STATE OF NEW JERSEY

In the Matter of Jeremy Kaczoroski, Trenton Psychiatric Hospital, Department of Health	:	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**
CSC DKT. NOS. 2019-314 and 2019-315. OAL DKT. NOS. CSR 12397-18 and 12398-18 (Consolidated)	:	

ISSUED: JUNE 30, 2022 (NFA)

The appeals of Jeremy Kaczoroski, Electrician, Trenton Psychiatric Hospital, Department of Health, two removals, effective December 11, 2017, on charges, were heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on May 18, 2022. Exceptions were 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, the Civil Service Commission (Commission), at its meeting of June 29, 2022, accepted and adopted the Findings of Fact as contained in the attached ALJ's initial decision. Accordingly, the Commission accepts and adopts the ALJ's recommendation to uphold the removal based on the appellant's interaction with Employee Relations employees. Additionally, given its adoption of the removal in the above matter, while it does not agree with the ALJ's recommendation to procedurally dismiss the charges underlying the removal based on the "pillowcase" incident, it declines to disturb that recommendation.

DISCUSSION

The appellant's two removals were predicated on separate, but related, events. The first removal was based predominantly on the appellant's violation of the State Policy Prohibiting Discrimination in the Workplace (State Policy). Specifically, it was alleged that the appellant, *inter alia*, attempted to place a pillowcase, with eye holes cut out, over his head in order to imitate a Ku Klux Klan (KKK) hood. The second removal was based on allegations regarding the appellant's inappropriate interactions with an Employee Relations employees when

he was receiving a disciplinary notice.

The Commission will deal with these incidents in reverse order. In his initial decision, the ALJ found that the appellant's actions towards the Employee Relations employees were threatening and intimidating. Based on these egregious actions, the ALJ found that the underlying removal was appropriate. Upon its *de novo* review of the record, the Commission agrees with the ALJ that such behavior is wholly inappropriate in the workplace and worthy of removal. In this regard, the Commission is unpersuaded by the appellant's exceptions which argue that the offenses are not worthy of removal absent the imposition of progressive discipline. The appellant's actions were threatening and bordering on violent, and have no place in the workplace, and therefore, of such an egregious nature that removal is warranted.

Regarding the pillowcase incident, the ALJ found that the appellant did commit the underlying infractions alleged. The ALJ also found that "the [pillowcase] incident in question is deplorable and would be a terminable offense." However, the ALJ dismissed these charges based on procedural grounds. Specifically, the ALJ stated:

> [B]ecause the State and the majority representative agreed to a procedure for review before the appointing authority, and the appointing authority failed to follow that procedure, per *N.J.S.A.* 11A:2-13, I **FIND** that the charges brought relating to the appellant's violation of the State Policy were procedurally defective and are thereby dismissed. I **FURTHER FIND** that the charges brought in the January 8, 2018, PNDA, *N.J.A.C.* 4A:2-2.3(a)6 – Conduct unbecoming a public employee; *N.J.A.C.* 4A:2-2.3(a)12 – Other sufficient cause NJ Department of Human Services Disciplinary Action Program D13-1 Engaging horseplay, running, scuffling, or throwing things, are procedurally defective because they were not brought within one year of the incident as required by the union contract and are therefore dismissed.

In this regard, the ALJ relied on provisions in the union contract which stated:

> An employee shall not be disciplined for acts which occurred more than one (1) year prior to the services of a [PNDA], except for those acts which would constitute a crime or involve alleged violations of the New Jersey Policy Prohibiting Discrimination in the Workplace ("State Policy"). The employee's whole record of employment, however, may be considered with respect to the appropriateness of the penalty to be imposed. Charges involving alleged violations of the State Policy must be brought within sixty (60) days of notification to the Appointing Authority of the EEO Investigative Determination.

The Commission does not agree. Nevertheless, as the appellant's removal for the other incident has been upheld, the dismissal of these charges and the underlying removal is essentially moot. As such, the following is for instructional purposes and details the Commission's position regarding major disciplinary matters and the interaction of Civil Service law and rules arising under a contract.

Initially, while it is permissible for the State and a majority representative to agree on departmental procedures under *N.J.S.A.* 11A:2-13,[1] as those procedures are part of a contract, neither the Commission nor the ALJ have the authority to review or enforce such provisions where they are not in accordance with the procedures outlined in Title 11A of the New Jersey Statutes or Title 4A of the New Jersey Administrative Code. For the Commission to have such authority, the statutes or any associated regulation would have to indicate the same. No such provision exists in Civil Service law or rules. This is particularly true in matters concerning egregious violations of the State Policy, which, in this case, the ALJ found occurred. In fact, it cannot be ignored that the appellant's threatening behavior toward Employee Relations staff on December 7, 2017, stemmed from his disagreement to attend EEO training as a result of the October 17, 2017, State Policy investigation determination. In this regard, in accordance with *N.J.A.C.* 4A:7-3.1(g)2 and 3, and *N.J.A.C.* 4A:7-3.1(k), an appointing authority is authorized to take remedial action, including referral to training, when an employee has violated the State Policy. Thus, the appellant's continued obstinance and outbursts in connection to his assertions that he should not be subjected to training for his violation of the State Policy *could* be viewed as a further violation of the Policy. Moreover, had the appellant's December 7, 2017 conduct not occurred, it is entirely possible that it would have not muddied an already explosive situation which resulted in the additional charges. Said differently, but for that action, the appellant may have very well been disciplined for the original State Policy violation within 60 days. Regardless, the ALJ should not have entertained the argument that the charges should be dismissed based on departmental-level procedural violations found in a contract.[2] Any such procedural arguments by the appellant needed to be made at the departmental level, and absent a satisfactory result, to the

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[1] *N.J.S.A.* 11:A2-13 states, in pertinent part, where the State of New Jersey and the majority representative have agreed to a procedure for appointing authority review before major disciplinary action is taken against a permanent employee, such procedure shall be the exclusive procedure for review before the appointing authority.

[2] The Commission also notes that it is the rarest case where it will dismiss disciplinary charges based on departmental-level procedural violations. In this regard, there is nothing in Title 11A of the New Jersey Statutes or Title 4A of the New Jersey Administrative Code that indicate that charges are **required** to be dismissed based on procedural violations. Indeed, in cases where procedural violations are deemed prejudicial to an appellant, the Commission may award remedies such as back pay. However, in most cases, the Commission deems any departmental-level procedural violations cured by the granting of a *de novo* hearing on the merits of the disciplinary charges. *See Ensslin v. Township of North Bergen*, 275 *N.J. Super.* 352, 361 (App. Div. 1994), *cert. denied*, 142 *N.J.* 446 (1995); *In re Darcy*, 114 *N.J. Super.* 454 (App. Div. 1971).

subsequent proper forum.[3] However, for the reasons previously outlined, as the appellant's removal has been upheld on other grounds, the Commission will not disturb the dismissal of that removal.[4] However, the Commission emphasizes that the ALJ did find that the appellant committed the reprehensible and egregious infractions alleged regarding the "pillowcase" incident, and violated the State Policy. He also agreed that such infractions would be worthy of removal. The Commission agrees.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirm that action and dismisses the appeals of Jeremy Kaczoroski.

