receiving a letter dated May 1, 2020, via e-mail, informing appellant of her bumping rights and the name of the person she could bump. May 1, 2020 is the Friday before the day appellant entered City Hall on Monday, May 4, 2020. The Clerk's office sent an e-mail to appellant on the day of the Council meeting at 12:59 p.m. in response to her OPRA request. (R-4.)

On or about May 7, 2020, Stratton received a telephone call from the deputy clerk expressing concern that appellant had been in the Clerk's office on Monday and testified during the City Council meeting on Wednesday that she was COVID-positive. Stratton spoke to the records clerk who had interacted with appellant and received an e-mail from the records clerk on May 8, 2020, advising that appellant "came to the Clerk's Office on Monday May 4, 2020 to do an OPRA request," which "was log[ged] in at 10:17 AM." (R-4.) The deputy clerk and the records clerk conveyed to Stratton that they were extremely concerned for their own health and safety.

On May 8, 2020, Stratton sent an e-mail to City employees, including appellant, advising that "City Hall will remain closed to the public from May 11th through May 15th [and] [w]ork from home policies remain in place." [R-1.] The e-mail further reiterated:

> **If you are sick or not feeling well stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both**

> **cases, please alert your supervisor immediately, and do not report to work.**

On May 12, 2020, Kraus sent an e-mail to appellant to ascertain whether appellant had resumed work and to address how to account for her time if she had not. (R-5.) The e-mail states:

> I hope this email finds you well and feeling better.
>
> As you may remember you were utilizing FFCRA leave through the close of business yesterday while recovering from COVID-19.
>
> As your FFCRA leave expired yesterday I am reaching out to see if you have recovered to the point where you can resume work. If you are not able to resume work you must begin using your accrued sick, vacation, personal or other time to continue receiving wages from the City.
>
> If you have recovered, which I hope is the case, please reach out to your doctor for a clearance for work note.
>
> Please let me know as soon as possible

Appellant responded to Kraus later that day and advised:

> Yes, I am feeling much better . . . I've [sic] was trying to schedule an appt with my doctor for a week ½, finally got an appt for Thursday, May 14, 2020. Once I receive my note I will forward to you. Can you use my sick days until then? [R-5; emphasis added.]

Kraus informed appellant by e-mail that day, "We can utilize sick days beginning today until your appointment on Thursday." (R-5.) On May 13, 2020, Kraus advised appellant by e-mail that Stratton had approved her use of sick time and, "Please remember that until medically cleared you cannot return to City Hall." (Ibid.) Appellant responded, "Yes Michael I understand, I have an appt with my doctor tomorrow, will keep you posted." (Ibid.) On May 14, 2020, appellant sent an e-mail to Kraus enclosing a letter from a doctor with Hackensack Meridian Health indicating that appellant had a virtual appointment with the doctor that day and appellant may return to work on May 15, 2020. (R-5.) After

utilizing the ten days provided under the FFCRA, appellant also utilized three sick days (covering May 12, 13, and 14) before submitting the doctor's note returning her to work on May 15, 2020.

On May 22, 2020, Freeman sent an e-mail to City employees advising that "City Hall will remain closed to the public through May 31st [and] [w]ork from home policies remain in place" through that date. (R-1.) The e-mail further directed:

> Please remember -- if you are sick, or not feeling well stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases, please alert your supervisor immediately.

On May 29, 2020, Stratton sent an e-mail to City employees advising that "City Hall will remain closed to the public through June 5th" and "[w]ork from home policies remain in place through the end of next week[.]" (R-1.) The e-mail further directed:

> Please remember -- if you are sick, or not feeling well stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases, please alert your supervisor immediately.

On June 3, 2020, Freeman sent an e-mail to City employees advising that "City Hall will remain closed to the public through June 14th [and] [w]ork from home policies remain in place" through that date. (R-1.) The e-mail further directed:

> Please remember if you are sick, or not feeling well stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases, please alert your supervisor immediately.

The City issued two PNDAs dated May 12, 2020 to appellant; one sought appellant's immediate suspension and the other sought appellant's removal based on charges of insubordination, conduct unbecoming a public employee, and other sufficient cause. (R-6.) On June 29, 2020, the City issued a FNDA sustaining the charges and providing for appellant's removal effective June 29, 2020. (Ibid.)

