STATE OF NEW JERSEY

In the Matter of Gary Playford, Lower Township, Department of Planning and Development CSC DKT. NO. 2022-1888 OAL DKT. NO. CSV 01549-22	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION** **ISSUED: FEBRUARY 1, 2023**

The appeal of Gary Playford, Construction Official, Lower Township, Department of Planning and Development, five working day suspension and removal, effective November 16, 2021, on charges, was heard by Administrative Law Judge Tama B. Hughes (ALJ), who rendered her initial decision on January 6, 2023. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of February 1, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending and removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Gary Playford.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 1ST DAY OF FEBRUARY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
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Nicholas F. Angiulo
Director
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01549-22
AGENCY DKT. NO. 2022-1888

IN THE MATTER OF GARY PLAYFORD, LOWER TOWNSHIP, DEPARTMENT OF PLANNING AND DEVELOPMENT.

Katherine D. Hartman, Esq., for appellant, Gary Playford (Attorneys Hartman, Chartered, attorneys)

Paul J. Baldini, Esq., for respondent, Lower Township, Department of Planning and Development

Record Closed: November 21, 2022 Decided: January 6, 2023

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF THE CASE

Gary Playford ("Playford" or "appellant") appeals the Lower Township Department of Planning and Development ("Township" or "respondent") February 14, 2022, Final Notice of Disciplinary Action (FNDA) sustaining the charges of violation of: N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency or failure to perform duties); N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); N.J.A.C. 4A:2-2.3(a)(6) (Conduct unbecoming a public employee); N.J.A.C. 4A:2-2.3(a)(9) (Discrimination that affects equal employment opportunity,

including sexual harassment) and; N.J.A.C. 4A:2-2.3(A)(12) (Other sufficient cause including but not limited to violation of Lower Township Policies — General anti-harassment, workplace violence, anti-sexual harassment, continuing education procedure) and imposition of a five-day suspension and removal.

PROCEDURAL HISTORY

On November 16, 2021, a Preliminary Notice of Disciplinary Action (PNDA) was served on appellant. The PNDA was subsequently amended on December 9, 2021. Appellant requested a disciplinary hearing which was subsequently held on January 18, 2022. An FNDA was issued on February 14, 2022, wherein all of the charges were sustained. The disciplinary action imposed was a five-day suspension for appellant's failure to complete the mandatory training and termination for his conduct towards R.M. On February 17, 2022, appellant appealed the FNDA and thereafter, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL) as a contested case where it was filed on February 28, 2022. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 to 13.

A prehearing conference was conducted on March 29, 2022, at which time hearing dates were set. Thereafter, a Prehearing Order was entered on April 4, 2022.

The hearing in this matter took place on August 22, 2022. The record was held open to allow the parties the opportunity to obtain transcripts and submit written summations. Written summations were received from both parties on November 21, 2022, at which time the record was closed.

TESTIMONY

Michael Laffey (Laffey), the Lower Township (Township) business manager testified on behalf of the respondent. He has been the Township manager since November 16, 2020. He is familiar with both Playford and R.M. as they are both employed by Lower Township, and he was their supervisor. Playford was the construction manager and R.M. was a clerk typist who reported directly to Playford.

R.M. was hired in mid-July 2021. While he and Playford were both involved in R.M.'s interview process, Playford was the one who ultimately made the decision to hire her because she was going to be his direct report. Playford also had another clerk typist, Rose Moore (Moore), who had been there for twenty-five years. The office space where R.M. and Moore were situated was a 12' x 12' room. The office contained two desks, a chair, and a filing cabinet. One wall had an open window space for individuals to approach that needed assistance.

Less than two weeks after R.M. was hired, while he was standing at the window area of the construction office, he saw Playford standing in R.M.'s personal space — off to her right side but leaning into her, presumably looking at her computer. R.M. was sitting at her computer and her body language was such that she was leaning away from him as she typed something into the computer. Concerned and not sure what he saw, he went back to his office and asked his assistant, Eileen Kreis (Kreis), to go and speak to R.M. to see if everything was alright. After speaking to R.M., Kreis reported that she was fine.

On cross-examination, Laffey was questioned about the Township's policy when someone believes that they are being sexually harassed. In response, he stated that the individual should report the issue to their direct supervisor. If it involves the individual's direct supervisor, then they need to report the matter to that individual's supervisor.