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

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[3] In its cursory review of the contract, the Commission could find no provision directing an appellant to the proper forum. Jurisdiction on such matters may rest with the Governor's Office of Employee Relations or, presumably with the Public Employment Relations Commission, or could be pursued via a contract action in the New Jersey Superior Court. The Commission also notes that it could not find a provision in the contract that called for the dismissal of disciplinary charges based on such procedural violations and it makes no judgement as to what determination would be made by the proper forum on such claims.

[4] There is nothing in Title 11A of the New Jersey Statutes or Title 4A of the New Jersey Administrative Code which limits the amount of time for the bringing forth of disciplinary charges. The only such provisions, found in other statutory chapters, pertain to law enforcement or public safety employees, such as Police Officers, Correctional Police Officers, Sheriffs Officers, *etc. See e.g. N.J.S.A.* 40A:14-147. In this regard, it is clearly in an appointing authority's interest to bring forth charges as soon as practicable as it has the burden of proof in major disciplinary matters. As such, there would only rarely be prejudice to an appellant for a long delay between alleged misconduct and the bringing forth of charges. Rather, there would be more potential for prejudice to the appointing authority, as a lengthy delay in bringing forth charges risks the spoilage of evidence, the lack of recall or availability of witnesses, or other related problems in proving any underlying charges. Moreover, an appellant is afforded significant procedural due process at the departmental level and upon further appeal to the Commission. Further, a successful appellant is afforded full remedies sufficient to make them whole. Accordingly, the length of time to bring the charges against an appellant for incidents similar to those in question does not normally form any basis to procedurally dismiss those charges.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF JUNE, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. CSV 12397-17
AND CSV 12398-18
AGENCY DKT. NOS. 2019-314
AND 2019-315

IN THE MATTER OF JEREMY KACZOROSKI, TRENTON PSYCHIATRIC HOSPITAL, DEPARTMENT OF HEALTH.

CONSOLIDATED

Mark D. Laderman, Esq., for appellant (Kamensky, Cohen & Riechelson, attorneys)

Achchana (A.C.) Ranasinghe and **Paul D. Nieves**, Deputy Attorneys General, for respondent (Matthew J. Platkin, Acting Attorney General, State of New Jersey, attorneys)

Record Closed: July 1, 2021 Decided: May 18, 2022

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE

Appellant Jeremy Kaczoroski (appellant or Kaczoroski) appeals his termination as an "Electrician" effective December 11, 2017, by respondent, Trenton Psychiatric Hospital, State of New Jersey, Department of Health (respondent or Trenton or DOH). Respondent contends that it terminated the appellant for insubordination, conduct

unbecoming a public employee, and other sufficient cause; specifically, for being hostile, loud, and argumentative with staff, disputing the need to attend EEO training, refusing to leave the Employee Relations Office (ERO) when requested by the Employee Relations Coordinator (ERC) and thereafter becoming loud, hostile, and argumentative when at the ERO. Appellant contends that his actions do not rise to the level warranting dismissal.

PROCEDURAL HISTORY

Respondent contends appellant violated the State policy prohibiting discrimination in the workplace when he attempted to place a pillowcase over his head which pillowcase had eyes cut out in order to imitate a Ku Klux Klan (KKK) hood (pillowcase incident.) Respondent contends appellant was insubordinate when he behaved in a loud and argumentative matter towards Cynthia Collins and Yvonne Soto Colon on December 7, 2017. Two parallel disciplinary actions ensued. The first was commenced by Preliminary Notice of Disciplinary Action (PNDA) served on appellant on December 11, 2017, (R-3) whereby respondent suspended appellant without pay from Trenton Psychiatric Hospital (Trenton). On June 20, 2018, appellant requested a hearing. On July 12, 2018, appellant was served with a Final Notice of Disciplinary Action (FNDA) removing appellant from employment effective December 11, 2017. (R-2.) The second was commenced by PNDA served on appellant on January 8, 2018, whereby respondent suspended appellant without pay from Trenton. (R-10.) On June 20, 2018, appellant requested a hearing. On July 12, 2018, appellant was served with a FNDA removing appellant from employment effective December 11, 2017. (R-9.)

Appellant filed a timely appeal to the Civil Service Commission and the matters were transferred to the Office of Administrative Law (OAL), where they were filed on August 27, 2018, to be heard as contested cases. N.J.S.A. 52-14B-1 to 15 and 14F-1 to 13. The matters were consolidated and were heard on July 11, 2019. The record remained open for the parties to provide post-hearing submissions and closed on July 1, 2021.

On March 9, 2020, the Governor of the State of New Jersey issued Executive Order 103, declaring a public health emergency, due to the COVID-19 pandemic. The Governor's Executive Order 127 authorized the extension of time for the completion of administrative decisions, after the public health emergency. Subsequent Executive Orders extended the public health emergency and extensions were requested for this Initial Decision.

TESTIMONY

Joseph Sorrentino (Sorrentino), Senior Repairer, began work at Trenton in 2015 as a "Repairer" and was subsequently promoted to "Senior Repairer". Sorrentino identified Exhibit 17 and discussed the working environment at Trenton. He worked with Michael Davis, the alleged victim of harassment, regarding Kaczoroski's policy violation. Sorrentino and Davis worked together for several years as repairers before Davis was promoted to electrician.

Michael Bressi (Bressi) was their supervisor and would hand out assignments and work orders in the morning to the crew. Next in seniority below Bressi was George Klein (Klein). Notwithstanding Klein's seniority, Sorrentino testified that when Bressi was out, Kaczoroski would hand out assignments to Davis and Sorrentino, among others and made it a practice to split up Sorrentino and Davis in their work orders. Sorrentino said there was a general feeling that Klein, Davis, and Kaczoroski did not get along. Sorrentino testified that when he began at Trenton, Davis and Kaczoroski were "very cordial" and that "everybody seemed to get along."

Sorrentino witnessed the pillowcase incident which occurred first thing in the morning. Kaczoroski took a sheet or pillowcase, cut out holes and put it on over his head. Kaczoroski then told Davis to look at him. At that point Bressi came in and told Kaczoroski to stop. Sorrentino stated that Joe Shargo was also in the room when this occurred. After he and Davis got in the van that morning, Davis let Sorrentino know that Kaczoroski' s action bothered him (Davis), but Davis did not want to make a big deal out of it.

Sorrentino saw a text message from Kaczoroski to Davis shown to him by Davis. The text message said that the joking and back and forth needed to end. Davis said that no one reported the pillowcase incident.

On cross-examination, Sorrentino stated that everyone got along. Sorrentino was questioned on whether he ever heard a comment from Davis to Kaczoroski about "how are your brothers in white." Sorrentino stated he had never heard those comments, but that it could have happened before he was hired. Davis told him about an article about pink flamingos. Sorrentino also testified that he never heard any questions from Davis like, "how was your weekend in the field?" or "did you get your white suit pressed?" Sorrentino testified that he had not spoken with Bressi. Sorrentino testified he saw appellant at Kaczoroski' s desk with scissors cutting a pillowcase or a sheet on the day of the incident.