After appellant's termination, Freeman issued an e-mail to City employees on June 30, 2020, which was signed by Freeman and Stratton and advised that "City Hall will remain closed to the public from June 29th through July 5th [and] [w]ork from home policies remain in place." (R-1.) The e-mail further directed:

> If you are sick or not feeling well stay home and contact your doctor or Teledoc. If you have taken a COVID-19 test, stay home until you receive your results. Under both cases, please alert your supervisor immediately, and do not report to work. If you receive a positive result for COVID-19 you may not return to work or report to any City building or property until your illness has run its course and you have a written clearance from the appropriate medical person returning you [to] work.

The Testimony

In addition to the evidence that forms the foundation of the above findings of fact, a summary of other pertinent testimony follows.

Caleb Stratton

Stratton testified that in May 2020, City Hall was only open to essential employees and he had previously asked Amado in March 2020 to inform appellant that she was not supposed to be in City Hall because she was not an essential employee. Appellant was not provided direction to be in City Hall after she was contacted by Amado and told not to report for work. Stratton never rescinded that order that appellant should not go to work and not report to City Hall.

Jason Freeman

Freeman explained that the City took COVID-19 "incredibly seriously," and the City spent hundreds of thousands of dollars trying to keep City employees safe. The City's policy throughout the entire pandemic has been that all employees who are sick or not feeling well must not report to work, and the City gave that directive by telling employees to stay home if they were sick. An employee who tests positive for COVID-19 is

considered sick. The guidance given to employees has always been that an employee who tests positive for COVID-19 cannot come to work and the employee should self-quarantine, which means that the employee should not go out in public. Freeman testified that appellant was directed to self-quarantine, which clearly means appellant should not be at work. Based on appellant's statements at the Council meeting, Freeman understood that appellant was actively combating the virus. Freeman explained that, in May 2020, appellant did not need a doctor's note to begin working from home but she would have to obtain a doctor's clearance to enter City Hall after receiving her positive COVID-19 test. He noted that, even before appellant tested positive for COVID-19, she was directed not to go to City Hall because she was a non-essential employee and, if appellant had an occasion to go to City Hall, she should have contacted her supervisor before violating the directive not to come to City Hall. Freeman further noted that the City would never have known that appellant used her position as an employee to enter City Hall if not for being notified by the Clerk's office.

Lisa Sanes

Appellant testified that she reported to work on March 30, 2020, because the Mayor's e-mail indicated that it would be in effect for two weeks; the City would reevaluate and update whether it had changed; and appellant did not receive an update or reevaluation. Appellant asserted that, because she had not been provided with a laptop, and she was not connected to City e-mails through her cell phone, appellant was not able to retrieve her City e-mails from March 16, 2020 to when she obtained her personal computer on May 4, 2020. According to appellant, she did not see the e-mails sent on March 25, April 1, April 9, and May 1 before May 4, when she got her laptop. Appellant also relayed that she received the e-mails sent by Stratton and Kraus on April 28. According to appellant, she had to contact the City after testing positive for COVID-19; she asked her neighbor if she could use her computer; the neighbor left her computer hanging on appellant's door; appellant received the April 28 e-mails; and she e-mailed the information needed to be sent to the City.

Appellant testified that, prior to April 27, 2020, she had not experienced any adverse symptoms associated with COVID-19. She went to get tested in order to see her

son's baby, who was born on March 20, 2020. After receiving the positive COVID-19 test, appellant self-quarantined and stayed at home. Appellant described that the Riverside letter refers to remaining in isolation for seven days from the onset of symptoms and appellant, who had no symptoms, quarantined and stayed home for seven days. Appellant had the COVID test in the afternoon on April 27; she immediately went home and self-isolated after receiving the results; and appellant considered April 27 her first day of self-quarantine with her last day being May 3.

According to appellant, on May 4, 2020, she was "feeling fine" and "had no symptoms." She went to City Hall because she wanted to retrieve her personal laptop. Appellant testified that she wanted to retrieve her laptop because she "was trying to file an OPRA request online, and [she] wasn't able to do so" regarding the employee who she could bump in the City's layoff. Appellant had never heard of the employee, and she wanted to know information about him (e.g., date of hire). She "wanted to retrieve [her] laptop as well, because [she] wanted to continue to work from home to continue [her] work duties," and the City had never provided her with a laptop.