In the instant matter, R.M. appropriately reported the matter to him as Playford's direct supervisor. On or about November 8, 2021, four months after she had been hired, R.M. came to him to file a complaint against her direct supervisor, Playford. It was the first time that she had reported any issue with him. R.M. reported that Playford had touched her inappropriately. She also reported other incidents that had occurred prior to that, which included among other things: Playford banging on the bathroom door when she was using the restroom; sitting at her desk, in her personal space, with his feet up which necessitated her having to navigate around him to get out of her desk area; sending her a "friend" request on Snapchat; taking her off site to pick up a Township vehicle which was outside her job description; bringing her, and no one else, treats/food items.

When the report came in, a labor attorney was hired to conduct the investigation. To the best of his knowledge, Moore, who had worked for Playford for years, was not questioned as part of the investigation nor had she ever filed a complaint against him. He was not aware of any Township policy that prohibited co-workers from "friending" one another on social media. He himself has made such contacts on social media.

When asked, if he had ever gone to the purchasing office and seen a bowl of candy, he stated that he has been to the office however did not recall seeing any candy.

Lisa Schubert (Schubert) testified that she works for the Township as a principal clerk typist in the Planning and Zoning Department. She is familiar with R.M. because she worked in the construction office which is located one office space over from her office. From her vantage point, she can see into the construction office and can partially see R.M.'s desk. Given the physical layout, she was able to observe interaction that took place between R.M. and Playford.

In describing some of the interactions that she had observed, Schubert stated that on multiple occasions, she would see Playford sit in the chair next to R.M.'s desk and put his feet up. When he did this, he effectively blocked R.M.'s ability to get out of her work-space area, causing her to squeeze by him if she wanted to get out. On several occasions, she observed Playford placing his hands on the back of R.M.'s chair and lean over her while she was on the computer. When Playford did this, she would see R.M. "scooch" to the left and away from him.

Schubert also reported that on a dozen or more occasions, she heard Playford call R.M. "cute" and "sweet." These comments were said in front of other employees. According to Schubert, Playford never spoke about, or to, any other female employees similarly and to the best of her knowledge, Playford and R.M. did not have a relationship outside of the office. He would also bring R.M. treats, such as a McDonald's shake or Twizzlers but none for the rest of the staff.

She recalled hearing about the bathroom incident involving Playford banging on the door when R.M. was in the bathroom. She was also aware of Playford taking R.M. to pick up a Township vehicle which she noted was not part of R.M.'s job responsibilities.

According to Schubert, on or about November 8, 2021, while she and other employees including R.M., were standing in the hallway at the end of the day, Playford approached R.M. R.M. at the time was leaning against a file cabinet. Playford came up behind her, stood close to her back and put his hands on her shoulders and then moved his left hand down her arm. When Playford did this, R.M.'s face lost color and she tried to move in closer to the file cabinet. He moved away from her shortly thereafter.

On cross-examination, Schubert was questioned about the location and proximity of her desk and her line of site to where R.M. was located. She reiterated that from her vantage point, she had a partial view of R.M.'s desk but not the entire office, including Moore's desk. Schubert was also asked how she was able to do her own work if she was constantly observing what was happening in the next office over. In response Schubert stated that given the location and the layout of the office space and window area, which is open to the public, she would frequently have to look up to ensure that no one was waiting at the window for assistance.

When asked if she ever spoke to Moore about the interaction between Playford and R.M. she stated that she had. When questioned about her observations — such as Playford placing his feet on R.M.'s desk, she acknowledged that when R.M. stood up, he would move his legs. She also acquiesced that she had seen Playford do the same thing to the prior clerk once or twice. Regarding Playford standing behind R.M. and leaning over her when she was on her computer, she agreed that it was Playford's job to answer R.M.'s questions. However, training R.M. was the job of the clerk not Playford. Additionally, prior to R.M. coming on board, he was not in that office with the same frequency — noting that his primary office was down the hall.

