STATE OF NEW JERSEY

In the Matter of Louis Urcinole
Seaside Heights Borough
Department of Public Works

CSC Docket No. 2021-1248
OAL Docket No. CSV 03000-21

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: DECEMBER 21, 2022

The appeal of Louis Urcinole, Maintenance Repairer, Seaside Heights Borough, Department of Public Works, removal, effective January 29, 2021, on charges, was heard by Administrative Law Judge Judith Lieberman (ALJ), who rendered her initial decision on November 15, 2022. Exceptions were filed on behalf of the appointing authority and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on December 21, 2022, the Commission adopted the ALJ's recommendation to modify the removal to a six-month suspension.

As indicated above, the Commission thoroughly reviewed the exceptions and reply filed in this matter. Upon that review, it does not find anything persuasive to overturn the ALJ's recommendations regarding the charges or the reduction in penalty. While there is some argument regarding the ALJ's findings as to whether the appellant called the victim in this matter a specific epithet or actually spat on that individual, the ALJ's findings in that regard was based on her assessment of the credibility of the witnesses, which upon review, the Commission finds were fully articulated and not arbitrary, capricious or unreasonable. Moreover, the ALJ's reasons for the recommended reduction in penalty are also reasonable.

In her initial decision, regarding the penalty, the ALJ found:

Here, appellant's disciplinary history documents that he was disciplined

ten times, between February 3, 2006, and December 3, 2020, prior to the proposed discipline at issue. The infractions and disciplines are summarized as follows:

- February 3, 2006, written warning for refusing to perform a work duty. He was charged with neglect of duty.
- August 20, 2018, written warning for not reporting to work.
- September 4, 2018, written warning for not reporting to work.
- November 29, 2018, one-day suspension for failing to follow directions.
- May 7, 2019, one-day suspension for a February 15, 2019, incident involving failure to report an accident involving a garbage truck and a co-worker.
- May 7, 2019, three-day suspension for a February 19, 2019, accident involving a garbage truck and a school bus. He was charged with incompetence.
- May 31, 2019, oral warning for "name calling."
- July 13, 2020, three-day suspension for absences without available leave time.
- November 2, 2020, three-day suspension for absences without available leave time and not reporting to work.
- December 3, 2020, oral warning for smoking cigars in Borough vehicles.

[R-4.]

Unlike the appellants in the above-cited cases who had unblemished disciplinary histories, appellant has a more involved disciplinary history and all but one of the infractions occurred close in time to the incident at issue here. Only one, however, is similar to the infraction here and it warranted just an oral warning.

It is well established, and should be readily understood, that racial epithets are harmful, damaging, and inappropriate under all circumstances. While appellant claims to understand the damaging impact of racial epithets, his testimony indicated otherwise. He did not indicate an understanding of the words he used while yelling at Aguilar and he did not apologize or appear remorseful. His demeanor at times during the hearing suggested at best, a lack of appreciation of the import of the charges against him. For these reasons, a significant penalty is warranted.

Other considerations, however, militate against removal. Respondent seeks removal based upon a set of facts that it did not fully establish.

> While Vaz testified that he believed the charge and proposed penalty were appropriate even if appellant did not call Aguilar a "s**c," respondent has not proven by a preponderance of the credible evidence that appellant spat at Aguilar or called Perez a "s**c." Also, the FNDA asserted that appellant used the word "n***er" on "numerous occasions." While Edgar asserted that appellant used the word "n***er" two or three times, he testified about only one incident in which this happened. This does not mean that use of the word one time is insignificant and unworthy of discipline. Discipline is certainly warranted here. However, respondent has the burden of proof here and it did not prove all of the charges that formed the basis for the proposed removal.
>
> Although appellant's offense is serious and warrants a significant penalty, I am constrained by the regulation that limits suspensions to six months without pay. *N.J.A.C.* 4A:2-2.4. Accordingly, because appellant did not prove all of the charges in the FNDA, and the proposed penalty of removal was based upon all of the charges, taken together, and appellant has only one prior discipline for a related infraction I **CONCLUDE** that a six-month penalty is appropriate here. I also **FIND** and **CONCLUDE** that there is a reasonable basis for ordering that appellant shall also be required to complete an individualized program of training about workplace violence, discrimination and harassment, as well as an individual program of anger-management counseling.

The Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's 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. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). Even when a public safety employee does not possess a prior disciplinary record after many unblemished years of employment, the seriousness of an offense occurring in the environment of a correctional facility may, nevertheless warrant the penalty of removal where it compromises the safety and security of the institution, or has the potential to subvert prison order and discipline. *See Henry,*

supra. Moreover, in In *In the Matter of Anthony Stallworth,* 208 *N.J.* 182, 199 (2011), the Supreme Court stated that:

> ...the contextual nature of the prior offenses is a relevant consideration when analyzing an employee's disciplinary record ... As already noted, progressive discipline is a flexible concept, and its application depends on the totality and remoteness of the individual instances of misconduct that compromise the disciplinary record. The number and remoteness or timing of the offenses and their comparative seriousness, together with an analysis of the present conduct, must inform the evaluation of the appropriate penalty. Even where the present conduct alone would not warrant termination, a history of discipline in the reasonably recent past may justify a greater penalty; the number, timing, or seriousness of the previous offenses may make termination the appropriate penalty. However, under the tenets of progressive discipline, removal is appropriate.

In this matter, the Commission finds that the sustained infractions, by themselves, are not so egregious, in and of themselves, to support removal from employment. While the Commission disagrees with the ALJ's implication that since the appellant only has one prior similar infraction, that removal would be inappropriate, it agrees that a penalty less than removal is appropriate. When determining a proper penalty while utilizing the tenets of progressive history, an employee's *entire history* is considered. Certainly, a history of similar misconduct serves as an aggravating factor, but the lack of significant similar misconduct, may, but does not necessarily, serve as a mitigating factor. In this case, the Commission finds it does not mitigate against the imposition of a severe penalty. Nevertheless, the Commission agrees that a six-month suspension is appropriate. In this regard, it cannot be ignored that, while most of the appellant's disciplinary history is recent, none of those infractions warranted major discipline.[1] Further, even assuming, *arguendo,* that the other proffered charges were sustained, those actions, while serious, are not so egregious as to warrant removal absent the application of progressive discipline. The Commission is satisfied that a six-month suspension, the most severe permitted under Civil Service law and rules should serve as sufficient warning to the appellant that any future infractions will result in his removal from employment. Further, the Commission agrees with the ALJ that the appellant, upon reinstatement, shall undergo and satisfactorily complete workplace violence and discrimination and harassment training, as well as an anger-management program.

Since the removal has been modified, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10 from

---

[1] In fact, several of those actions do not even constitute formal discipline as defined in Civil Service law and rules.

six months after the first date of separation until the date of actual reinstatement.[2] However, he is not entitled to counsel fees. *N.J.A.C.* 4A:2-2.12(a) provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in the disciplinary appeal is the merits of the charges. See *Johnny Walcott v. City of Plainfield,* 282 *N.J. Super.* 121,128 (App. Div. 1995): *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained, and major discipline was imposed. Consequently, as appellant has failed to meet the standard set forth at *N.J.A.C.* 4A:2-2.12, counsel fees must be denied.

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

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was not justified. The Commission therefore modifies that action to a six-month suspension. The Commission further orders that the appellant be granted back pay, benefits, and seniority from six months after the first date of separation to the actual date of reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay dispute.

Counsel fees are denied pursuant to *N.J.A.C.* 4A:2-2.12.

The Commission further orders that the appellant, upon his reinstatement, shall undergo and satisfactorily complete workplace violence and discrimination and harassment training, as well as an anger-management program.