At City Hall, appellant wore double gloves and a double protective mask. According to appellant, after entering the building on Washington Street, she asked the security guard if she could retrieve her personal laptop from her office and the security guard granted her permission to enter. Appellant had seen the security guard "numerous times" before and is "familiar with him." She did not know if the guard recognized her as an employee because she was wearing a mask, but appellant told the guard who she was. The conversation lasted less than one minute. Appellant described that she proceeded to go in, turned around, and asked the security guard if she could stop at the Clerk's office to ask a question about the City's website, and the security guard "gestured with his hands like to go ahead." Appellant testified that she went to the Clerk's office to ask if there was a glitch in the City's website because the website would not allow her to file an OPRA request online. Appellant wore her mask and gloves in the Clerk's office. As far as she could recall, the records clerk, who was not wearing a mask, was the only person in the Clerk's office. Appellant relayed that she asked the records clerk if there was a glitch with the City's website because she could not file an OPRA request online, and the records clerk responded that he was not aware of a problem. As appellant

proceeded to turn around, the records clerk handed her an OPRA request form and advised that she only had to fill out the first page. Appellant responded that she would fill it out at home and either return it on a later date or e-mail it back. According to appellant, the records clerk said, "You only have to fill out the first page, insisting that [she] fill out the first page." Appellant filled out the form, which took approximately three minutes, put the form on the counter and proceeded to walk out. The records clerk advised that he would either e-mail or call appellant when the information was ready. Appellant then exited the Clerk's office and asked the security guard if it was still okay for her to go upstairs to retrieve her laptop, and the security guard responded in the affirmative. Appellant went to her office on the third floor and picked up her laptop, the laptop charger, and a plant. She described the computer as a "small," "thin" Dell laptop, which was approximately twelve inches. Appellant put the computer with the cords wrapped around it in her bag and exited the building through the steps on the First Street side. Appellant estimated that she was in City Hall for approximately seven minutes. According to appellant, when she went into City Hall, appellant did not believe that she was violating any directive or order issued by any City representative.

Appellant testified that she had not experienced any symptoms related to COVID-19 when she spoke at the City Council meeting on May 6 or at any time before that appearance. She was feeling "great" on that date and "great" prior to the date. According to appellant, she coughs on a daily due to allergies and sleep apnea, and she clears her throat a lot. Regarding her battling COVID-19 comments, appellant testified that she "simply said that because . . . for obvious reasons I tested positive [and] [a]s far as battling I meant just . . . I had to deal with the whole quarantine, not being able to work, trying to get a doctor's appointment so early in the pandemic, just going through all those loopholes." Appellant added, "I didn't mean that I was specifically experiencing symptoms that I was battling COVID, because I had no symptoms."

Appellant testified that she did not request the FFCRA leave, and she thought the leave was mandatory, and that she had to take the ten days, because she tested positive for COVID-19. Regarding Kraus's May 12, 2020 e-mail, appellant indicated that on May 12 she was "absolutely" in a condition to return to work and "absolutely" wanted to work. Appellant described being told that in order to return to work she needed medical

clearance; it was hard getting a doctor's appointment because it was so early in the pandemic; she called daily inquiring about an available doctor's appointment because she was trying to return to work; she had been trying to schedule an appointment for approximately a week and one half; and she finally got an appointment on May 14. Appellant was under the impression that she could not work remotely from home without medical clearance. Appellant returned to remote work on May 15; she received a message from prime point on May 18 rejecting her time due to a suspension; and she received the PNDA approximately two days later. Appellant was terminated on June 29 and the City disabled her e-mail address.

Appellant denied that she violated a direct order or directive from the City and asserted that she complied with all rules, regulations and directives given by Riverside and the City. According to appellant, no one from the City ever directed or ordered her to stay home and, if there was such an order, she would have complied with it. She would never deliberately or recklessly put anyone in danger. Prior to the June 30, 2020 e-mail sent after her termination, appellant had not previously seen an order stating that if you receive a positive result for COVID-19 you may not return to work or report to any City building or property until your illness has run its course and you have a written clearance from the appropriate medical person.