Schubert was also questioned about Playford calling R.M. "cute" and "sweet" and whether other people heard it. In response she stated that if she heard it, others did as well, given the central locality of their office space. She could not remember the context

when the comments were said. At no time has she ever heard Playford call Moore "sweet" or "cute." R.M. never complained to her about Playford's conduct or commentary. She had no knowledge whether Playford or R.M. ever had a conversation about McDonald's shakes or Twizzlers and acknowledged that when Playford brought R.M. the McDonald's shake, he offered to get her one when she asked where her shake was.

Regarding the incident on November 8, 2021, Schubert reiterated what she saw with Playford putting his hands on R.M.'s shoulders and then move his one hand down her arm. She did not see him massaging her shoulders nor could she hear what Playford said to her. The whole incident happened quickly, maybe thirty seconds or less. When they left the building for the day, R.M. did not say anything to her nor did she bring it up because there were too many people walking out with them.

On the issue of social media, Schubert does have social media and has "friended" a couple of work colleagues. She is not aware of any Township policy that prohibits such conduct.

R.M. testified that she is married and has a seven-year-old child. On July 12, 2021, she was hired as a clerk typist in the Township's construction office. As part of her duties, she was responsible for among other things, entering permits into the system, scheduling inspections and filing. When she was hired, Moore was the primary person responsible for training her. On occasion, if Moore was not available, Playford would train her.

On a daily basis when she first started, Playford called her "newbie." This made her feel singled out because she was trying to learn her job and did not know anyone. He stopped calling her "newbie" when Laffey told him to stop which was a couple of weeks into her new job. After that on a daily basis, he started calling her "cute" or "too cute." This would be said in front of her co-workers. She does not know why he would say that to her however at times he would say it if she did or said something. As an example, sometimes she would sit in her chair with her feet tucked under her because she was cold. Playford would tell her that she was "too cute" because she was small enough to sit in her chair like that. Another example was when she wore heels, and he would comment that she was taller than him and that she was "too cute."

Every day Playford would put his feet up on her desk — sometimes multiple times a day. He never put his feet on other people's desk. When he did this, she was effectively blocked from leaving her desk area. He would also come up behind her every day and lean over her shoulder or back, talking about something in the office. When he did this, he would have his hand on the back of her chair or hover over her to look at her computer screen. He never did this to Moore. When he did this, she would lean away from him because he was in too close a proximity.

R.M. went on to recall an incident where Playford brought her a McDonald's McFlurry shake. They had discussed McFlurry shakes and the next thing she knew he brought her one. He did not bring any for the rest of the office which made her feel bad particularly when Schubert pointed out that he did not bring one for anyone else. The same with Twizzlers. He had gone to the Town Hall building and when he came back, he brought her a handful of Twizzlers. She believes she must have told him at some point that she liked them. As with the milkshake, she felt singled out because he did not bring any back for anyone else.

Another example of how Playford made her feel uncomfortable occurred about a month after she started when he sent her a "friend" request on snapchat. (R-10.) She never told him about her account or sent him a "friend" invite, nor did she socialize with him after work. The request came in when she was on her lunch break, and she never responded to it.

R.M. went on to relay other instances where Playford made her feel uncomfortable. In October 2021, while in the bathroom, he banged on the door. She didn't think anything of the noise until she came out of the bathroom, and he asked her if he had scared her. It troubled her that he took notice when she went into the restroom. Another instance was when he pointed out the tattoo on her thigh. He was sitting at her desk with his feet up and made a comment about the tattoo on her thigh. He then went on to describe his tattoos. It disturbed her that he was looking at her thigh. She went on to note that there was no reason for him to sit at her desk, he could have spoken to her while standing in front of her desk if he needed to speak to her. Yet another instance was after she first

started, and he had her go with him off site to pick up a Township vehicle. It was not part of her job description, and she thought it strange that he asked her to go. While nothing happened, she made sure she had her phone with her the entire time.

She also recalled the time that she had gone out to meet her girlfriend at a local establishment. When she looked out the window, she saw Playford waiving to her outside on the deck. A little while later, the waitress came over and said that he had bought her and her girlfriend a drink. After some internal debate, she accepted the drink thinking that she would appear rude or inconsiderate if she did not accept it. The following morning, he said that he saw me pull into the lot and he watched as I parked my car and walked into the establishment. While she did not say anything to him, the whole incident made her feel uncomfortable particularly the fact that he had been watching her.