---

[2] In the ALJ's decision, there is some discussion about a period of time the appellant "waived" back pay. The record is unclear as to exactly what period, if any, the ALJ is referring to. Absent any such actual waiver, the appellant is entitled to back pay pursuant to *N.J.A.C.* 4A:2-2.10 from the first date he was no longer being paid until the date of his actual reinstatement.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 21ST DAY OF DECEMBER, 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 03000-21
AGENCY DKT. NO. 2021-1248

IN THE MATTER OF LOUIS URCINOLE,
SEASIDE HEIGHTS BOROUGH,
DEPARTMENT OF PUBLIC WORKS.

Kevin P. McGovern, Esq., for appellant Louis Urcinole (Mets, Schiro & McGovern, LLP, attorneys)

Matthew J. Donohue, Esq., for respondent Seaside Heights Borough, Department of Public Works (Rothstein, Mandell, Strohm, Halm and Cipriani, PA, attorneys)

Record Closed: September 29, 2022 Decided: November 15, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Appellant Louis Urcinole ("appellant") appeals his removal by respondent, Seaside Heights Borough Department of Public Works ("Borough", "respondent" or "appointing authority"), from his position of maintenance repairer due to a determination that he engaged in conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6), when he used derogatory and racial epithets when addressing co-workers and

spat in a co-worker's face during an argument. Respondent also charged appellant with violating N.J.A.C. 4A:2-2.3(a)(9), discrimination that affects equal employment opportunity, N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, and N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties, because the above described acts violated its Workplace Violence, General Anti-Harassment and Anti-Discrimination Policies and constituted violations of the criminal code.

PROCEDURAL HISTORY

On January 29, 2021, respondent issued a Preliminary Notice of Disciplinary Action (PNDA) setting forth the charges and specifications made against appellant. Appellant did not request a departmental hearing. On February 5, 2021, respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges in the PNDA and removing appellant from his position effective January 29, 2021. Appellant filed a timely appeal, and the Office of Administrative Law received it on March 24, 2021, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15 and N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. The matter was assigned to me on April 7, 2021, and status conferences were conducted on May 13, 2021; June 2, 2021; July 26, 2021; August 30, 2021; and October 12, 2021. The hearing was conducted on January 19, 2022, by way of Zoom video technology due to the COVID-19 pandemic. The record remained open to permit the parties to receive the hearing transcript and submit post-hearing briefs. All briefs were received by June 20, 2022, and the record closed that day. An extension of time to file this Initial Decision was granted on July 29, 2022. The record was reopened on September 14, 2022, to permit respondent's counsel to respond to point VIII of appellant's brief. The response was received on September 28, 2022, and appellant replied on September 29, 2022, after which the record closed.

FACTUAL DISCUSSION AND FINDINGS

The following is undisputed. I, therefore, **FIND** the following as **FACT**:

1. Appellant Louis Urcinole was employed by the Borough as a maintenance repairer for seventeen years at the time of the hearing.

2. On December 21, 2020, appellant and co-worker Miguel Aguilar worked together on a Borough garbage truck.

3. On January 29, 2021, appellant was served with a PNDA, dated January 29, 2021, that charged appellant with the following:

   - Charge I: Appellant "confronted" Aguilar and accused him of "working too slow." J-1 at 5. "During the argument, [appellant] positioned himself close to Aguilar's body and called him a 's**c'[1] and 'Mexican' and assaulted Aguilar by spitting in Aguilar's face. [Appellant] told Aguilar that 'he should go back to Mexico.'" This constituted conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). Ibid.

   - Charge II: Borough employee Richard Edgar "reported that on numerous occasions he observed and heard [appellant] refer to black persons as ['n-words']" This constituted conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). Ibid.

   - Charge III: Borough employee Jeremiah Perez reported, during a January 22, 2021, interview concerning the interaction between appellant and Aguilar, reported that appellant asked him, when they first worked together, "are you a s**c?" Ibid. Perez informed

[1] Appellant is charged with using a phrase that contained the word "fucking" and the epithets "nigger" and "spic." These words have been abbreviated throughout this Initial Decision.

executive secretary Barbara Terregino that he could no longer work with appellant. Superintendent of Public Works William Rumbolo "directed Perez to avoid [appellant] going forward." Ibid. This constituted conduct unbecoming a public employee, in violation of N.J.A.C. 4A:2-2.3(a)(6). Ibid.

- Charge IV: Appellant violated Borough policies prohibiting discriminatory conduct, workplace violence and harassment when he discriminated against Aguilar and Perez, who are Hispanic, and when he referred to "black persons" as "[n-words]." Id. at 6. He "discriminated against Aguilar and Perez" and "created a hostile work environment." This constituted discrimination that affects equal employment opportunity, including sexual harassment, in violation of N.J.A.C. 4A:2-2.3(a)(9).

- Charge V: Based upon the assertions in Charges I through IV, appellant violated the Borough's Workplace Violence Policy. Ibid.

- Charge VI: Based upon the assertions in Charges I through IV, appellant violated the Borough's General Anti-Harassment Policy. Ibid.

- Charge VII: Based upon the assertions in Charges I through IV, appellant violated the Borough's Anti-Discrimination Policy. Id. at 7.

- Charges V through VII constituted other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(1)[2]. Id. at 6.

[2] The PNDA identified N.J.A.C. 4A:2-2.3(a)(12) as the authority for the charge. However, the appropriate citation is N.J.A.C. 4A:2-2.3(a)(1).

- Charge VIII: Based upon the assertions in Charges I through IV, appellant violated the Borough's policies and failed to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(12). Id. at 7.

- Charges IX and X: Based upon the assertions in Charge 1, appellant committed assault, in violation of N.J.S.A. 2C:12-1(a)(1) and (3), and disorderly conduct, in violation of N.J.S.A. 2C:33-2. These criminal offenses constituted other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). Id. at 7-8.

- Charges XI and XII: Based upon the assertions in Charges I and III, appellant committed harassment, in violation of N.J.S.A. 2C:33-4, and bias intimidation, in violation of N.J.S.A. 2C:16-1. These criminal offenses constituted other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12). Id. at 8–9.

4. Appellant was suspended without pay, effective January 29, 2021, because it was determined that immediate suspension was "necessary to maintain safety, health, order and the effective direction of public services." J-1 at 3. Appellant was considered "a clear and present danger to co-employees and supervisors" based upon the "totality of the circumstances[.]" Ibid.

5. Neither appellant nor his union representative requested a departmental hearing or otherwise contested the suspension without pay or the substantive charges. J-2.

6. On February 5, 2021, respondent issued a FNDA sustaining the charges in the PNDA. Ibid.

7. The Borough's "General Anti-Harassment Policy" defines harassment as including "slurs, epithets, threats, derogatory comments, unwelcome jokes, teasing, caricatures or representations of persons using electronically or physically altered photos, drawings, or images, and other similar verbal or physical conduct." R-1 at 2. Violation of the policy can result in discipline up to and including immediate discharge. Ibid.

8. The Borough's "Workplace Violence Policy" prohibits making threatening remarks and "aggressive, hostile or bullying behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress[.]" Ibid.

9. The Borough's "Anti-Discrimination Policy" prohibits it from discriminating on the basis of enumerated protected categories including but not limited to race, color and national origin. Id. at 8.

10. Appellant received copies of these policies on December 19, 2019. R-2.

11. Appellant received training concerning these policies. R-3.

Testimony

The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above-described issue.

For respondent

Richard Edgar worked for the Borough as a driver from October 2019, through February 2021. He worked with appellant on projects throughout the town and on the garbage truck, which Edgar drove while appellant worked at the back of the truck, bailing garbage.