On redirect, Sorrentino stated that in retrospect he should have reported the incident and that Kaczoroski went too far, and his actions were unacceptable. Sorrentino stated that he thought Davis and Kaczoroski had a joking relationship, but the jokes were in poor taste, and they were bad jokes, but that is what it was. On recross-examination, Sorrentino was asked if he thought Kaczoroski was in the KKK. Sorrentino responded that he did not think Kaczoroski was in the KKK.

Michael Bressi, Electrical Supervisor, had been with Trenton for twenty-nine years and became an electrical supervisor in 2012. He supervises eight individuals, and he is second in charge under George Klein. Sorrentino and Davis were his "relamping" crew. Bressi testified that, usually, two workers are assigned to tasks together because they work in a psychiatric hospital so assignments can be dangerous if workers go out alone. He testified there are risks including patients stealing tools, knocking employees off ladders and other similar hazards. Bressi stated that Davis had come to him on more than one occasion to state that Kaczoroski sent him alone rather than with a partner when he assigned work orders.

Bressi testified that when Davis and Kaczoroski began to work together, they worked well together. The relationship grew worse over time with issues arising between them regarding the temperature of the room, fans blowing, and a complaint about a drawer being nailed shut. Bressi testified that after receiving the complaint about the drawer, he looked into it and believed the drawer's nail had come loose and stuck into the drawer from use, not because someone nailed it shut. Davis had asked him to write-up Kaczoroski about the incident, but he did not do so because he did not witness any tampering with the drawer. Bressi spoke with the ERO about next steps on the matter and they informed him that Davis would need to write a formal complaint.

Regarding the pillowcase incident, Bressi testified that the incident happened early in the morning about four years before the hearing. Bressi testified that he remembered walking in and seeing Davis and Kaczoroski laughing and joking. Bressi stated that the crew had a pillowcase and Kaczoroski put it on. Bressi testified that there were no eyes cut out. Bressi stated he did not see the context of what the pillowcase meant at the time, testifying "he could have been making believe he was a ghost." When asked again whether he saw whether the pillowcase had eyes cut out, Bressi testified he walked in after the fact, saw two guys joking around and saw one of them put something over his head. Bressi then told them to "knock it off."

On redirect examination, Bressi stated that at the time he did not feel the situation more than just two guys goofing around. Bressi stated that he does know now that the pillowcase was supposed to be a KKK hood. When pressed, Bressi stated that he is attending several courses since this incident, he is facing discipline himself due to the incident and has learned a lot since the incident.

Bressi also stated that he was aware because Kaczoroski went to the ERO and was ultimately told to leave the grounds. Bressi then identified Exhibit 4 regarding Kaczoroski's requirement to attend a "Workforce Discrimination and Harassment" training course.

Cynthia Collins (Collins) is an employee relations employee for Trenton. Collins processes discipline matters, advises on policy, and conducts random drug tests, among other duties. Collins reports to Yvonne Colon (Colon) in the ERO.

Collins' experiences relate to Kaczoroski's discipline for his actions at the ERO. Collins testified that Kaczoroski came into her office at the ERO twice on the date of the incident, December 7, 2017. The first time Kaczoroski came into her office was at 8:00 a.m. At that time, she did not remember any specific questions Kaczoroski asked her. She testified that he generally wanted to know why his name was on a document and that he wanted to take his name off the document. Collins testified that the first time Kaczoroski came, he was not angry, but "really worried and concerned [and] a little confrontational at that moment."

Collins testified that the second time Kaczoroski came in was at about 10:00 a.m. Collins stated that "[h]e was definitely angry then." She testified that when he came in, he was yelling about the letter again. She testified that his voice was elevated and she "felt like whatever [she] said was not enough." She testified that she felt that because she was not giving him the answer he wanted, he was getting progressively angrier. At the time of the incident, Collins was seated behind her desk with Kaczoroski on the other side of the desk. Collins testified that they were in close proximity to one another. Collins testified that "at some point Kaczoroski got upset . . . and he slammed his hand on the table and like leaned over in my face." She stated, "all I can remember is being scared and, like, you know, a little anxious." She further testified that Kaczoroski's actions made her feel scared, anxious, confused as to what to do, and worried about what actions he would take if she had to discipline him. She said she felt her safety was at risk and she was afraid. She also testified that after Kaczoroski slammed his hands on the table, Colon entered and told Kaczoroski multiple times to leave.

After the incident, the ERO installed a locking door to the office. Collins testified that the two-part locking door was installed because of Kaczoroski's behavior that day. The door has two sections, the bottom half of which locks. Collins testified that the door was installed in response to Kaczoroski's actions on December 7, 2017. Collins testified that the ERO also now has an unwritten policy that requires people to make an appointment before they are able to enter the office.

On cross-examination, Collins admitted she had never called security about Kaczoroski. She also never called the police and did not know of anyone else calling the police. Collins admitted Kaczoroski never touched her during the incident. He also did not say anything verbally that she considered threatening. She stated she must have told him that everyone needed to take the training he was upset about having to take, but she admitted it was not in the statement she gave on the day of the incident.

Collins was asked a series of questions about the process of disciplining employees, where she outlined the steps, she would take to submit a discipline. That process involves drawing up a discipline and sending it to the main office. At the time, Collins reported to human services. Collins admitted that the process used may not conform to union contract as far as she knew.

Mike Davis (Davis), Electrician, has been with Trenton since 2012. Davis began as a repairer and then was promoted to senior repairer about two years after he began. Davis was a senior repairer at the time of the pillowcase incident. Davis became an electrician in 2018.

On direct, Davis was asked about his interview with Investigator Pamela Connor regarding the allegations against him by Kaczoroski. Connor asked Davis whether he had ever made comments to Kaczoroski about "having brothers in the field," suggesting he was in the KKK. Davis stated he and Kaczoroski had a joking relationship and admitted he used to say, "your friends in the field," referring to the KKK. Davis testified

that Kaczoroski never told him what he said offended Kaczoroski. As a result of Connor's investigation, Davis had to complete EEO sensitivity training. On direct, Davis testified that this sensitivity training made him realize that the actions were not okay. Davis further testified that then Kaczoroski put up a "red neck" calendar, a gift from Joe Shargo, he asked for the calendar to be taken down. Davis stated that it "didn't seem appropriate" and he "didn't want to look at it." Davis asked Kaczoroski to remove it, which Kaczoroski did.

Davis admitted he gave Kaczoroski an article about the death of the inventor of pink flamingos. Davis stated he did so as a joke, stating that Kaczoroski held himself out to be a red neck. David stated Kaczoroski laughed when he received the article and hung it up on a peg board for everyone to see. Davis denied calling Kaczoroski "white trash."

Davis then testified about the various issues that arose between Davis and Kaczoroski regarding office decorations. Kaczoroski had a newspaper clipping showing a caricature of former President Obama leaving the White House with the caption "Moving Day," which Davis found offensive. Davis asked the maintenance office to remove the cartoon. Davis also testified that Kaczoroski often referred to him as "fucker." Davis stated that this was said in a joking way, but he found it offensive. Davis testified that Kaczoroski's use of the nickname was not regular but happened from time to time. Davis stated that he did not feel that the nickname was used to pick on him, however.