The last incident occurred on November 8, 2021. It was the end of the day, and she was standing in the hallway with other people waiting to leave for the day. Playford came up behind her and put his hands on her shoulders and massaged them. His left hand then went down her left shoulder and his right hand went down to the center of her back. He then backed away from her and removed his hands. She left the building after that with everyone, but she was very upset over the episode so much so that the following day, she told the building supervisor of the incident. He in turn took her to Laffey so that she could report the incident to him.

On cross-examination, R.M. acknowledged that when she was hired by the Township, she had no experience and that she was informed from the start that she would be trained by Moore and Playford. When questioned about her testimony about Playford saying that she was "cute" or "too cute" and whether, on one occasion, she had pulled her shirt tight over her belly and said that she was having a food baby after which he had commented that she was "too cute." She acknowledged that she had done that one day after eating a big lunch and acquiesced that she had felt comfortable enough in his presence to do so. When asked if she was offended that Playford would say she was "cute" or "too cute," she said that she was not offended per se, rather felt it was inappropriate that her supervisor was making such comments to her. While she thought his actions were inappropriate, she never reported them to anyone including Moore who

sat right next to her, or her husband; never looked at the Township handbook to see what to do; or tell Playford to stop.

Her testimony of Playford putting his feet up on her desk was also questioned — specifically whether there were other chairs in the room and if Playford moved his legs when she stood up to move away from her desk. In response she stated that there was only one chair in the room, which was next to her desk, and that he would laughingly move his legs when she stood up. She never felt trapped, nor did she ever tell him to put his legs someplace else. The fact that he propped his legs on her desk did not impact her work.

Regarding her testimony that he would lean over her to look at her computer, she reiterated that he could have stood at other locations to view her monitors instead of over her. She acknowledged however that she never told him that his actions made her feel uncomfortable but when he did that, she would move her chair or lean away from him so that he would not be so close. R.M. also acknowledged that Ms. Kreis asked her if she was ok with Playford's proximity and that she had said that she was fine. She went on to state however, that she had just started working there; Playford was her supervisor; and she did not know how to handle the situation.

Also questioned was her testimony surrounding the food items that Playford brought her — specifically the McDonald's shake and the Twizzlers. She acquiesced that they had discussed their favorite shakes from McDonald's and the fact that she liked Twizzlers but reiterated that when he brought her those items, it made her feel uncomfortable and singled out. R.M. was also questioned about her Snapchat account and whether she had received "friend" requests on the site. In response she stated "no," and that she had never had a conversation with Playford regarding her Snapchat account. She acknowledged that Playford did not retaliate against her for not responding to his "friend" request. She did not know whether he had other work colleagues as "friends" on his social media account. She herself has work colleagues as "friends" on her social media accounts but they had been "friended" prior to her working for the Township.

In going through her testimony about picking up the Township car, R.M. agreed that he asked her to help him pick up a car. The location where they went was approximately five or six minutes away and at no time did Playford act inappropriately towards her.

R.M.'s testimony surrounding her tattoo was also questioned. She acknowledged that when she wears a dress, a part of the tattoo is visible. When he saw it, he questioned her about it and started talking about his own tattoos. While she did not find the conversation offensive, she did feel it was inappropriate that he was looking at her legs but did not say that to him at the time.

Playford's habit of sitting in the chair next to her desk was also discussed — specifically whether he was frequently on the phone when he was sitting next to her. In response she stated that he was. If his feet were not propped on her desk, he would talk on the phone with his elbows on his knees leaning over. Regardless of how he was seated, she always felt as though he was trying to be in close proximity to her. She acknowledged that he never touched her. She also acknowledged that she never moved the chair but noted that the room was small and cramped. To move the chair, the room furniture would need to be reconfigured.

As to her testimony about Playford seeing her out one night, she agreed that the waitress came over and asked if she and her girlfriend wanted a drink and that at no time did Playford attempt to interfere with her personal time. She was aware that he was meeting people there.