On December 21, 2020, Edgar drove a garbage truck that appellant and Aguilar worked on. After completing work, they were in the restroom in the Borough Department of Public Works (DPW) building. Edgar was in the restroom, washing his hands; the door to the room was behind him and to the left. He did not recall who started the argument, although it began as an "altercation" concerning the position of the garbage truck when Edgar, the driver, stopped it. T[3] 34:16. The altercation escalated into an argument. The two men were standing no more than three feet from each other and they spoke loudly. Edgar heard appellant call Aguilar a "s**c" and told him to "go back to Mexico." T 25:10 to T 25:15. Aguilar initially tried to "brush it off" and replied that he is not from Mexico. T 25:19. The argument, however, continued and Aguilar became "flustered." T 25:23.

Edgar did not see appellant spit in Aguilar's face. Noting that the two men were "really nose to nose" while they argued, he surmised that perhaps spittle came out of appellant's mouth while he was arguing. T 31:5. Although masks were required at that time, due to the COVID-19 pandemic, none of the men in the bathroom wore a mask.

Appellant did not actively prevent Aguilar from leaving the restroom. However, Aguilar could not exit because appellant stood in front of the door. It was a small room and, thus, he could not move around appellant.

Edgar was interviewed by the Borough attorney on January 22, 2021, and by Borough Administrator Christopher Vaz on his last day of work for the Borough, in February 2021. He recalled telling Vaz that appellant used a racial epithet while in the bathroom. He also stated that he previously heard appellant use the word n**ger while they worked together. He explained, "[W]hen we were working on the road dumping trash we would come across people trying to get around us and if they were people of a different color he would refer to them as . . . n***ers." T 27:23 to T 28:3. Edgar did not report this to a supervisor. Rather, because he was in charge of the truck when it happened, he directed appellant to not use that word again. He stressed that he did not want appellant to use that word when speaking with him "because I don't want to be any part of that." T

[3] "T" refers to the transcript of the January 19, 2022, hearing. It is followed by the referenced page and line numbers.

28:10 to T 28:12. Also, appellant was a much more senior employee and Edgar feared that appellant would dispute any report he filed and he could be at risk of losing his job. He noted that it took him a "long time to get the job." T 28:22.

On cross-examination, Edgar was asked about his interview with Vaz, which was videotaped. During the interview, Edgar did not say that appellant used the word "s**c." Edgar testified that this is incorrect and that he recalled hearing the slur. He noted that it "stuck out the most" to him. T 35:2.

The recording of the interview was played. Vaz asked Edgar to relay "exactly" what he heard appellant say. T 44:9. Edgar explained that his back was to the men when he heard the following exchange:

> When I was going to the bathroom . . . I heard Miguel [Aguilar] say to Lou [appellant] . . . you got to stop telling all the new guys that are coming through or the seasonal guys, whatever, the temp agency that you — you can only go ten miles an hour — you know, the drivers can only drive ten miles an hour on these trucks because it's — it's going to take us forever to get out there and get everything done and Lou started firing back at him telling him he doesn't know what the F he's talking about, that's he's just a — you know, an F-ing Mexican. He — you know, if he has any problems with the way things get done around here to go back to — to Mexico and now at this time I'm washing my hands.
>
> So I'm like looking over at them because it's like there was — you know, it was — it was again, you know, heated and I was just kind of watching to make sure I guess nothing happened and then Lou got like right up in his face. I mean it . . . I'm pretty sure they . . . touched noses at one point and he just kept calling him an F-ing Mexican[.]
>
> [T 44:15 to T 45:14.]

Vaz asked Edgar if he heard appellant use any other "word." T 45:16. Edgar replied, "I only — honestly I only heard him say — call him an — an F'ing Mexican . . . at that time." T 45:17-19. Edgar continued to describe the incident:

> Miguel just stepped around him and he . . . tried to walk out of the bathroom and that's . . . when Anthony [Albanese] came in and I tried — like I was saying I tried to leave the bathroom, but . . . the bathroom door is only so wide and Lou standing in front of the door I couldn't . . . even get out. He was kind of like barricading us in there. . . . There was no way of getting around Lou. He was blocking that whole entrance off.
>
> . . .
>
> Miguel eventually did leave and I remember him saying to me he's got to get out of here[.]
>
> [T 45:23 to T 47:24.]

Albanese was unable to enter the bathroom. He stood in a small hallway that leads to the bathroom. Albanese tried to "clarify" what Aguilar was trying to say to appellant. T 47:4.

Edgar acknowledged that, when Vaz asked him about slurs used by appellant, he replied that appellant only said "Mexican" and "go back to Mexico." T 48:20 to T 49:1. He acknowledged that he did not say that appellant spat on Aguilar. However, he testified that he was "incorrect" during the interview because he "did hear the racial slur ["s**c"] because that's when [he] knew things were starting to get heated" and he feared he would become involved in their fight. T 35:16 to T 35:17. He also acknowledged that the argument was initially about appellant telling new drivers how quickly they should drive the trucks and not about the positioning of the trucks or Aguilar's work performance.

Also on cross-examination, Edgar stated that he worked with appellant approximately twelve times and that he heard appellant use the "N word" two or three times. He heard the epithet while he sat in the driver seat of the garbage truck and appellant stood by the open vehicle window. He described one incident in which a driver passed the stopped truck very quickly. Appellant reacted by saying, "f***ing n***ers." T 62:21. Edgar did not report this. He did not know if he was required to report it. He did not know if he received the Borough's policy concerning this. If he received it, he did not recall having read it.

Edgar testified that he did not work with appellant and Aguilar very often. He did not recall hearing them use racial terms when they spoke with each other. He also clarified that he believed no people of African American descent heard appellant use the "N word" and appellant did not direct the statement directly to people of African American descent.

On redirect examination, Edgar clarified that, in the bathroom, appellant became aggressive and loud. He was the only one who yelled. Edgar speculated that he may have used the word "Mexican" during his interview with Vaz because he did not like saying "s**c." Edgar asserted that he "remember[ed] it like it just happened because . . . that's when [he] started getting like a little nervous that something was going to happen[.]" T 59:13- T 59:15. While the men argued about the speed and position of the truck, appellant "got into . . . [Aguilar's] face and was telling him you're just a . . . f-ing s**c, you should go back to Mexico, you know, Miguel kind of like shrugged it off." T 59:18- T 59:21. Although Aguilar tried to "laugh it off," Edgar noted that he was actually "getting flustered" and was unhappy. T 60:7- T 60:10.

Miguel Aguilar has worked for the Borough since 2002. He works on the back of the garbage truck, collecting garbage and putting it into the truck. He worked with appellant on occasion, although appellant had other work assignments.

On the day at issue, appellant and Aguilar worked on the same truck. After completing work, Aguilar entered the DPW building and went to the bathroom to wash his hands. Edgar was in the bathroom when he arrived. Appellant next entered the bathroom and started to fight with Aguilar because he believed Aguilar moved too quickly while working. T 84:25 To T 85:2. Appellant "got in [Aguilar's] face" and, "like he always" did, called him a "lot of names." T 72:25 to T 73:10. Appellant called Aguilar "f***ing a***hole," "f***ing Mexican" and "this a***hole." T 74:21 to T 74:22. Appellant leaned in, close to Aguilar's face, "to spit on [his] face." T 73:4. Aguilar held his hand to his nose, to demonstrate how close appellant was. Appellant's saliva hit Aguilar in the face. Anthony Albanese entered the bathroom and defended Aguilar, who left the bathroom to go home.

On cross-examination, Aguilar explained that appellant "went too close and spat to me. He called me more names, but I walk away. Soon as he spat at me I walk away. That's it." T80:6 to T80:8. He cleaned his face before he left and before Anthony entered the bathroom to defend him. He could not immediately exit the bathroom because appellant "tried blocking the bathroom." T 80:23 to T 80:24. When Anthony arrived, he told Aguilar to leave and appellant got out of the way.