Additionally, Davis testified about the complaint Kaczoroski filed against Davis with the note to Davis which Kaczoroski left on his own desk, Exhibit 20. The note reads, "If your (sic) reading this mind your own business (sic) Fucker. Get away from [obscured] desk. Fuck you." Davis stated the note was on Kaczoroski's desk on top of the complaint filed against him. Davis testified that he believed the photo was taken on June 30, 2017. Davis believed that the complaint was out in full view on Kaczoroski's

desk to elicit a reaction from Davis. Davis said that Kaczoroski leaving the complaint out in full view and the note were offensive to him.

Davis also testified about the jammed drawer. Davis kept his belongings in a drawer at his desk. He kept personal items, such as a tablet and keys, in the drawer. Davis testified that he went to lunch, and when he returned the drawer would not open. Davis believed the drawer was nailed shut and that Kaczoroski nailed the drawer shut. Davis complained to Bressi, but Bressi dismissed Davis' complaint. Davis believed Kaczoroski nailed the drawer shut because he believed it to be a retaliation for the back-and-forth tension that was brewing between him and Kaczoroski. Other incidents that Davis cites as evidence for the escalated tension between the two include heaters being moved and unplugged, televisions being unplugged, the cable box being disconnected, and the temperature. Regarding the temperature of the workstation, Davis stated that he had no prior knowledge of any kind of condition Kaczoroski suffered that might be worsened by certain climate conditions. Davis complained about a fan that would blow cold air at him in the winter because Kaczoroski did not like to have the heat on. Davis and Kaczoroski met with engineering who told them that Kaczoroski could get a personal fan that would mount on his desk and blow towards him. Instead, Kaczoroski got a fan that blew across the room at Davis. Davis bought a personal heater. Davis testified that he did not feel his supervisor Bressi, advocated for him through that process.

There were numerous incidents regarding writings on the shared chalkboard about which Davis testified. One of the writings stated, "If it offends you try Minding (sic) your own business," Exhibit 25. Davis testified that he did not remember exactly when the photo was taken, but he believed it was during the time where they had a back-and-forth escalation in tension. Davis stated he believed the writing in Exhibit 25 was directed at him because he "felt there was a lot of back and forth about a lot of different issues going on and . . . all the writings on the board were kind of directed in the same manner." (T153.) Another writing stated "Some people are like clouds. Everyone is happy when they are gone," followed by a happy face. (Exhibit 26.) Davis testified that

Sorrentino took the photo. Davis testified that the photo was taken on August 4, 2017, citing his phone's metadata for when the photo was taken. He also remembered that on that day he took a half day because it was his anniversary. Davis testified that the writing was not on the chalkboard when he left for the day. Davis testified that he believed Sorrentino took the photo because there was a lot of back and forth between Davis and Kaczoroski. Davis reported the incident to Bressi who then had the chalkboard removed.

Finally, there was an issue regarding the installation of a piece of plywood between Kaczoroski's desk and Davis' desk. When asked whether the installation of the plywood offended him, Davis answered "Yes and no." Davis felt that if that is what Kaczoroski felt he needed to do, then it was not offensive.

On direct, Davis was asked about the pillowcase incident. When asked what he interpreted the white pillowcase or sheet over Kaczoroski's head was intended to communicate, Davis testified he understood it to mean a direct representation of the KKK. Davis testified that the incident was out of the blue. Davis was shocked at the incident, realizing that his joking with Kaczoroski had gone beyond what is acceptable. Davis stated he was offended by the incident, but he tried to laugh it off. Davis testified that he told Kaczoroski that the incident went too far, and then he spoke to Sorrentino about the incident.

On cross-examination, Davis testified that all of the small incidents happened after the pillowcase incident. On cross, Davis admitted the calendar was a gift from another employee, Kaczoroski did not buy it himself. The attorney contradicted Davis' earlier testimony where Davis stated he never said Kaczoroski was "meeting his brothers in white." In Davis' statement to Connor, Davis answered "yes" to Connor's question, "[d]id you ever say anything to Jeremy Kaczoroski about meeting with his brothers in with referring to the KKK?" Davis testified that at the time, Davis did not believe Kaczoroski was in the KKK. Davis admitted that at the time of the pillowcase

incident, the two would often joke back and forth. Davis testified that the pillowcase incident was a turning point for his relationship with Kaczoroski.

When asked on cross why Davis looked at the complaint on Kaczoroski's desk, Davis explained that the complaint was the only thing on his desk. Davis believed that Kaczoroski left it there on his desk for Davis to see, but Davis did not see Kaczoroski leave it on the desk.

On redirect, Davis stated that Kaczoroski's behavior had a negative effect on his employment. Davis testified that his reputation had been tarnished, and he is deeply embarrassed by it. Davis stated that Kaczoroski's behavior has made the shop's environment hostile towards him.

Yvette Colon was an employee relations coordinator for Trenton. She held the position for about two years at the time of the hearing. As employee relations coordinator, Colon did contract interpretation, worked on disciplinary actions and grievances, handled hostile work environment, harassment, and workplace violence claims, among other duties.

Colon was a witness to the December 7, 2017, confrontation between Kaczoroski and Collins. Colon testified that that morning, she was coming from a meeting to her office. As she was walking through the gymnasium adjacent to her office, she heard a slam and a very loud man's voice. She could not hear exactly what they were saying. She walked into her office and saw Kaczoroski leaning forward on Collin's desk with his hands on the desk over some paper. The two were arguing about a complaint, Colon testified. Colon told Kaczoroski he had to leave. Colon testified she informed Kaczoroski that he should just go to the class and "Everyone has to go to this class." (T199.) After she said this, Colon testified Kaczoroski got up and Colon stepped back because she did not know what Kaczoroski was doing. She said she passed by him and went to his office and told him to "get out" at least four or five times. Colon stated Kaczoroski tried to talk over her. Colon testified she had never had that kind of

interaction with an employee. After the incident, Colon tried to locate Kaczoroski to put him off duty. She gave him a disciplinary paper and other employees took his badge and his keys.

Colon testified that she was very upset about the encounter. She testified she had never had a situation like that happen to her. She went to the CEO and told the CEO that they must take steps to ensure their safety, such as a security guard. After that, the company installed a locking half door. After the door was installed, Colon told her employees that meeting with other employees was by appointment only.

Regarding Kaczoroski's alleged medical conditions, Colon testified that there was nothing on file for any accommodation or any condition that would need an accommodation. Colon then testified about the process of submitting an EEO complaint for employees.

On cross-examination, Colon admitted she never called the police. Colon testified she filed as to the two PNDA's for Kaczoroski: The first on December 11, 2017, and the second on January 8, 2018.

George Klein was an electrician for Trenton, and he is the senior most electrician in the office after Bressi. Klein worked with Kaczoroski and Davis at the time of the incidents. Klein's supervisor is Bressi. Klein and Kaczoroski worked together outside of Trenton for Klein's personal company and stated that the two were friends. Klein testified that Kaczoroski was not in the KKK.