R.M. was also walked through the events of November 8, 2021, and November 9, 2021. In going through November 8, 2021, in conjunction with the surveillance footage, R.M. was adamant that when Playford approached her from behind and put his hands on her shoulders, he made massaging movements. When his hands left her shoulder, his left hand moved down her left arm and his right hand went to the small of her back before he moved away. While it seemed like a long time, it was only seconds. She did not recall anything he may or may not have said to her. Schubert saw what happened because their eyes met. Schubert commented on what had occurred the next day and told her to

report what had happened if she was uncomfortable with the whole situation. She did not believe anyone else saw what had occurred. She said nothing that night because she had to pick up her son from daycare. She acknowledged that at no time did she tell Playford that he made her uncomfortable or that his actions were offensive. She also never discussed anything with Moore who sat next to her or anyone else of her discomfort. On this last point, R.M. again reiterated that the job was important to her and her family.

Gary Playford (Playford) testified that he has been the construction official for the Township for fourteen years. Prior to that he was an inspector for two years. As the administrative head of the office, among other things, he has inspectors that report to him; deals with code enforcement issues; and interacts with the public daily. His office is located in the county building. In a separate location, he has two administrative assistants that report to him.

He has two assistants who work for him — R.M. and Moore. Moore has worked for him for the entire time that he has been with the Township. He has known her years having gone to school with her. He went on to note that they have a good working relationship. Prior to R.M. being hired, he had another administrative assistant for approximately thirteen years with whom he also had a good working relationship.

He was involved in R.M.'s hiring process and sat in on her interview. When he was interviewing the potential candidates, he was looking for either someone with construction experience so that they could hit the ground running, or someone with no experience so that he and Moore could properly train the person.

R.M. was hired in July 2021 with no prior experience. At the time of hire, he was aware that both he and Moore would need to train her because the position was difficult and there were a lot of moving parts. He had no problems with R.M. when she started. He would sit next to her when he was in the office to assist in her training. When he sat next to her, he would put his feet up against the desk. It was never his intention to block her ingress or egress. If she had to get out of the desk area, he would move his legs or if he was sitting forward in his seat, he would move back to allow her to get through. The chair was about three feet away from her desk. Many times, when he was in the office

area where R.M. was located, he would be on the phone responding to status inquiries and at times, he would need her computer to look something up. There were several times he would stand behind R.M. to look at her computer to answer questions, or to show her how to do something. He recalled one occasion when R.M. told him to stand behind her so that they could watch a Halloween parade video of her son and his grandson. At no time did he have a sexual interest in R.M. or try to get into her personal space. He did not typically have to go behind Moore to look at her computer because she had been there for twenty-five years and knew what she was doing.

In discussing the accusations that had been levied against him, specifically the singling out of R.M. by bringing her food items, Playford stated that there was nothing untoward meant by his gestures. With regard to the McDonald's shake, one day he had stopped at McDonald's and bought himself a shake. When he wandered into the office space where R.M. was located, she asked him what the flavor was and in turn told him her favorite flavor. When he went to McDonald's the next time, he picked her up one. He only bought the one for R.M. because there are many employees that work in the building. When he came back with the shake for R.M., Schubert saw what he had and asked where hers was. He offered to go and get her one, but she declined. Moore was also there at the time but said nothing.

The same with the Twizzlers. R.M. had told him that she liked them. One day when he was in the purchasing office, he saw that there were Twizzlers, so he brought some back for both himself and R.M. He didn't bring Moore any because she walks every day at lunch. Nor did he bring Schubert any because she never told him that she liked Twizzlers. He did not bring R.M. the shake or Twizzlers because she was a woman or because he wanted sexual favors.

Regarding Snapchat, he has social media accounts, one of which is Snapchat, and has work colleagues as "friends." He has "friended" people in the past and has never had an issue or heard that the person he sent a "friend" request to, was offended. In R.M.'s case, her name popped up as someone he may know, so he accepted it and asked her to "friend" him. She did not respond. He didn't really realize that she had not

responded because he rarely goes on the site. He was not offended, nor did he take any adverse action against her for not responding.

In discussing the time that he saw R.M. out at a bar/restaurant, he was there meeting friends. When he saw R.M., he was outside waiting for his friends to show up. While standing there, he saw a car pull into the lot and having difficulty parking. When the people got out of the car and entered the building, he saw that it was R.M. At no time did he approach her or attempt to directly contact her. He sent her a drink like he would for anyone of his employees or co-workers, whom he may see out.