Appellant admitted that she did not need her laptop on May 4 because she was not going to perform any work for the City until she received a doctor's note. Appellant admitted that, after retrieving her laptop, she did not perform any work for the City because she had not received her doctor's clearance. Appellant testified that she did not go to City Hall on May 4 to report for work, but to retrieve her personal laptop, so she had a laptop to perform her work duties when she was cleared to go back to work.

Analysis and Additional Findings of Fact

Based on the evidence presented, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality or internal consistency

and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." Id. at 521–22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). A trier of fact may also reject testimony as "inherently incredible" and when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

In judging the strength of the evidence and evaluating the credibility of the witnesses, I found the City employees to be forthright and credible witnesses. They presented persuasive and substantially consistent testimony as to the pertinent facts, which was corroborated by other offered evidence, and the strength and credibility of this testimony was not, in my view, undermined by counsel's thorough cross-examination. The record is devoid of credible evidence suggesting that the witnesses harbored any motive or bias to fabricate their versions of the relevant facts. Plainly, on balance, appellant has the greater stake in the outcome of this proceeding since it involves the propriety of her removal from employment.

Succinctly stated, I found appellant's testimony to be riddled with inconsistencies, lacking internal consistency, inherently improbable, and not "hanging together" with, and discredited and overborne in significant respects by, other evidence in the record. A

canvas of the totality of the evidence casts substantial doubt on the accuracy, reliability, and believability of appellant's version of the events. For example, appellant's repeated claim that she never had any symptoms of COVID-19, is irreconcilable with the representations and admissions that she made at the May 6, 2020 Council meeting that she was "battling COVID-19." She also coughed on more than one occasion during her short presentation. Appellant's actions and e-mails lend further proof that she was sick and had symptoms of COVID-19. For example, on April 28, 2020, Kraus sent an e-mail to appellant after she tested positive for COVID-19 stating that he assumed that appellant was "no longer working from home and are solely focused on [her] recovery," and advising that appellant's "time sheet should reflect regular hours beginning today through either when you have recovered and are no longer experiencing symptoms for 3 days or May 11th." The record is bereft of any evidence that appellant advised the City at any point before she went to City Hall on May 4 that she was symptom free and able to work. Indeed, in response to Kraus's May 12, 2020 e-mail stating, "I hope this email finds you well and feeling better," appellant indicated, "Yes, I am feeling much better," which makes no sense if she never felt sick. Appellant also continued to be on sick leave under the FFCRA when she entered City Hall on May 4 and admitted knowing that sick time is only supposed to be used when an employee is actually sick and unable to work and that an employee on sick leave is responsible to notify the City when they are better and can return to work. In other words, if appellant never had any symptoms as claimed at the hearing, then, at a minimum, appellant should have notified the City three days after her positive test that she has been symptom free for three days. See Riverside letter. Appellant's claim that she believed that it was mandatory for her to take the ten days because she tested positive for COVID-19 is not credible considering Kraus's unambiguous e-mail on April 28 directing that appellant's "time sheet should reflect regular hours beginning today through either when you have recovered and are no longer experiencing symptoms for 3 days or May 11th." (Emphasis added.)

Equally unpersuasive is appellant's testimony that she went to City Hall on May 4, primarily to pick up her laptop so she could work. Appellant admitted that she did not need her laptop to work because she was not going to perform any work for the City until she received a doctor's note returning her to work. Further, after allegedly retrieving her laptop on May 4, appellant admitted that she did not complete any work for the City before