Klein testified that back in 2014 and 2015, Davis would come in on Monday mornings and make jokes implying Kaczoroski was in the KKK. Klein stated Davis would say things like, "how was the meeting," "how are the brothers," and "did you burn any crosses?" among other things. He testified that Davis and Kaczoroski's back and forth became more hostile over time. Klein testified that Davis tried to aggravate

Kaczoroski as time went on by turning fans off, turning up the heater, and similar acts. Klein stated Kaczoroski would joke about the issues and then try to let it go.

Regarding the pillowcase incident, Klein testified that he did not see the incident. Klein testified that he did not think Kaczoroski would do anything like that, calling it "ridiculous." Regarding the pink flamingo argument, Klein testified that Davis gave Kaczoroski the article to imply Kaczoroski is white trash. Klein testified that he wrote the phrases on the chalkboard. Regarding the nailed drawer, Klein testified that Bressi found a structural nail in the drawer, and nothing was nailed shut. Klein testified that Davis had a grudge against Kaczoroski because he felt that Kaczoroski had taken his job.

Klein stated he knew that Kaczoroski used the term "fucker" around the workplace, but denied it was ever directed at any individual. Klein testified that the term was used as a term of endearment. Klein also stated that when Bressi was absent, sometimes he would hand over the work assignments for Kaczoroski to distribute.

On cross-examination, Klein testified that he did not find the use of the term "fucker" to be offensive. Klein testified that Kaczoroski wanted Davis out of the office. Klein admitted that there were two individuals, Warmly and Shargo, directly beneath him in seniority. Klein admitted that Shargo should have been handing out work assignments when Bressi was not present. He admitted that when Bressi and Shargo were absent, Warren should have been handing out assignments.

Regarding the pillowcase incident, Klein admitted that there is no place in the workplace for putting a pillowcase over your head and pretending to be a member of the KKK.

On cross-examination, Klein testified that Bressi also worked for Klein at Klein's company. Klein testified that he did not recall if he reported that his supervisor worked for his personal company to human resources. He stated he only worked with Bressi a few times.

Klein testified that he did not believe Davis was qualified to be an electrician. Klein admitted he had never worked with Davis, but he had heard of his work from others. Klein said Kaczoroski often referred to himself as a "red neck," but not as "white trash." Klein said Kaczoroski embraced the "red neck" calendar.

Finally, Klein testified that Kaczoroski had told him he had a skin condition. Klein testified that Kaczoroski had never told him that the skin condition interfered with his work. Klein said he was not aware of any accommodation necessary for Kaczoroski.

Joseph Shargo (Shargo) was an electrician for Trenton for about thirteen years. Shargo testified that he had a good working relationship with Kaczoroski. Shargo also worked with Davis once Davis was promoted to electrician. Shargo testified he believed he had a good working relationship with Davis as well.

Shargo testified as to the issues that arose between Davis and Kaczoroski. Shargo stated that there were issues with Davis concerning the heating during winter and cooling during the summer. Shargo was not aware that Kaczoroski filed a complaint against Davis. Shargo stated that he gave Kaczoroski the "red neck" calendar for Christmas. Shargo testified that there was a general joking environment in the office. Eventually however, Davis started to take offense to the jokes. Shargo testified that Davis accused Kaczoroski of nailing his desk drawer shut. Shargo did not believe anyone had actually nailed the door shut. Shargo confirmed that the incidents happened in 2017 but the joking environment went back to 2014 or 2015.

Shargo testified that now that everything that happened with the accusations against Kaczoroski, he feels like he must "walk on eggshells" while working with Davis.

On cross-examination, Shargo admitted that the term "red neck" could be used to stereotype people. Shargo admitted that "red neck" could be used prejudicially and could be offensive to some people. Shargo testified that he does not believe that a person of color cannot be offended by the term "red neck." Shargo admitted that a black person could be offended by being shown a KKK symbol. However, he believed a white person would not be offended by being shown a KKK symbol.

Shargo testified that Davis is not qualified for the position of Electrician. Shargo explained that unlike other electricians in the shop who went through schooling and completed their electrical apprenticeship, and who have papers certifying that they are journeymen electricians, Davis was promoted to electrician based on a recommendation from someone who he works with on the side. Shargo did not know what work Davis did with that individual on the side. Shargo stated even though he does not know what Davis learned from the other person, he has to teach Davis on the job how to complete tasks. Shargo had not expressed this concern to anybody in the office.

Jeremy Kaczoroski was an electrician with Trenton. Kaczoroski testified that he and Davis used to have a joking relationship. He stated it was never too extreme, but they had fun. Eventually, Davis started making jokes like "how are the brothers in white," "were they out in the field," "did you get your white suit pressed," and "did you burn any crosses over the weekend."

Kaczoroski testified that after he filed his complaint, he received some correspondence about training. Kaczoroski stated that he was confused when he received the letter saying he had to go to training. He stated that what he was being disciplined for was under appeal and according to EEO if he was under appeal, he was not allowed to be disciplined for it. Kaczoroski referred to the letter he received on October 17, 2017, from the EEO, Exhibit 11. The letter was from Bonny E. Fraser at the

Office of EEO regarding Kaczoroski's complaint and Davis' counter complaint. Kaczoroski stated he had appealed that matter. When he received the letter saying he had to go to training, he signed it because he did not know exactly what it was. He called Connor who explained what was going on. Kaczoroski stated he then went to EEO to retract his signature because he felt that taking the course was basically admitting to the findings.

Kaczoroski testified that the first time that he went to the ERO, he did not get any answers out of the employees there. Kaczoroski testified that he then called Connor again and decided to head back to ERO.

Kaczoroski testified that the second time he went back up, at a certain point, "it got out of hand." He stated he is "a little loud to begin with" and he "could definitely see how somebody could take that as raising [his] voice." Kaczoroski stated that both parties were frustrated and the ERO employees had no idea what he was talking about. Kaczoroski testified that he was seated the entire time except for when he placed the paper on Collins' desk.

Kaczoroski testified that Colon came to the office while he was talking with Collins. Colon asked what was going on. Kaczoroski testified that Colon asked for his name. As soon as he told her, Kaczoroski testified she became dismissive and "gave me an attitude." Kaczoroski testified that he refused to leave. Kaczoroski asked for Colon's name and phone number, and he told her she would be hearing from his lawyer.

Kaczoroski went back to his office and back to work after the second time at ERO. Kaczoroski received a call from the engineer's office who told him to bring his badge and key to them. Kaczoroski brought his badge and keys to the engineering office and then left the grounds.

Kaczoroski admitted he received the preliminary notice of discipline on December 11, 2017, for his actions on December 7, 2017, in the ERO. Kaczoroski also wrote a letter to ERO which stated "I truly apologize to ERO if our conversation came off as a threat. By no means did I intend such and by no means did I do such." (Exhibit 8.) Kaczoroski admitted he received a preliminary notice of discipline on or about January 8, 2018, for the pillowcase incident. Regarding both preliminary notices of discipline, Colon, the ERO employee, recommended removal.