Appellant and Aguilar were friendly before the incident. Appellant previously called him names but Aguilar did not care. It was "normal." T 83:8. Appellant never called Aguilar by his name and always called him Mexican even though he is from Peru. He "always" used racial or derogatory terms when he addressed Aguilar, prior to the incident, including "s**c." T 87:1-7; T 89:14. He testified that appellant "never called me for [sic] my name really or s**c or Mexican or whatever." T 85:6 to T 85:7. Aguilar explained his view of how he was treated by appellant, "Call me the names you call me. So it's not bothering me. The more that's bothering me why he spit in my face." T 83:8 to T 83:10. Aguilar never reported appellant's behavior to supervisors.

Aguilar acknowledged that, prior to the incident, he sometimes responded to appellant by calling him names. T 88:20; 89:18-23. He called him "white boy" or "little Italian." T 92:3to T 92:12. He did so because appellant never, in their entire time working together, called Aguilar by his name, even though appellant has helped him with personal matters, like car rides. Aguilar explained that he was not treated respectfully and appellant, thus, did not deserve respect in return.

William Rumbolo is the Borough's Superintendent of Public Works. He is responsible for employee discipline and was appellant's immediate supervisor. The Borough's Anti-Violence Policy prohibits all physical contact, threats and hostile work environments. R-1 at 2. The General Anti-Harassment Policy also prohibits harassment of employees or the public and requires employees to report harassment to "appropriate personnel." R-1 at 3. He was one of the supervisors to whom a report could be made. On December 19, 2018, appellant received copies of the policies and was trained concerning the policies. R-2, R-3.

Rumbolo was not working on December 21, 2020, and did not have firsthand knowledge of the incident. He was advised of the incident and reported it to Vaz when he returned to the office. He spoke with Aguilar, who said that he and appellant had an argument and that appellant spit in his face and called him a name. Rumbolo "believed [appellant] called him a s**c." T 110:15. He also spoke with appellant, who denied calling Aguilar any names and said nothing happened between them.

Rumbolo was asked about Charge III of the PNDA, which referenced an interview with Jeremiah Perez, a temporary employee. Perez reported that when he and appellant first worked together, appellant asked him, "Are you a s**c?" J-1 at 5. Rumbolo did not know when they started working together; however, it was before December 21, 2020. T 124:6 to T 124:8. The PNDA reported that Perez told Barbara Terregino, Rumbolo's executive secretary, that he could not work with appellant and Rumbolo "directed Perez to avoid [appellant] moving forward." Ibid. Rumbolo did not recall speaking with appellant about Perez's assertion or whether he recommended discipline. A review of appellant's disciplinary record indicates that he was not disciplined at that time. R-4. Rumbolo acknowledged that the Borough's Policy requires him to respond to allegations of this nature.

Christopher Vaz has been the Borough Administrator since January 2015. He is responsible for promulgating and disseminating rules and policies. All department heads report to him. The Workplace Violence and General Anti-Harassment Policies discussed by Rumbolo were effective at the time of the incident between appellant and Aguilar. R-1 at 2 to 3. An attorney trained the public works crew on the Borough's policies, which appellant received on December 19, 2018. R-2, R-2.

Rumbolo advised Vaz of the altercation between appellant and Aguilar. Rumbolo "verified the allegations with Miguel" and "talked with some of the other employees." T 134:4 to T 134:8. The Borough's attorney conducted an independent investigation of the allegation.

Appellant engaged in conduct prohibited by the Workplace Violence Policy: "making threatening remarks" and "aggressive, hostile, or bullying behavior that creates

a reasonable fear of injury to another person or subjects another individual to emotional distress." R-1 at 2. Spitting was akin to an assault.

Vaz met with appellant's union representative, Patrick Guaschino. Appellant did not submit anything in response to the PNDA charges and did not request a hearing to contest the charges or his suspension without pay.

The FNDA proposed removal of appellant, based upon the "totality of the charges and the specifications and the allegations and the interviews" that the attorney conducted, as well as appellant's disciplinary history. T 142:507. All of the charges, including charges number nine through twelve, which reference criminal conduct, are based upon the same set of allegations. Vaz explained, "We have a diverse workforce particularly in the summer and spring and fall when we hire seasonal employees. . . . [A]nd we also have a diverse group of people that visit Seaside Heights." T 142:11 to T 142:20. Also, Vaz previously worked with appellant when appellant was the fire department chief. During that time, appellant was "a bully, very hard on people, constantly cursed. . . . [H]e referred to most of us as 'f***ing retards' and 'f***ing a**holes' and when you questioned him, 'I'm the f***ing chief.'" T143:4-9. The General Anti-Harassment Policy expressly authorized termination of employees who violate the policy. R-1 at 3. However, termination is not required.

On cross-examination, Vaz acknowledged that another employee who used a racial epithet was demoted and not terminated. While the demotion was related to a civil service classification correction, it was an isolated incident and the employee apologized. He also acknowledged that the charges against appellant were written before he interviewed Edgar. He did not recommend that the charges against appellant should be amended after he interviewed Edgar and learned that Edgar only heard appellant refer to Aguilar as "Mexican." He did not believe the difference between the charges and Edgar's account of the incident required an amendment to the charges. The word "Mexican" can be used in a way that is akin to a racial slur, depending upon the context in which it is used. However, "a**hole" is not a racial epithet.

On redirect examination, Vaz explained that he spoke with the union representative after Rumbolo advised him about Perez's allegation. Vaz "thought it was time to have a conversation with [union representative Patrick Guaschino] . . . in general about [appellant's] behavior[.]" T 183:13 to T 183:15. He wanted to "bring [Guaschino] into it . . . and see if we could kind of resolve this[.]" T183:17 to T 183:18. The incident with Aguilar "just got pushed into the same bucket at that point in time." T 183:20 to T 183:22.

Appellant was previously disciplined for not reporting to work. He did not advise that he would be away from work and he had no more leave time. Vaz recalled a brief conversation with either appellant's son or stepson, who called to discuss appellant's available leave time. Vaz said that appellant had no available time and, because he was out of work, he was on unpaid status. Vaz said he needed verification in writing that appellant was in a rehabilitation facility. When appellant returned to work, Vaz and Rumbolo told him that he needed to provide this proof. They would then consider reversing the discipline. Appellant never produced proof of his rehabilitation stay.

For appellant

Patrick Guaschino is the vice president and business representative for Teamsters Local 97, which represents Borough employees and previously represented appellant. He received a copy of appellant's PNDA, and met with Vaz after the initial investigation was conducted. He waived a departmental hearing because he did not believe it would result in a favorable outcome for appellant.

Louis J. Urcinole, appellant, was employed as a maintenance repairer by respondent for seventeen years. He testified that he believed he and Aguilar were close friends prior to the incident. He had confided in Aguilar, who had visited appellant's house and helped him by driving him to work when necessary and to a compensation lawyer when he was injured. They worked together approximately one or two days per week. He described Aguilar as an "excellent worker, probably the best guy the Borough has." T 218:1 to T 218:2.

Appellant testified that he knew Aguilar was Peruvian. He would joke with Aguilar by "always" referring to him as a Mexican and telling him to go back to Mexico. T 219:2 to T 219:3. Aguilar would always reply, "I'm Peruvian." T 219:3 to T 219:4. "It was just a joke and he would call me the N word and I just figured he was calling me that because I have a black grandson to try to get under my skin." T 219:4 to T 219:7. Appellant said it "rolled off his back." T 220:12 to T 220:13. He testified that Aguilar did this "once every couple days." T 220:15. He did not report it to management because they were friends who kidded with each other.