May 15. Appellant's claim of needing to pick up her laptop on May 4 is also inherently improbable and inconsistent with common experience. In short, it is improbable to believe that, after appellant was told by Amado on March 31 that she must leave the building and work from home without a return date, and after being told that the City would work on getting her a computer, appellant then left her laptop in her office at City Hall, which, according to appellant, is the only computer she owned. Indeed, at that point City Hall had already been closed for two weeks, appellant had already spent two weeks at home without access to the only computer she allegedly owned, and appellant left City Hall on March 31, without her only computer despite her advice to Amado that she needed a laptop to work from home. It further cannot be ascertained from the video footage whether a computer was, in fact, in appellant's bag when she left City Hall on May 4. In addition, a cloud of suspicion surrounds appellant's attempt to side-step her responsibilities by claiming that she was unable to retrieve her City e-mails before May 4 because she did not have a laptop. Plainly, appellant should have received Freeman's March 25, 2020 e-mail directing that work from home policies remained in place through April 3 when she was in the office on March 30, yet she still went to the office on March 31. Appellant was also able to retrieve and send e-mails to the City on April 27 and 28, 2020, after testing positive for COVID-19. Although appellant claimed that she used her neighbor's computer for those e-mails, it is unknown how she knew, without computer access, whether work at home orders were still in place and how she was doing her work at home without a computer. Appellant also did not explain the reason why she did not take her alleged only computer home on March 13, March 30 or March 31, 2020.

I further found incredible and reject appellant's attempt to portray that the security guard authorized her to go to the Clerk's office and to her office. Rather, appellant admits she identified herself as an employee to the guard and the credible evidence establishes that City employees, not the security guards, were responsible for monitoring themselves as to whether the employee was allowed to enter City Hall. Although the evidence falls short of establishing that non-essential employees were precluded from entering the building to pick up items for work, Freeman's April 1 and 9, 2020 e-mails unambiguously direct that an employee must contact his/her supervisor and/or department director for instructions if there are specific items that need to be addressed in the office, which appellant did not do. In addition, appellant admitted knowing that she was not allowed in

City Hall for work without medical clearance, which appellant did not have when she entered City Hall on May 4, and appellant's May 12 e-mail stating that she was trying to schedule a doctor's appointment for a week and a half confirms that she knew about the medical clearance requirement when she entered City Hall. It is simply unbelievable that appellant thought she could go to City Hall without medical clearance because she was picking up personal items, and not working, in City Hall. Similarly improbable is appellant's claim that the records clerk encouraged or insisted that she complete her OPRA request in the Clerk's office, even though that office was closed to the public for OPRA requests.

Appellant offered no witnesses to refute the testimony of the City employees, or to corroborate her testimony which, as noted, I found improbable, incredible, and not trustworthy. According to appellant's rendition, appellant was without a computer to do work for approximately a month and a half (since March 16) and went to City Hall on May 4, which was the next business day after receiving notice of the layoff on May 1, to get her personal computer even though she did not intend to work and did not work until May 15. The undisputed evidence demonstrates that appellant was concerned because the City eliminated her position, she was bumping into the position of another employee, and appellant wanted information regarding that employee and her new position. Based upon a review of the totality of the evidence, the preponderance of the evidence establishes that appellant used her position as a public employee to enter City Hall and to file an OPRA request.

Based upon a review of the totality of the evidence presented and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

Freeman and Stratton issued e-mails on March 25, April 1, April 9, and May 1, 2020, that unambiguously directed employees to stay home if the employee is sick or feels sick.

On April 28, 2020, Stratton sent an e-mail to appellant that directed appellant to self-quarantine, or stay home, until her symptoms improved.

Based on appellant's admissions at the Council meeting, along with her various e-mails and actions, including being on FFCRA sick leave, appellant did not comply with the above directives by her supervisors, and was "battling COVID-19," when she entered City Hall on May 4, 2020.

On April 1 and 9, 2020, Freeman issued e-mails that unambiguously directed, "If there are specific items that need to be addressed in the office, please contact your supervisor and/or department director for instructions."

Appellant did not comply with the above directive by her supervisor and did not contact her supervisor or department director for instructions prior to going to City Hall on May 4, 2020.

Appellant was directed that she needed medical clearance before returning to work and appellant knew that she was not allowed in City Hall for work without medical clearance.

Appellant did not comply with that directive and went to City Hall on May 4, 2020 before she secured medical clearance.

Appellant entered City Hall to file an OPRA request because she wanted to obtain public information regarding another City employee who she could bump as part of the City's layoff.

On May 4, 2020, while still utilizing sick leave under FFCRA and knowing that she was not allowed in City Hall, appellant used her standing as an employee to enter City Hall, where she filed an OPRA request with the City Clerk's office and picked up personal belongings.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing are whether the employee is guilty of the charges brought against her and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

The City bears the burden of proving the charges against appellant by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); see Se In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna & W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for various causes as set forth in N.J.A.C. 4A:2-2.3. In this matter, the City charged appellant with insubordination, conduct unbecoming a public employee, and other sufficient cause.