Regarding the pillowcase incident, Kaczoroski testified that at the time, he and Davis had a joking back-and-forth relationship. Kaczoroski testified that the incident occurred on a Monday morning. He stated that there was no pillowcase involved, he had used rags that he had on his desk. Kaczoroski testified that he "might have been in a bad mode (sic) . . . and just for some reason [Davis'] comments just got to me, so I held up the rag and I said, 'You better knock it off before I come get you.'" Kaczoroski stated that is where the joke ended. He stated he knew that he had gone too far and he "basically apologized to [Davis]." Kaczoroski testified that before he put on the rag, Davis asked him if he got his suit pressed this weekend. Kaczoroski testified that he never cut holes in the rags, he just had rags from his work.

Kaczoroski stated that after the incident, they no longer joked back and forth with each other. Then, he felt that Davis began to blame everything on him. Kaczoroski testified that Davis blamed him for his heater going off, appliances being unplugged, and other events. Kaczoroski admitted that he used the term "fucker" at work, but stated he called everybody "fucker." Kaczoroski testified that he did not use that term as a specific nickname for Davis.

Kaczoroski stated he left the note on his desk. on top of his complaint because he suspected that there were individuals rummaging through his belongings. Kaczoroski did not mean for the note to be addressed to anyone in particular. Kaczoroski testified that he put up the Obama cartoon in response to political

conversations in the office. Kaczoroski stated he did not intend the cartoon to be offensive. Kaczoroski testified that regarding the "red neck" calendar, he thought it was a personal gift that was never meant to offend. Kaczoroski said he did not write any of the writings on the chalk board. He denied that the writings were directed at Davis. Instead, Kaczoroski stated the writings were meant to refer to "[t]he guy over in the garage." Kaczoroski explained that the guy over in the garage "had a problem." The man would stare at Kaczoroski and George. Kaczoroski told ERO about all these incidents when he filed his complaint about Davis.

On cross-examination, Kaczoroski stated that he had not attended ERO training in the past. He attended training associated with orientation. Kaczoroski admitted that the training did instill the idea that talking about politics in the office, teasing people, and calling people names is not acceptable in the workplace. Kaczoroski admitted that during the pillowcase incident he told Davis "if you keep it up, I'll pay you a visit." Kaczoroski denied that there was a pillowcase and insisted that it was just a rag.

Kaczoroski testified on cross that he did not raise his voice to Collins or Colon. When presented with his prior testimony from direct examination where he said he "may have raised his voice," Kaczoroski stated, "[y]es, it might have come up a notch or two."

FACTUAL DISCUSSION

Where facts are contested, the trier of fact must assess and weigh 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' testimony. It requires an overall assessment of the witness' story in light of its rationality, 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 521-522. See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

I found the testimony of Sorrentino and Bressi to be credible notwithstanding their respective lack of judgment in their observations of the incidents detailed. Both detailed seeing a pillowcase with eyes cut out signifying the KKK. Bressi further testified to work structure, the President Obama caricature, writings on the chalkboard and items around the office. Bressi also testified that he gave the appellant the notice to attend EEO training at which point appellant became "agitated" and "lost his temper" and was then escorted off the grounds.

I found the testimony of Collins extremely credible. She detailed appellant's demeanor when in the ERO office first at 8am and then at 10:00 a.m. Of particular interest was appellant's confrontational attitude and his slamming his hands on her desk resulting in feeling anxious and scared of appellant during this confrontation.

I found the testimony of Davis credible notwithstanding the repartee between he and the appellant which at some point devolved into an acrimonious skunk contest. Davis provided appellant with the "pink flamingo" article which to Davis symbolized "white trailer trash" but Davis stated he never called appellant "white trash". Davis stated that Shargo gave appellant the "red neck" calendar. He also progressed though a number of inappropriate items left in the office and on the chalkboard. Also of interest was Davis recounting the pillowcase incident – which Davis felt was a turning point at the workplace.

Colon, as the ERC, proved an extremely credible witness and recounted appellant's encounter in the ERO office when he slammed his hands on the desk. Colon's concerns let to the installation of a "Dutch door" so employees could not just

"walk in". Her testimony on the accommodation, the PNDA's and appellant's letter were also insightful.

Klein countered a statement made by Bressi regarding the chalkboard and testified that the term "fucker" is a term of endearment and is an acceptable term at work. My teachers (among which were Sisters of St. Joseph) and my co-workers would disagree. He testified to office procedures and admitted that there is no place in the workplace for a black man to be shown a pillowcase with eyes cut out – even in jest. I found Klein credible in his testimony but sorely lacking in judgment.

Shargo was a credible witness and detailed the deteriorating dynamic between appellant and Davis.

The appellant's testimony was lacking in credibility. He provided information on the EEO training incident and his apology. He also testified to his and Davis' comments and that alleged pillowcase was just a bunch of rags he had at his desk. He also calls everyone "fucker". Although he stated he did not raise his voice to Colon, he had told an investigator he may have raised his voice in direct contravention to Colon's testimony – which I found to be credible.

With the above in mind, and having considered the testimonial and documentary evidence offered by the parties, I **FIND** as **FACT** the following:

Appellant was an electrician stationed at the Trenton Psychiatric Hospital. He engaged in badinage with his coworkers, specifically Davis. This included phrases as "how are the brothers in white," "were they out in the field," "did you get your white suit pressed," and "did you burn any crosses over the weekend."

Appellant held up material, identified as a pillowcase and addressed Davis stating, "You better knock it off before I come get you." He engaged in behavior such as calling co-workers "fucker" and stated he called everybody "fucker." His actions,

physical and verbal, document not only a lack of judgment for a government employee but on a base level a lack of common sense for participation in a workplace. His actions and his expressions have no place in any work environment.

Appellant was trained in EEO standards during his orientation which explained what was and was not acceptable behavior.

Appellant's intentional actions toward Collins and Colon consisted of a threat to them, and he intimidated them in their workplace, even creating a public disturbance. He approached Collins two times insisting that he not be required to attend the EEO class, yelling at her when she did not agree. His demeanor and gestures indicated his anger, he slammed his hands on the desk several times and moved aggressively toward Collins.

Appellant had a raised voice and admitted his frustration. He issued a letter of apology which did not address his offensive behavior and attempted to deflect his behavior onto others. He did not take responsibility for his action, neither did he recognize the results of his denigrating actions to any of his coworkers.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 147 (1965). A civil service employee who commits a wrongful act related to his or her duties or for other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The Commission may evaluate both the guilt and the appropriate penalty imposed when it is of the

conclusion that the penalty imposed is inequitable and not appropriate to the violation charged. West New York v. Bock, 38 N.J. 500, 518 (1962).

An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). This case involves a consolidation of major disciplinary actions resulting from two separate incidents: the "pillowcase incident" and the December 7, 2017, incident. In both cases, the appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See, Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

I. The Pillowcase Incident

A. The respondent's charges of the appellant's violation of the State Policy are dismissed for their procedural deficiency.

The first issue is whether the appellant was given proper notice of the disciplinary actions resulting from the pillowcase incident. It is undisputed that the PNDA for the pillowcase incident was issued on January 8, 2018.

The ERO notified the Appointing Authority of the investigative determination on October 17, 2017. Colon's testimony confirmed that the Appointing Authority received the results on that date. Appellant argued that in order for the discipline to occur, the PNDA should have been sent within sixty days of October 17, 2017. Because the PNDA was sent on January 8, 2018, it was late, and appellant argued that the charges relating to the pillowcase incident should be dismissed due to lack of notice.