On the day of the incident, appellant argued with Aguilar because he believed the garbage truck had travelled at an excessive speed. He did not accuse Aguilar of working too slowly. Aguilar told appellant to not tell the drivers how to drive the trucks. Appellant replied that it is dangerous, particularly for people like him who worked on the back of the trucks. Aguilar "had a bad temper" and the argument "got heated." T 221:25 to 222:3. Appellant did not remember the entire exchange but "at the end [they] were yelling at each other." T 222:6 to T 222:7.

Appellant emphatically denied having called Aguilar a "s**c." The only word he used that related to Aguilar's ethnicity was "Mexican." He may have called him a "f***ing Mexican;" however, he did not remember the entire incident. He also told Aguilar to go back to Mexico, which was something he had said to Aguilar on prior occasions. Appellant testified that he used these words in the context of an argument and not a joke. T 239:2 to T 239:6. He later testified that he was "absolutely" joking and that he did not say the things Aguilar reported. T 239:17 to T 239:23.

Appellant "didn't think anything came of it" until he learned that Aguilar complained about the incident. T 224:1 to T 239:2. Appellant recalled that he did not call Aguilar a "f***ing Mexican" prior to the incident.

Appellant testified that Aguilar "called [him] things too." T 225:23–25. Appellant could not remember what Aguilar said but he suggested, "f---ing a-hole and other stuff." T 226:3.

Appellant was certain that he did not spit on Aguilar. He noted that he is missing teeth and it is possible he could have accidentally spit while yelling. He also believed they were wearing masks at the time of the argument.

Appellant did not recall attempting to block the bathroom door to prevent Aguilar from exiting. He "was probably positioning [himself] at the door. That's all." T 225:6 to T 225:7. He noted that Aguilar "just walked out" without first asking appellant to step aside. T 225:12. Neither Anthony Albanese nor Richard Edgar asked him to step aside.

After the incident, appellant stayed away from Aguilar because Aguilar has a bad temper. Appellant did not apologize to him. He believed Aguilar was "acting" when he became upset while testifying about the incident. T 238:3 to T 238:6. They did not work together after the incident. Appellant believed that Rumbolo separated them.

Appellant recalled working with Jeremiah Perez. Appellant never called him a "s**c" and Rumbolo did not speak with appellant about an allegation that this occurred. Appellant explained, "You could see the guy's Spanish. Why would I say that?" T 227:21 to T 227:22.

Appellant also countered Edgar's assertion that he used the "N word" two or three times while they worked together, testifying that he does not use that word. He explained that he "has a black grandson and it's offensive to him and I would never hurt him. I love him." T 228:9 to T 228:10.

From November 2019, through November 2020, appellant struggled with alcohol, which was triggered by marital problems. He voluntarily entered an inpatient rehabilitation program. He missed work while at the program and did not communicate with his employer prior to or during his absence. He did not have access to a phone while residing at the inpatient facility. When he returned to work, he did not produce proof of his stay at the facility. After his discharge, he took medication that impacted his memory for approximately one or one and one-half months. Nonetheless, he remembered that he did not call Aguilar a "s**c" or intentionally spit in his face.

On cross-examination, appellant acknowledged that he did not remember who entered the bathroom first. He clarified that he was "absolutely" joking with Aguilar during their argument. T 239:23. He stated that he "lost a good friend . . . [p]robably over the argument." T 241:17 to T 241:19.

ADDITIONAL FACTUAL FINDINGS

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

I had the ability to observe the demeanor, tone and physical actions of the petitioner and witnesses during the hearing. Appellant's demeanor during his testimony was pleasant. However, during the hearing, while a witness was testifying, he was clearly observed smoking a cigar. This required an interruption of the proceeding to remind petitioner that, although he was not physically in a hearing room, he was required to comport himself as if he were. Also, despite this admonition, he was clearly observed clipping his fingernails while Rumbolo testified. These actions conveyed disrespect for

the proceeding and a lack of appreciation of its import. It calls into question petitioner's pleasant demeanor during his testimony.

Also, appellant claimed that his memory was adversely impacted by medication during the time of the incident. He acknowledged his memory problems and his incomplete recollection of the incident, while he simultaneously asserted that he recalls his actions and intentions that day. Furthermore, his testimony concerning other important matters was inconsistent. In particular, within a matter of minutes, he testified that he called Aguilar a "Mexican" and told him to go back to Mexico in the context of an argument and then testified that he was joking when he said it. For all of these reasons, I cannot find appellant's testimony to be fully credible.

Edgar testified in an earnest manner that conveyed his desire to be clear and direct. A former Borough employee, there is no suggestion of bias toward or improper motivation to benefit respondent. Further, he demonstrated no personal animus, bias or improper motivation with respect to appellant. Moreover, his body language, eye contact and overall demeanor indicated a sincere desire to be forthcoming and clear. There was, however, one aspect of his testimony that was concerning. Although he testified that appellant called Aguilar a "s**c," the recording of Edgar's more contemporaneous account of the incident revealed that he did not report this to Vaz, even though Vaz clearly expected Edgar to provide a full accounting of the incident. Edgar's rationale for not reporting this — that he edited himself due to discomfort with the word — is not compelling, as he freely testified to this and other offensive epithets during the hearing. Notwithstanding this inconsistency, however, I find Edgar's testimony to be otherwise credible for the following reasons. Importantly, the remainder of his testimony about the altercation was consistent with not only his recorded interview but also that of Aguilar. As noted, there is no evidence in the record that suggests that Edgar has a motive to mislead or exaggerate. His interview was conducted on his last day of work for the Borough and he has not worked there since that date. There is no evidence of animus between him and appellant. Also, as noted, the manner in which he testified clearly demonstrated his sincere desire to be forthcoming and clear. In sum, Edgar's testimony, with the exception

of his recollection of the use of the word "s**c," is credible as it was bolstered by the evidence in the record and there is no evidence suggesting a motive to mislead.[4]

Aguilar testified earnestly and emotionally. He clearly attempted to testify in a precise manner; however, he acknowledged that he had some difficulty speaking English. In light of this, he was provided opportunities to clarify his testimony. He did not appear to embellish his testimony and acknowledged that appellant's past behavior toward him, which was similar in some regards, was not as bothersome as the behavior at issue. He was visibly emotional and it was clear that he experienced pain as a result of the incident. His account of the subject of their argument — that appellant complained about the speed at which they worked — comports with appellant's testimony and is reliable. Also, his account of the derogatory terms used by appellant — he did not testify that appellant used the epithet "s**c" — comports with appellant's testimony. I find his testimony to be credible.

William Rumbolo testified clearly and directly. He had little in the way of firsthand knowledge about the incident between appellant and Aguilar and relied upon Aguilar's account of the event. He clarified that he "believed" Aguilar said that appellant called him a "s**c." Rumbolo acknowledged that he did not act in response to Perez's complaint other than to tell him to stay away from appellant.

Vaz also testified clearly and directly. His testimony about his interview of Edgar was bolstered by the video recording of the interview and I find it to be credible. Also, he candidly acknowledged that he issued the PNDA before that interview and that he did not have firsthand information about appellant's interaction with Perez.

[4] I note that, while Edgar did not accurately recall the subject of the argument, this is insufficient to negate this finding. Given that he did not know that an argument was about to erupt, it is reasonable to believe that he was not paying close attention when the argument started.

ADDITIONAL FINDINGS OF FACT

Based upon the testimonial and documentary evidence, and having had the opportunity to observe the appearance and demeanor of the witnesses, I **FIND** the following as **FACT**:

Appellant and Aguilar argued about a work related matter. The argument was not about an accusation that Aguilar worked slowly. The argument became heated and the men stood very close to each other as they argued. Although appellant did not call Aguilar a "s**c," he did call him a "f***ing Mexican" and told him to "go back to Mexico." Appellant used these words in the context of a heated argument stemming from his upset over Aguilar's comment about work procedures. He used these words to hurt and offend Aguilar, not as part of a joke or a purportedly good natured ribbing. He did not indicate that he regretted his use of the words or that he understood why they were hurtful and inappropriate.