Playford also spoke about the time he questioned R.M. if she had a tattoo on her leg. He saw a spot on her leg and asked if she had a tattoo. He was not intentionally looking at her leg or ogling her. When he asked her if it was a tattoo, she told him that it was. After that he told her about his tattoos. She did not appear to be embarrassed or uncomfortable with the conversation. The same with the time that he asked her to go and help pick up a Township car. There was no one else around and he needed to pick up the car which was five minutes away. While it was not in her job description, he needed to pick up the vehicle. R.M. did not express any discomfort at being in the car with him.

He acknowledged that when R.M. first came to work for him, he called her "newbie." He called her this for no other reasons other than he could not remember her name. When Laffey told him to stop calling her newbie, he immediately did so. It was never his intent to demean, embarrass or sexualize her in any way. He went on to note that R.M. did not appear to be offended and even pointed out to him that he had spelled "newbie" wrong on the board and told him the correct spelling so he could change it.

Playford also acknowledged that he would occasionally call R.M. "cute" or "too cute." He would call her that when R.M. did something funny such as holding her nose while spraying the lobby with air freshener after a particularly pungent person visited the office, or when she said she had a food baby after eating lunch, and pulled her shirt across her belly to demonstrate what she meant. R.M. never expressed discomfort over his comment — to the contrary at times she would giggle. At no time has he called her "sweet." He would only say that word at a restaurant and would say "hon" or "sweetie."

Playford went on to state antidotally that he made the mistake of calling Schubert "hon" at work once and she corrected him. He never said it again. If he called R.M. "cute" or "too cute," it was never done in a sexual manner.

With regard to training, Playford stated that every two years, they are trained on the Township's sexual harassment policies. In February 2021, he received the mandatory training notification from the training coordinator via email. (R-7.) A month later, in March 2021, he received a second email reminding him and others of the mandatory training. (R-8.) Two months later, in May 2021, he received a third email reminding him that he needed to register to take the training.[1] (R-9.) He did not take the training and after May 2021, no further notifications were provided regarding the mandatory training. It was not until November 2021, after R.M. had lodged a complaint against him, that he was charged with failure to take the mandatory training. The reason he did not attend the training was because his job was demanding at times, and he never found the time to get to his computer to take the course.

In discussing what happened on November 8, 2021, he stated that Moore was out on that date and the person who was to assist in answering the phones and help in the office did not show up. An emergent situation arose which required the issuance of a temporary certificate of occupancy (TCO). He asked R.M. to assist him in making calls. It took a better part of the day but by the end of the day he was able to resolve all of the issues and approve the TCO. R.M. was in the hallway getting ready to leave. He went out to the hallway where she was standing with other individuals, approached her, put his hands on her shoulders and thanked her for all of her assistance. At no time did he caress her back or arm. His gesture was not sexual in nature, it was meant to be a reassurance that she had done a great job because she had just started, and pump her up a little because she was a new employee. Everyone left shortly after that with R.M. asking him to lock the door after them.

On cross-examination, Playford acknowledged that he was fifty-nine years old and R.M.'s direct supervisor since mid-July 2021 to November 8, 2021. When questioned

[1] On the first and third notification, Playford was provided the training dates available in April and May 2021.

about the number of times he put his feet on R.M.'s desk or leaned over her back to look at her computer screen, he stated that he probably put his feet on her desk about twenty-five times and leaned over her back two or three times a day. He could not say whether she leaned away from him when he leaned over her because he was busy looking at her computer screen.

Regarding blocking R.M. with his feet, he stated that if that had occurred, it was unintentional because he was probably on the phone fielding calls and not paying attention. He did not believe that R.M. ever had to "scooch" by him and believed that there was plenty of room to get by — despite the fact that he was 235 lbs. and 5'7". He never thought that his actions made R.M. feel uncomfortable nor was that his intention. If he had been made aware that she was uncomfortable by his actions, he would have stopped. He wasn't sure whether the mandatory training that he failed to attend would have protected him from the very allegations that had been brought, but after some consideration, said it was possible.

Also questioned were the various names that he called R.M. — "newbie," "cute," "too cute" and "sweet." Playford admitted to calling R.M. "newbie" several times a day in front of others. He also acknowledged that he had written "newbie" on a piece of paper which was posted on the office board where other people could see it. He reiterated that the reason he called her "newbie" was because he could not remember her name. When pressed on this point and asked why he didn't just write her real name on the board, he stated that he kept it up to "kid" her. Regarding the other names, Playford stated that he called R.M. "cute" four or five times, "too cute" once, but never called her "sweet" or "sweetie."