Before any disciplinary action is taken against a permanent employee, the employee must be notified in writing and shall have the opportunity for a hearing before the appointing authority or its designated representative. N.J.S.A. 11A:2-13. Where the State of New Jersey and the majority representative have agreed to a procedure for appointing authority review before disciplinary action in N.J.S.A. 11: A2-6(a)(1)-(3) is taken against a permanent employee, such procedure shall be the **exclusive procedure** for review before the appointing authority. Id. (emphasis added.) N.J.S.A. 11A:2-6 states that the CSC shall, after a hearing, render the final administrative decision on appeals concerning permanent career service employees regarding, among other categories, removal. N.J.S.A. 11A:2-6(a).

Appellant argued that the union contract governs when disciplinary actions can be brought against an employee. The union contract states:

> An employee shall not be disciplined for acts which occurred more than one (1) year prior to the services of a [PNDA], except for those acts which would constitute a crime or involve alleged violations of the New Jersey Policy Prohibiting Discrimination in the Workplace ("State Policy"). The employee's whole record of employment, however, may be considered with respect to the appropriateness of the penalty to be imposed. Charges involving alleged violations of the State Policy must be brought within sixty (60) days of notification to the Appointing Authority of the EEO Investigative Determination.

The October 17, 2017, EEO Letter informing the appellant and the Appointing Authority of the EEO's determination stated that the EEO substantiated a violation of the State Policy. The Appointing Authority then charged the appellant in its PNDA on January 8, 2018, listing both the violation and the specifications of the charge. These charges were brought outside of the agreed upon sixty-day notice period in the union contract. Accordingly, because the State and the majority representative agreed to a procedure for review before the appointing authority, and the appointing authority failed

to follow that procedure, per N.J.S.A. 11A:2-13, I **FIND** that the charges brought relating to the appellant's violation of the State Policy were procedurally defective and are thereby dismissed. I **FURTHER FIND** that the charges brought in the January 8, 2018, PNDA, N.J.A.C. 4A:2-2.3(a)6 – Conduct unbecoming a public employee; N.J.A.C. 4A:2-2.3(a)12 – Other sufficient cause NJ Department of Human Services Disciplinary Action Program D13-1 Engaging horseplay, running, scuffling, or throwing things, are procedurally defective because they were not brought within one year of the incident as required by the union contract and are therefore dismissed.

The respondent argued that the fact that EEO investigations into State Policy violations requires many steps of approval and processing before charges may be brought should influence this court's opinion on the application of the union contract to the case at hand. However, with the knowledge that there are several steps in between an EEO investigation determination and the appointing authority's determination to charge an employee, the appointing authority entered into a valid agreement with the majority representative limiting the notice period to sixty-days after the appointing authority was informed of the EEO's decision. If the appointing authority does not believe that it can readily enforce the State Policy within such a notice period, it should reconsider its position with the majority representative.

Additionally, respondent argued that the State Policy was issued to ensure the equality of opportunity for all employees in State government. The policy was enacted to reflect the State's commitment to providing a work environment free of prohibited discrimination. This is true, and it is a worthy goal. However, the policy imparts a duty on the State to ensure a work environment free of discrimination. Part of that process includes establishing procedures that enforce the mandates of the policy and enforcing those mandates. A failure by the State to follow its own procedures in enforcing the State Policy should not be ignored as that may lead to lax or inconsistent application of the policy. Instead, rigorous enforcement and actionable procedures are required to ensure the furtherance of the State Policy's goals. The appointing authority here failed to follow its own procedures and should not be rewarded for its inadequacy

notwithstanding the aberrant and abhorrent behavior of the office in which appellant was employed.

That being said, the incident in question is deplorable and would be a terminable offense in itself if the State had properly followed its own procedures. The State Policy was enacted to provide every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. N.J.A.C. 4A:7-3.1. It is a violation of the State Policy to use derogatory or demeaning references regarding a person's race or ethnic background. N.J.A.C. 4A:7-3.1(b). A violation of the policy can occur even if there was no intent on the part of an individual to harass or demean another. Ibid. The State Policy has a zero-tolerance policy toward offensive conduct. Conduct does not need to meet the legal definition of "harassment" or "discrimination" in order to be actionable under the policy. N.J.A.C. 4A:7-3.1(a). There was adequate credible testimony substantiating the finding of a violation of the State Policy. The appellant's actions were inexcusable and in clear violation of the State Policy's goal of providing a workplace free from discrimination. The fact that the appellant intended the action as a joke is irrelevant because the action is to be viewed from an objective standpoint. However, because the State failed in its duty to enforce the State Policy as the procedures require, this action will pass undisciplined.

B. The respondent met their burden to prove that appellant violated N.J.A.C. 4A:2-2.3(a) Insubordination and N.J.A.C. 4A:2-2.3(6) Conduct Unbecoming.

Regarding the ERO incident on December 7, 2017, appellant was charged with violating N.J.A.C. 4A:2-2.3(a)(2) – Insubordination; (6) – Conduct unbecoming a public employee; (12) – Other sufficient cause; and the NJ Department of Human Services Disciplinary Action Program: C7-1 – Fighting or creating a disturbance on State property; C25 – Threatening, intimidating, coercing or interfering with fellow employees on State property; E1-1 – Violation of a rule, regulation, policy, procedure, order, or

administrative decision (specifically Policy & Procedure 3.501 = Code of Conduct Behaviors that Undermine a Culture of Safety in the Workplace.)

Insubordination generally denotes a subordinate's refusal to obey a supervisor's order whether by non-compliance and non-cooperation or by affirmative acts of disobedience. In re Adams, Camden Vicinage, Judiciary, CSC 2018-2946, 2019 N.J. CSC LEXIS 216, Final Agency Determination (April 24, 2019). In In re Young, CSV 05247-17, CSV 05249-17, Initial Decision, (August 28, 2018), appellant was charged with insubordination for asking to review a document and getting his union representative before signing the document. The Administrative Law Judge (ALJ) found that such action did not constitute insubordination because the record did not show any act of disobedience or any use of abusive or insulting language. Ibid.

Here, the specifications of the charges note that appellant was asked several times to leave the Employee Relations Office and appellant refused. Collins' testified that appellant had to be asked several times by Colon to leave the office. Colon testified that she asked appellant at least four or five times to leave the office. Additionally, both Colon's and Collins' testimony indicated that appellant was yelling at Collins during the incident. Appellant admitted that he might have been loud. Accordingly, I **CONCLUDE** that respondent proved by a preponderance of the evidence that appellant was insubordinate when he aggressively refused to leave the Employee Relations Office after being asked several times. Although appellant eventually left the Office, the weight of the credible evidence showed that appellant was using abusive language during his refusal through the inappropriate volume of his voice, the manner of his actions and imposition of his presence.

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 has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. 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)].

Unbecoming conduct has also been defined as any conduct which adversely affects the morale or efficiency of the department, or which has a tendency to destroy public respect for employees and confidence in the operations of government services. Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992).