Whether appellant spat at Aguilar is unclear. Appellant's denial is not entirely reliable, given his diminished memory. Edgar's assertion that he did not see this is reliable, given that he testified on behalf respondent and did not embellish this fact. Rather, Edgar surmised that saliva accidently hit Aguilar because the men were standing very close to each other while appellant yelled. It is reasonable to believe that saliva could accidentally leave a person's mouth and land on someone nearby. Although Aguilar's testimony is credible, it is reasonable to believe that he perceived having been spat upon when, in fact, it was not intentionally done. I therefore **FIND** as **FACT** that there is simply not enough evidence in the record to permit a finding by a preponderance of the credible evidence that appellant intentionally spat at Aguilar.

With respect to the allegations that appellant used the "N word" on prior occasions, Edgar testified to his firsthand knowledge of appellant's action in one instance. Although he testified that appellant used the word on two or three occasions, he described only one incident. Although he did not state when this occurred, it can reasonably be understood to have occurred after October 2019, when Edgar began working for the Borough. I note that the Borough did not present evidence that it investigated the

allegation. However, absent a showing that Edgar had a motive to mislead or other credible evidence that contradicts this testimony, his testimony about appellant's statement is credible. Whether he should have reported the infraction does not negate the finding that appellant used the word. I therefore **FIND** as **FACT** that appellant used the "N word" when speaking with Edgar on one occasion.

With respect to the charge that appellant called Perez a "s**c," respondent relies solely upon hearsay evidence.[5] None of the individuals with firsthand knowledge of the act testified. Rumbolo learned about the allegation from his assistant, who did not testify. There is no evidence corroborating the allegation. Thus, I **FIND** as **FACT** that there is insufficient evidence in the record to permit a finding by a preponderance of the credible evidence that appellant called Perez a "s**c."

With respect to charges IX through XII, which assert that appellant violated multiple sections of the Criminal Code, there is no evidence in the record of an adjudication of these criminal charges. The OAL does not have jurisdiction to adjudicate criminal charges. Therefore, I **FIND** as **FACT** that there is insufficient evidence in the record to find by a preponderance of the credible evidence that appellant committed these criminal acts.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to N.J.S.A. 11A:1-12.6, 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

[5] Hearsay evidence is admissible in the trial of contested cases, and shall 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). However, while hearsay evidence is admissible, 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(b). Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony, when there is a residuum of legal and competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1971).

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); Loew v. Union Beach, 56 N.J Super. 93,104 (App. Div. 1959). 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).

The New Jersey Supreme Court has clearly recognized the harm caused by racial epithets and related language used in the workplace. In Karins v. Atl. City, it observed, "There are certain words and phrases that in the context of history carry a clear message of . . . hatred, persecution, and degradation of certain groups." 152 N.J. 532, 562 (1998) (citation omitted). "Hate conduct or speech harms the individual who is the target[;] . . . perpetuates negative stereotypes [and] promotes discrimination . . . by creating an atmosphere of fear, intimidation, harassment and discrimination." Id. (citation omitted). Such speech or conduct "is not purely private when made in connection with the performance of public service. Under those circumstances, a public employee is not immune from disciplinary proceedings." Id. at 563. See also Taylor v. Metzger, 152 N.J. 490, 510 (1997) ("Racial insults are different qualitatively because they conjure up the entire history of racial discrimination in this country") (citation omitted).

In Karins, a firefighter who was stopped by police for suspected drunk driving said a racial epithet when an African American policeman arrived as a backup officer. Just less than one year earlier, Karins had received a ten-day suspension for racial epithets directed at a fellow firefighter. Atlantic City thus imposed a forty-eight-day suspension without pay for conduct unbecoming and rules violations. The ALJ reversed and the Commission and Appellate Division concurred with the dismissal of charges. In reversing the lower court and upholding the forty-eight-day suspension, the Court noted that "[c]onduct subversive of discipline and morale not only violates the department's rules and regulations, but it warrants serious discipline especially for repeat offenders," and that the firefighter, "having been previously suspended without pay for similar conduct, should not be surprised to receive more severe discipline the second time." 152 N.J. at 562.

In Matter of Hendrickson, the Court recognized that a public employee's use of a "highly offensive gender slur in a public place and overheard by co-workers must be firmly condemned, even if Hendrickson [the employee] was just 'muttering' to himself in a loud voice about his female supervisor." 235 N.J. 145, 161 (2018). "A belittling gender insult uttered in the workplace by a state employee is a violation of New Jersey's policy against discrimination and Hendrickson's conduct was unbecoming a public employee." Ibid. Hendrickson was suspended and not terminated because the behavior was an "isolated incident" and Hendrickson had an "otherwise unblemished disciplinary record." Ibid. See also Butler v. Township of Scotch Plains, CSV 9890-03, Initial Decision (March 11, 2005), adopted, Merit Sys. Bd. (April 25, 2005), http://njlaw.rutgers.edu/collections/oal/ (an off-duty police officer without any prior suspensions received a ninety-day suspension for repeatedly calling a motorist, whom she saw make an illegal U-turn, a "s**c," poking him in the chest with her index finger, and otherwise treating him with utter disrespect while acting under the color of her authority as a police officer).[6]

[6] Administrative and unpublished Appellate Division cases are not binding. They are cited here because they provide relevant guidance.

Charges I – III

Charges I through III allege appellant engaged in "conduct unbecoming a public employee." N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase which encompasses conduct that adversely affects the morale or efficiency of a governmental unit, or that tends to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. at 554; 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)).

Charges I and II address the allegations concerning appellant's interaction with Aguilar and his use of the "N word." Appellant, in the heat of an argument during which he was positioned very near Aguilar, yelled at Aguilar that he is a "f***ing Mexican" and that he should "go back to Mexico." Whether he joked this way in the past does not diminish the racist intent and hurtful effect of this conduct. This, alone, is sufficient to permit a conclusion that respondent has proven by a preponderance of the credible evidence that appellant's actions constitute conduct unbecoming a public employee. The addition of evidence that he also used the "N word" while at work, openly and without apparent concern, further supports this conclusion.

Charge III addresses the allegation that appellant called Perez a "s**c." As this fact has not been established, the charge has not been proven by a preponderance of the credible evidence.

Accordingly, I **CONCLUDE** that the Borough has established, by a preponderance of the credible evidence the allegations contained in Charges I and II. Accordingly, I

CONCLUDE that the charge of violation of N.J.A.C. 4A:2-2.3(a)(6) (conduct unbecoming a public employee) must be and is hereby **SUSTAINED**. I also **CONCLUDE** that the Borough has not sustained its burden with respect to Charge III.

Charges IV, V, VI, VII

Relying upon the same facts and allegations as those asserted in the prior charges, the Borough asserts that there is other sufficient cause to warrant discipline, pursuant to N.J.A.C. 4A:2-2.3(a)(12), because appellant violated Borough rules and policies, and engaged in discrimination that affects equal employment opportunity, in violation of N.J.A.C. 4A:2-2.3(a)(9). With respect to the latter charge, the Borough wrote that appellant discriminated against Aguilar and Perez and "created a hostile work environment by referring to black persons as [N-words]." J-1 at 6.