Insubordination encompasses an employee's refusal to follow a directive or order of a supervisor. City of Newark v. Massey, 93 N.J. Super. 317, 322-23 (App. Div. 1967). Black's Law Dictionary (7th Ed. 1999) defines insubordination "as a 'willful disregard of an employer's instructions . . .' or an 'act of disobedience to proper authority[.]'" Ricci v. Corporate Exp. of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (quoting Black's Law Dictionary at 802). "It is a fundamental principle of the workplace . . . that when an

employee is given an order by a superior that the order will be followed." In the Matter of Robert Osle, CSV 6289-01, Merit System Board (April 1, 2003). <http://njlaw.rutgers.edu/collections/oal/>. "It is not for a public employee to second guess a superior's order and refuse to obey that order because it would result in . . . a result which the subordinate does not concur in." Headen v. E. Jersey State Prison, 94 N.J.A.R.2d (CSV) 623, 627. An order need not be in written form to be valid. See Hale v. Dep't of Transp., CSV 6778-02 and CSV 510-03, Initial Decision (October 9, 2003), adopted, Merit System Board (November 24, 2003). <http://njlaw.rutgers.edu/collections/oal/>. Further, whether a supervisor identified his/her advice as an "order" is irrelevant. See Osle. An order must be given a reasonable construction and construed considering the particular situation. See Osle; McCorry v. Hudson County, 93 N.J.A.R. 2d (CSV) 677, 679 ("verbal order . . . to provide the doctor's notes implicitly includes that such notes shall be valid and correct" and "[t]he submission of false or forged notes is in direct contravention of that order and constitutes clear insubordination"). And the determination regarding whether an employee's conduct will be deemed to rise to insubordination must be viewed in the context of the situation. See Osle.

Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "'which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.'" In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Unbecoming conduct need not be predicated upon a violation of the employer's rules or policies and may be based merely upon a violation of the implicit standard of good behavior. See City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

Based upon the aforesaid Findings of Fact, I **CONCLUDE** that the City has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant's actions amount to insubordination and conduct unbecoming a public employee. Although the City also charges appellant with other sufficient cause, I

CONCLUDE that the facts more appropriately fit the above charges, warranting dismissal of the other sufficient cause charge.

Simply put, after testing positive for COVID-19, appellant acted in a manner that violated direct orders to quarantine, or to stay home, until her symptoms improved; to stay home if she was sick or feeling sick; to not go to City Hall until she secured medical clearance; to work from home as a non-essential employee; and to contact her supervisor and/or department director for instructions if there were specific items that need to be addressed in the office. Plainly, appellant's deliberate and reckless failure to obey these orders constitutes insubordination. Further, appellant's conduct was unprofessional, unjustified, unreasonable and unbecoming a public employee. Appellant's actions fall significantly short of the type of conduct that the public has the right to expect from a public employee. By engaging in the conduct she did, appellant failed to exercise good judgment and to act in a responsible manner with due regard to the safety of others. Appellant engaged in conduct that has the likelihood of eroding the public's perception, respect, and confidence in public employees along with the operation of the City during the pandemic. Appellant's actions created health and safety issues by placing other employees at potential risk of harm. Her presence in City Hall caused a disruption in the workplace due to her "battling COVID-19" statements during the Council meeting. Appellant's conduct adversely impacted the efficient operation of the City, and created a hardship to the City, based on the need to take protective actions after learning that appellant had been in City Hall.

The only remaining issue concerns the penalty that should be imposed. It is beyond debate that appellant's past disciplinary record may be considered for guidance in determining the appropriate penalty, and the principle of progressive discipline is applied in this state. See Bock, 38 N.J. at 522. The seriousness of appellant's infraction must also be balanced in the equation of whether removal or something less is appropriate under the circumstances. See Henry, 81 N.J. at 580. The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding

a largely unblemished prior record." Carter, 191 N.J. at 484. Progressive discipline is not a necessary consideration "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." Herrmann, 192 N.J. at 33. In this regard, "progressive discipline has been bypassed when an employee engages in severe misconduct, especially when . . . the misconduct causes risk of harm to persons or property." Ibid.; see, e.g., Henry, 81 N.J. at 580; Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994). The courts have also upheld the dismissal of employees for engaging in conduct unbecoming to their position without regard to whether the employee had a substantial past disciplinary record. Herrmann, 192 N.J. at 34; see Div. of State Police v. Jiras, 305 N.J. Super. 476 (App. Div. 1997). Public-safety concerns may also bear upon the propriety of an employee's removal from employment. See Carter, 191 N.J. at 485.