Playford acknowledged that he brought R.M. a McDonald's milkshake and Twizzlers. He also acknowledged that he did not bring anyone else in the office a shake or Twizzlers despite the fact that other people were present in the office at the time.

He also acquiesced that he did not ask R.M. if it was ok to send her a "friend" request on Snapchat. He went on to add however, that he is not very savvy on the app — he knows how to send things but not how to navigate the program. Playford further

admitted to banging on the bathroom door when R.M. was using the facility and then asking her afterwards if he had scared her. It was something he had done to other co-workers to add levity to the workplace. He acknowledged that in hindsight, it was probably not appropriate.

In questioning Playford about his commentary to R.M. about her tattoo on her thigh, he admitted that he is the one to start the conversation after observing the tattoo on her thigh while at work. He also admitted that after pointing out her tattoo, he proceeded to talk about his tattoos. According to Playford, he probably had the discussion between phone calls and the conversation did not appear to interrupt R.M. from working.

Playford was also asked about taking R.M. to pick up a car. While it was not in her job description, it was his common practice to have one of his "girls" go with him to pick up cars if no one else was available. With regard to buying R.M. a drink, he believed that most people would think of his gesture as an act of kindness. The next day he admitted to confronting R.M. at work about her driving in the parking lot the night before in the presence of other co-workers. At no time did he believe that his actions were escalating into R.M.'s personal space.

He acknowledged that he received three notices to take the mandatory training courses and that on the third notice, he was the only person being notified of the training. He further agreed that he has yet to take the training. According to Playford, he was not aware of the sexual harassment policy until he got in trouble. He received the Township's Personnel Policy Manual (Manual) in 2006 and it sat on his desk, and it was not something he reviewed daily. His testimony subsequently changed at this point when asked on re-direct, when he acknowledged that he was aware of the sexual harassment policy and that he receives sexual harassment training every two years, the last time taking place in 2019.

Photo stills of November 8, 2021, were also reviewed with Playford. He agreed that the incident occurred at the end of the workday when workers, including R.M., were standing in the hallway waiting to leave. He also agreed that when he walked into the hallway, he immediately approached R.M. and put his hands on her shoulder from behind

with his body and feet against R.M. He also acknowledged that at one point his left hand went down her left arm but claimed that he was letting go of her shoulders at that point. He disagreed with the notion that his body was leaning into her — laughingly stating that that was not possible for him to get too close because his belly was too big. (R-14 to R-21.) When asked whether he touched other employees at work the same way, he stated that if they had experienced a death in the family he would have. When asked if he ever put his hands on other employees' shoulders during work, he claimed that he had with his prior assistant and possibly his "guy" inspector. When questioned further on the issue, he stated that he may have put his hands on Kreis' shoulders — justifying his actions by saying that they were friends.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

Four people testified in this matter and based upon the totality of the testimony, there does not appear to be a lot of discrepancy. I found R.M.'s testimony to be candid and credible throughout. With some exception such as the number of instances he referred to her as "cute," "too cute" or "sweet," or how often he sat at her desk with his feet up blocking her in, R.M.'s testimony was uncontroverted by Playford. When asked, she candidly stated that for the most part, she was not offended by his actions, rather, she was uncomfortable and troubled over the inappropriateness of them, which were repeatedly witnessed by her co-workers.

On the other hand, I found Playford's testimony less than credible. As an example, he testified that when R.M. first came on board as his direct report, he called her "newbie." He is the one who interviewed her, hired her, and supposedly trained her, but he claimed that he could not remember her name. Instead of writing her real name on the communal office board, he posted her name as "newbie" — so for the first two weeks on a new job, that was how she was referred to. The only reason he stopped calling her "newbie" was because Laffey, told him to stop. When pressed on cross-examination why he repeatedly called her "newbie," he finally admitted that it was not because he couldn't remember her name, but because he was "kidding" her.