The Borough's "General Anti-Harassment Policy" defines harassment as including "slurs, epithets, threats, derogatory comments, unwelcome jokes, teasing, caricatures or representations of persons using electronically or physically altered photos, drawings, or images, and other similar verbal or physical conduct." R-1 at 2. Violation of the policy can result in discipline up to and including immediate discharge. Ibid. The "Workplace Violence Policy" prohibits making threatening remarks and "aggressive, hostile or bullying behavior that creates a reasonable fear of injury to another person or subjects another individual to emotional distress[.]" Ibid. The "Anti-Discrimination Policy" prohibits it from discriminating on the basis of enumerated protected categories including but not limited to race, color and national origin. Id. at 8.

N.J.A.C. 4A:7-1 addresses equal employment opportunity:

> (a) There shall be equal employment opportunity for all persons in, or applicants for, the career, unclassified, and senior executive services, regardless of race, creed, color, national origin, nationality, ancestry, sex/gender (including pregnancy), affectional or sexual orientation, gender identity or expression, age, marital status, civil union status, domestic partnership status, familial status, religion, atypical hereditary cellular or blood trait, genetic

> information, liability for service in the Armed Forces of the United States, or disability, except where a particular qualification is specifically permitted and is essential to successful job performance. See N.J.A.C. 4A:4-4.5 on bona fide occupational qualification.
>
> (b) Equal employment opportunity includes, but is not limited to, recruitment, selection, hiring, training, promotion, transfer, work environment, layoff, return from layoff, compensation, and fringe benefits. Equal employment opportunity further includes policies, procedures, and programs for recruitment, employment, training, promotion, and retention of minorities, women, and persons with disabilities. Equal employment opportunity but not affirmative action is required with respect to persons identified solely by their affectional or sexual orientation.
>
> . . .
>
> (g) In local service, an appointing authority may establish policies and procedures for processing discrimination complaints.

The regulation incorporates and requires consideration of the Borough's policies and procedures concerning discrimination. The Borough has expressly prohibited disparate treatment based upon an employee's national origin. For the reasons stated above, I **CONCLUDE** that the appointing authority has demonstrated by a preponderance of the competent, relevant, and credible evidence that appellant violated Borough policies when he used inappropriate language that was intended to diminish and degrade Aguilar based upon his Latino ethnicity. Accordingly, I **CONCLUDE** that the charges of violations of N.J.A.C. 4A:2-2.3(a)(12) (other sufficient cause) and N.J.A.C. 4A;2-2.3(9) (discrimination that affects equal employment opportunity) must be and are hereby **SUSTAINED**.

Charge VIII

Appellant is charged with violating N.J.A.C. 4A:2-2.3(a)(1), failure to perform his duties. In this type of breach, an employee performs his duties in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of

performance, such that his or her performance is substandard. See Clark v. N.J. Dep't of Agric., 1 N.J.A.R. 315 (1980), http://njlegallib.rutgers.edu/njar/. Respondent contends that appellant failed to perform his duties to the extent he violated its policies, which appellant was aware of and about which he was trained. This charge is substantively identical to the charges addressed above and, therefore, I **CONCLUDE** that the appointing authority has demonstrated by a preponderance of the competent, relevant, and credible evidence that appellant violated Borough policies. Accordingly, I **CONCLUDE** that the charge of violation of N.J.A.C. 4A:2-2.3(a)(1) (failure to perform duties) must be and is hereby **SUSTAINED**.

Charges IX – XII

As noted above, these charges assert violations of the criminal code. Because there is no evidence in the record documenting that appellant has been found, by a court of competent jurisdiction, to have committed these criminal acts, I **CONCLUDE** that the Borough has not sustained its burden with respect to these charges.

Penalty

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). Thus, "consideration of past record is inherently relevant" in a disciplinary proceeding. West New York v. Bock, 38 N.J. 522. An employee's "past record" includes the "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." Id., 38 N.J. at 523—24.

Notwithstanding the general principal of progressive discipline, the New Jersey Supreme Court explained that some offenses may warrant severe discipline notwithstanding limited or no prior disciplinary history

> [T]hat 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 . . . 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.
>
> Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property.
>
> [In re Herrmann, 192 N.J. 19, 33 (2007).]

Consideration must also be given to the purpose of the civil service laws, which "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) at 465.

In In re Ruggerio, 2022 N.J. Super. Unpub. LEXIS 1012 (App. Div. June 8, 2022), the public employee was overheard saying "nigga" to someone during a private telephone conversation while at work. The court distinguished "nigga" from the "N word" and noted that neither witness "felt that the work environment was hostile nor became hostile because of Ruggerio's conduct." Id. at *25. The court further noted that it was "not directed at anybody in the workplace, not involving an epithet or derogatory statement, and not said in public but on a personal telephone call having nothing to do with work[.]"

Id. at *22. The employee acknowledged that she should not have used the word and committed to not doing so again. The court noted that her "fifteen years of employment have been unremarkable from a disciplinary perspective save a single written reprimand." Id. at *25. Given the facts of the case, including the employee's lack of discriminatory intent, and applying the principle of progressive discipline, the court concluded that a suspension, rather than termination, was the appropriate penalty. Id. at *26. In so holding, the Appellate Division referenced Supreme Court decisions in which a proposed termination was reduced to a lesser penalty. Although each case "involved serious transgressions by the public employee," the employees had unblemished work records. Id. at *24.[7] See also McVey v. Atlanticare Med. Sys., 472 N.J. Super. 278 (App. Div. 2022) (reiterating that a public employee can be terminated for racist remarks).

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 was too severe a penalty, he nonetheless concluded that a

[7] The Appellate Division described a sample of the cases to which it referred:

> See e.g., Thurber v. City of Burlington, 191 N.J. 487, 492-93 (2001) (affirming the Merit System Board's reduction of a termination to a six-month suspension for reckless driving committed by a deputy municipal-court administrator, concluding that "in light of plaintiff's unblemished record and long period of service (ten years) there is nothing arbitrary or capricious in the Board's decision that a penalty short of termination would be appropriate"); N.J. Dep't of Corr. v. Torres, 164 N.J. Super. 421, 428-29 (App. Div. 1978), aff'd sub. nom. Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980) (affirming CSC's reduction to a fifty-day suspension for sleeping on duty, concluding reduction warranted in light of Torres' unblemished work record, and mitigating factors[.]).

six-month suspension was appropriate, despite a past record that included only an oral reprimand.

In In re Smith, CSV 6605-10, Final Decision (March 7, 2012), http://njlaw.rutgers.edu/collections/oal/, the Commission rejected the ALJ's recommendation of a six-month suspension and a fitness-for-duty exam for a carpenter who used the "N-word" and other racial slurs in front of co-workers and then threatened a co-worker who reported the incident, and instead ordered his removal. In so doing, the Commission noted that "it is clear that the appointing authority's discrimination policy, which aims to provide a work environment free from all forms of discrimination, prohibits the type of language used by the appellant," that "the appellant was employed for only approximately four years and was already previously disciplined for using the 'N' word," and that "the fact that no African Americans were in the group when the appellant made the comment does not serve to mitigate his conduct." The Commission found, that while a fitness-for-duty exam could have been imposed as a condition for reinstatement, it was inappropriate because the employee's egregious conduct and prior discipline for using the "N-word" warranted his unconditional removal.

In Wilmouth v. Department of Environmental Protection, CSV 2446-03, Initial Decision (April 24, 2004), adopted as modified, Merit Sys. Bd. (July 15, 2004), http://njlaw.rutgers.edu/collections/oal/, a forest-fire observer employed by the Department of Environmental Protection (DEP) was charged with conduct unbecoming for assaulting a co-worker and threatening a superior. The ALJ modified the proposed removal penalty to a six-month suspension and recommended anger-management classes prior to the appellant's reinstatement. The Merit System Board further ordered the employee to undergo a fitness-for-duty exam prior to his reinstatement:

> Although the Board agrees with the ALJ's determination to modify the removal to a six-month suspension, the Board is concerned with the unprovoked nature of the appellant's attack, and whether this is indicative of a psychological condition which may have an impact upon the appellant's ability to perform his job duties. Therefore, the Board orders that prior to the appellant returning to work, he is to undergo a psychological examination to determine his fitness for duty.