Collins testified that after the incident with the appellant, the Employee Relations Office changed their policy about walk in visits regarding employee issues. Colon testified that she refused to continue working unless a locking door was installed. A locking "Dutch Door" was installed after the incident. Colon stated the door was installed because of the incident. Additionally, appellant's manner and actions were such as to offend publicly accepted standards of decency. Although it is not uncommon that employees may disagree or become confused in the workplace, publicly accepted standards of decency do not support loud verbal altercations against another employee. Also, appellant's physical action of slamming the paper on Collins' desk as he yelled at her violated publicly accepted standards of decency.

In light of the credible evidence presented, I **CONCLUDE** that the respondent has produced sufficient evidence to support the charge of conduct unbecoming a public employee such that he violated publicly accepted standards of decency and adversely affected the morale of the Employee Relations Office by a preponderance of the evidence.

The next issue is whether appellant violated the New Jersey Department of Human Services Disciplinary Action Program. I **CONCLUDE** that these charges should be dismissed because the Department of Human Services Disciplinary Action Program was never entered into evidence. The tribunal cannot guess as to the definitions of the violations with which appellant is charged as they appear in the Department of Human Services Disciplinary Action Program. In other OAL decisions where an ALJ made a decision regarding the violation of the Program, the Department of Human Services Disciplinary Action Program was introduced into evidence for review by the court. See Patricia Trapasso v. Greystone Park Psychiatric Hospital, CSV 01706-02, Initial Decision (March 26, 2003); In re Nicholas Manla, CSV 0784-11, Initial Decision (November 7, 2011); In re Quran Santana, CSV 10607-08, Initial Decision (May 15, 2009); In re Marguerite Verne Cheramy, CSV 16364-12, Initial Decision (September 26, 2013). The Program contains information dictating how the violations should be defined and punished, and without the Program, this court cannot reliably adjudge the appellant's actions as violative or not, and what penalty, if any, the appellant deserves in light of the Program. Accordingly, the charges alleging appellant violated the New Jersey Department of Human Services Disciplinary Action Program: C7-1 – Fighting or creating a disturbance on State property; C25 – Threatening, intimidating, coercing, or interfering with fellow employees on State property are dismissed.

Additionally, E1-1 – Violation of a rule, regulation, policy, procedure, order, or administrative decision (specifically Policy & Procedure 3.501 = Code of Conduct Behaviors that Undermine a Culture of Safety in the Workplace) is dismissed. Although Policy & Procedure 3.501 Code of Conduct Behaviors that Undermine a Culture of Safety in the Workplace was introduced as an exhibit, Exhibit 7, the charges were alleged under the New Jersey Department of Human Services Disciplinary Action Program E1. Without having the Program in evidence, it is unknown whether a violation of E1 constitutes a minor or major discipline under the program. Accordingly, the penalties associated with a violation of E1 of the Program were not presented to the court. Regardless of whether appellant violated Policy & Procedure 3.501, because the policy by which the appellant was charged, Department of Human Services Disciplinary

Action Program, was not presented to the court, I **CONCLUDE** that these charges as detailed above contained in the first FNDA be **DISMISSED**.

PENALTY

Once a determination is made that an employee has violated a statute, regulation or rule concerning his employment, the concept of progressive discipline must be considered. With respect to the discipline, under the precedent established by Town of West New York v. Bock, courts have stated, "[a]lthough we recognize that a tribunal may not consider an employee's past record to prove a present charge, West New York v. Bock, Id. at 523, "that past record may be considered when determining the appropriate penalty for the current offense." In re Phillips, 117 N.J. 567, 581 (1990). Ultimately, however, "it is the appraisal of the seriousness of the offense which lies at the heart of the matter." Bowden v. Bayside State Prison, 268 N.J. Super. 301, 305 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to reevaluate the proofs and penalty on appeal, based on the charges presented. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, a suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. Termination of employment is the penalty of last resort reserved for the most severe infractions or habitual negative conduct unresponsive to intervention. Rotundi v. Dep't of Health and Human Servs., OAL Dkt. No. CSV 385-88 (Sept. 29, 1988.)

In the instant matter, the appellant did not have any prior disciplinary infractions recorded. As above, the alleged violation of the State Policy was procedurally defective, and so does not warrant a penalty. Accordingly, the removal of the appellant was

inappropriate for a first violation of N.J.A.C. 4A:2-2.3(a)(2) Insubordination and first violation of N.J.A.C. 4A:2-2.3(a)(2)(6) Conduct Unbecoming.

In light of the nature of the circumstances surrounding the incidents detailed, the workplace environment and the situation surrounding the incident, that the appellant became irate and aggressive at the EEO's request that he complete workplace conduct sensitivity training, that appellant's behavior so disturbed the EEO employees as to concern them for their safety and that appellant's behavior so disturbed the EEO employees as to warrant the installation of a locking door and change their policy for admission to their office, I **CONCLUDE** that the circumstances were sufficiently aggravating to justify the penalty of dismissal.

I **CONCLUDE** that a penalty of dismissal is appropriate for appellant's violation of N.J.A.C. 4A:2-2.3(a)(6) Conduct Unbecoming.

I **CONCLUDE** that a penalty of dismissal is appropriate for appellant's violation of N.J.A.C. 4A:2-2.3(a)(2) Insubordination.

ORDER

I hereby **ORDER** that the charges as detailed in the second FNDA have been sustained and are hereby **AFFIRMED.** I **FURTHER ORDER** that the action of the Appointing Authority in removing appellant from his position of employment is **AFFIRMED.**

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days

and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

May 18, 2022
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

CVB/tat

APPENDIX

WITNESSES

For appellant:

George Paul Klein
Joseph Shargo
Jeremy Kaczoroski

For respondent:

Joseph Sorrentino
Michael Bressi
Cynthia Collins
Michael Davis
Yvonne Colon
George Paul Klein
Joseph Shargo

EXHIBITS

For appellant:

None

For respondent:

R-1 Master filing
R-2 FNDA
R-3 PNDA
R-4 December 4, 2017, letter

R-5 Collins statement

R-6 Not applicable

R-7 Policy and Procedure Code of Conduct

R-8 Kaczoroski letter, December 21, 2017

R-9 FNDA

R-10 PNDA

R-11 October 17, 2017, letter Fraser to Kaczoroski

R-12 Bressi statement, August 8, 2017

R-13 Bressi statement, August 24, 2017

R-14 Davis statement, August 8, 2017

R-15 Kaczoroski statement, August 8, 2017

R-16 Kaczoroski statement, August 24, 2017

R-17 Sorrentino statement, August 10, 2017

R-18 Klein statement, August 24, 2017

R-19 Not applicable

R-20 "Mind your business" photograph

R-21 "Moving day"

R-22 "You might be a red neck" calendar page

R-23 Photograph of plywood

R-24 "If it offends you" photograph

R-25 "Everyone is happy when you are gone" photograph

R-26 EEO Policy and Procedure

R-27 Not applicable

R-28 Discrimination complaint signed by Kaczoroski, June 29, 2017

R-29 Discrimination complaint signed by Kaczoroski, July 17, 2017

R-30 Not applicable

R-31 Installed door photograph

R-32 Davis time sheet, September 4, 2017

R-33 Office photograph

R-34 Union contract

R-35 Joseph Shargo statement

R-36 Pink Flamingo article

R-37 Contract (portion)