Appellant's disciplinary record includes warnings and minor disciplinary that resulted in hours docked and a one-day suspension relating primarily to attendance related issues. (See R-13 to R-20.) Although appellant's disciplinary record in and of itself would not warrant a severe penalty, the seriousness of appellant's infraction is a critical consideration in this case. While the incident involved a short duration of time, this does not mitigate the gravity of appellant's dereliction. Further, appellant's claim of differential treatment is misplaced. The issue is not whether others were or should have been disciplined but, rather, whether appellant is guilty of the charges against her and, if so, the appropriate discipline for her conduct. Appellant's infraction must also be viewed in the context of when it occurred; namely, during the early months of the pandemic when little was known about the virus, which resulted in the shutdown of virtually all businesses throughout the country. Appellant's irresponsible, reckless and inexcusable conduct in entering City Hall after testing positive for COVID-19, and "while battling COVID-19," and knowing she was not permitted to enter the building without medical clearance, endangered the health and safety of others and cannot be countenanced. Appellant's unauthorized actions were antithetical to the proper functioning of the City and the rules the City implemented to keep employees and the public safe. Appellant's failure to acknowledge or appreciate the inappropriateness and severity of her misconduct serves as further support for the conclusion that appellant is unsuitable for her continued

employment with the City. Based upon the totality of the circumstances, I **CONCLUDE** that appellant's insubordinate and unbecoming conduct is of a sufficiently egregious nature to warrant her termination.

ORDER

I **ORDER** that the charges of insubordination and conduct unbecoming a public employee be and hereby are **SUSTAINED**, and that the charge of other sufficient cause be and hereby is **DISMISSED**. I further **ORDER** that, based upon the aforesaid sustained charges, appellant be and hereby is removed from her employment effective June 29, 2020.

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.

August 23, 2022
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

List of Witnesses

For Appellant:

Daisy Amado

Michael Kraus

Caleb Stratton

Annastacia Seguinot

For Respondent:

Jason Freeman

Lisa Sanes

List of Exhibits in Evidence

For Appellant:

A-1	Appellant's First Set of Interrogatories and Respondent's Answers

For Respondent:

R-1	Packet of e-mails
R-2	E-mails to and from Caleb Stratton and Daisy Amado dated March 31, 2020
R-3	Packet of e-mails dated April 27 and 28, 2020
R-4	E-mail from Jerry Lore to Caleb Stratton dated May 8, 2020; e-mails to and from City Clerk and Jerry Lore dated May 8, 2020; e-mail from City Clerk to Lisa Sanes dated May 6, 2020; and OPRA request and response
R-5	E-mail from Lisa Sanes to Michael Kraus dated May 14, 2020; letter from Hackensack Meridian Health dated May 14, 2020; and e-mails to and from Lisa Sanes and Michael Kraus dated May 12 and 13, 2020

R-6	Letter from Brian J. Aloia, Esq. to Lisa Sanes dated May 12, 2020; Preliminary Notices of Disciplinary Action dated May 12, 2020; and Final Notice of Disciplinary Action dated June 29, 2020
R-7 to R-11	Video footage
R-12	CAMPS – Transaction History
R-13	Notice of Minor Disciplinary Action dated December 16, 1998
R-14	Notice of Minor Disciplinary Action dated January 7, 2015
R-15	Notice of Minor Disciplinary Action dated July 10, 2001
R-16	Written Warning dated November 12, 1999
R-17	Notice of Minor Disciplinary Action dated November 16, 2016
R-18	Notice of Minor Disciplinary Action dated December 22, 1998
R-19	Memo from Leo Pellegrini to Lisa Sanes dated November 7, 2013
R-20	Notice of Minor Disciplinary Action dated April 16, 2018