> See N.J.S.A. 11A:2-6(f). The DEP is to select, and pay for, the psychiatrist or psychologist who will administer the psychological examination. If the State-authorized psychiatrist or psychologist determines that the appellant is fit for duty, then he is to be immediately reinstated with mitigated back pay, benefits and seniority. Additionally, if the appellant is determined to be fit for duty, he must undergo an anger management course. However, if the State-authorized psychiatrist or psychologist determines that the appellant is unfit for duty, then the DEP may immediately suspend the appellant as of the date of the report and issue a Preliminary Notice of Disciplinary Action for unfitness. It is noted that, even if the appellant is determined to be unfit, he would still be entitled to mitigated back pay, benefits and seniority, from the end of his six-month suspension until his immediate suspension on the new charge of being unfit for duty.

See also In re Brown, 2009 N.J. CSC LEXIS 1324 (noting that "if the appointing authority has a specific and legitimate basis to require fitness-for-duty examinations, it has the authority to order the appellant, as its employee, to submit to such examinations"); In re Kingston, 2013 N.J. CSC LEXIS 32, aff'd, No. A-3288-12 (App. Div. June 2, 2015), http://njlaw.rutgers.edu/collections/courts/ (conditioning the reinstatement of a laborer who harassed and assaulted a co-worker upon his successful completion of a fitness exam).

Here, appellant's disciplinary history documents that he was disciplined ten times, between February 3, 2006, and December 3, 2020, prior to the proposed discipline at issue. The infractions and disciplines are summarized as follows:

- February 3, 2006, written warning for refusing to perform a work duty. He was charged with neglect of duty.
- August 20, 2018, written warning for not reporting to work.
- September 4, 2018, written warning for not reporting to work.
- November 29, 2018, one day suspension for failing to follow directions.
- May 7, 2019, one day suspension for a February 15, 2019, incident involving failure to report an accident involving a garbage truck and a co-worker.
- May 7, 2019, three day suspension for a February 19, 2019, accident involving a garbage truck and a school bus. He was charged with incompetence.
- May 31, 2019, oral warning for "name calling."

- July 13, 2020, three day suspension for absences without available leave time.
- November 2, 2020, three day suspension for absences without available leave time and not reporting to work.
- December 3, 2020, oral warning for smoking cigars in Borough vehicles.

[R-4.]

Unlike the appellants in the above-cited cases who had unblemished disciplinary histories, appellant has a more involved disciplinary history and all but one of the infractions occurred close in time to the incident at issue here. Only one, however, is similar to the infraction here and it warranted just an oral warning.

It is well established, and should be readily understood, that racial epithets are harmful, damaging, and inappropriate under all circumstances. While appellant claims to understand the damaging impact of racial epithets, his testimony indicated otherwise. He did not indicate an understanding of the words he used while yelling at Aguilar and he did not apologize or appear remorseful. His demeanor at times during the hearing suggested at best, a lack of appreciation of the import of the charges against him. For these reasons, a significant penalty is warranted.

Other considerations, however, militate against removal. Respondent seeks removal based upon a set of facts that it did not fully establish. While Vaz testified that he believed the charge and proposed penalty were appropriate even if appellant did not call Aguilar a "s**c," respondent has not proven by a preponderance of the credible evidence that appellant spat at Aguilar or called Perez a "s**c." Also, the FNDA asserted that appellant used the word "n***er" on "numerous occasions." While Edgar asserted that appellant used the word "n***er" two or three times, he testified about only one incident in which this happened. This does not mean that use of the word one time is insignificant and unworthy of discipline. Discipline is certainly warranted here. However, respondent has the burden of proof here and it did not prove all of the charges that formed the basis for the proposed removal.

Although appellant's offense is serious and warrants a significant penalty, I am constrained by the regulation that limits suspensions to six months without pay. N.J.A.C. 4A:2-2.4. Accordingly, because appellant did not prove all of the charges in the FNDA, and the proposed penalty of removal was based upon all of the charges, taken together, and appellant has only one prior discipline for a related infraction I **CONCLUDE** that a six-month penalty is appropriate here. I also **FIND** and **CONCLUDE** that there is a reasonable basis for ordering that appellant shall also be required to complete an individualized program of training about workplace violence, discrimination and harassment, as well as an individual program of anger-management counseling.

Since the penalty has been modified, I **CONCLUDE** that appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated for that period of time when back pay was waived.[8]

I also **CONCLUDE** that appellant is not entitled to counsel fees. Pursuant to N.J.A.C. 4A:2-2.12(a), the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See Johnny Walcott v. City of Plainfield, 282 N.J. Super, 121, 128 (App. Div. 1995); James L. Smith v. Department of Personnel, Docket No. A-1489-02T2 (App. Div. March 18, 2004); In the Matter of Robert Dean (MSB, September 21, 1989). In the case at hand, while the penalty was

[8] Citing N.J.A.C. 4A:2-2.5(a), appellant argues that his suspension, prior to the issuance of the FNDA, was inappropriate because circumstances that would necessitate his suspension were not present. The regulation provides, "An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services." Based upon his testimony, he asserted that, after the date of the incident, he was separated from Aguilar and Borough services were not adversely impacted. Thus, he argues, there was no basis to suspend him. There is no authority in the record for appellant's assertion. N.J.A.C. 4A:2-2.5(b) provides, "Where suspension is immediate . . . and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority." It is undisputed that appellant was apprised of the charges when he met with Vaz on January 29, 2021, and that his union representative met with Vaz and waived a departmental hearing on the suspension and the substantive charges.

modified and one set of charges was dismissed, the appointing authority has sustained the remaining charges and major discipline was imposed. Therefore, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. See In the Matter of Bazyt Bergus (MSB, decided December 19, 2000), aff'd, Bazyt Bergus v. City of Newark, Docket No. A-3382-00T5 (App. Div. June 3, 2002); In the Matter of Mario Simmons (MSB, decided October 26, 1999). See also, In the Matter of Mario Simmons (MSB, October 26, 1999). See also, In the Matter of Kathleen Rhoads (MSB, decided September 10, 2002).

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee, violation of respondent's policies, failure to perform duties, and other sufficient cause are **SUSTAINED**. I further **ORDER** the charges related to criminal offenses are **DISMISSED**. I **ORDER** that the appointing authority's proposed penalty of removal is **MODIFIED** to a six-month unpaid suspension and satisfactory completion of individual training about workplace violence, discrimination and harassment and satisfactory completion of a robust anger-management program. Since the penalty has been modified, I **ORDER** that appellant is entitled to back pay, benefits and seniority pursuant to N.J.A.C. 4A:2-2.10. The amount of back pay awarded is to be reduced and mitigated for that period of time when back pay was waived. I further **ORDER** that appellant is not entitled to counsel fees.

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

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

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

November 15, 2022
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JL/jm

APPENDIX

WITNESSES

For appellant

Patrick Guaschino

Louis Urcinole

For respondent

Richard Edgar

Miguel Aguilar

William Rumbolo

Christopher Vaz

EXHIBITS

Joint

J-1 Preliminary Notice of Disciplinary Action, January 21, 2021, and letter of immediate suspension

J-2 Final Notice of Disciplinary Action, February 5, 2021

For appellant

P-1 Video of Edgar interview

For respondent

R-1 Borough policies

R-2 Appellant's acknowledgement of receipt of Borough policies, December 19, 2019

R-3 Training sign in sheet, December 19, 2019

R-4 Appellant's disciplinary history