Playford also testified that he was always extremely busy and would sit in the chair at R.M.'s desk with either his feet up or slumped over in the chair with his elbows on his knees, fielding calls. Notably, he had his own office down the hall. Indeed, his non-stop schedule was the reason he cited for failing to take the mandatory sexual harassment training — despite being reminded three times. According to Playford, while he was constantly on the phone either making or receiving calls, in between his calls, he noticed that R.M. had a tattoo on her thigh which he felt compelled to mention, and thereafter spent time discussing and describing his own tattoos. His explanation did not comport with the rest of his testimony of how very busy he was. The same with banging on the bathroom door. He would have had to have observed R.M. going into the bathroom, then go out of his way to bang on the bathroom door, then make a point to approaching her to let her know it was him banging on the door and to see if he had "scared" her. Again, putting aside the inappropriateness of the action, for someone so busy, he appeared to have time to play pranks.

The same with his testimony on why he would lean over R.M. to look at her computer. Playford testified that he did this because he was either training her or he was looking something up. Again, Playford had his own office and computer. R.M. testified that he did this several times a day which he did not dispute. What appeared however, to be disingenuous was his testimony that he never noticed R.M. attempting to move her body away from him every time he did this. Playford testified that despite the confined space, he never noticed R.M.'s body posture because he was always very focused on what was on the computer. Notably, Laffey and Schubert credibly testified that they observed R.M. leaning away from Playford when he leaned over R.M.s' back. Playford did not deny he could have stood elsewhere to look at the monitor, instead rationalized that if she had expressed her discomfort, he would have moved to the side. There is an additional question of how much training did R.M. require four months into the job that would necessitate Playford constantly at her desk either sitting with his feet up or standing over her? This point takes on further emphasis when considering the fact that Moore was R.M.'s main trainer.

Playford also testified that four or five times he called R.M. "cute" or "too cute," but he never called her "sweet." He would tell her she was "cute" or "too cute" if she did something he thought was funny or quirky such as putting her legs up underneath herself while sitting on a chair. R.M. on the other hand testified that Playford referred to her by one of those names daily. Schubert testified that on at least a dozen or more occasions, Playford referred to R.M. by one of those names in her and other co-worker's presence. Playford said he would never call anyone at work "sweet," or "sweetie" — yet he admitted that those terms were in his repertoire of endearments. He would not come out and say R.M. lied when she said that he had call her "sweet," instead reiterating that he never called her "sweet." This seems too coincidental on R.M.'s part to hit upon that exact endearment and for Schubert to have heard it, but regardless, it appears that Playford downplayed the number of times he referred to R.M. by one of those endearments.

Last but not least — Playford testified that he is not savvy on Snapchat, in fact doesn't know how to use it, therefore rarely uses it. Despite this fact, within a month of R.M. starting work, he asked to "friend" her on Snapchat because her name popped up

as having an account. I found his testimony patent and his rationale for his actions illogical given his admitted inability to navigate the application and rare usage.

With the above in mind, I **FIND** the following as **FACT**:

R.M. was hired in mid-July 2021 as a keyboard clerk. As a keyboarding clerk, her job responsibilities primarily centered on clerical work such as reviewing and/or inputting data into the computer system, copying, printing, filing, etc. Playford was her direct supervisor. Moore was the person who primarily trained her on her job tasks, however Playford was, to some extent, involved in her training. Her job responsibilities did not include picking up Township vehicles.

For the first two weeks on the job, Playford, called R.M. "newbie." He posted the name "newbie" on the office board instead of her real name. He called her "newbie" to "kid" her. He did not stop calling R.M. "newbie," until his direct supervisor, Laffey, told him to stop.

When he stopped calling her "newbie," he started telling her that she was "cute," "too cute" or "sweet." He would say this to her daily and was overheard by other staff members on several occasions. He did not refer to other individuals, men, or women, in the office by those names or in those terms.

When R.M. started working for the Township, Playford started spending an increased amount of time in R.M.'s and Moore's office. From the start, Playford would sit in a chair next to R.M. with his feet up on her desk. When he did this, R.M. could not exit her work area. When R.M. wanted to leave her work area, Playford would laughingly remove his legs from her desk to allow her passage out of her area. If Playford was sitting in the chair with his feet on the ground, R.M. would have to squeeze by him to get out of the space.

Several times a day Playford would stand behind R.M. and lean over her while she was sitting at her desk under the pretense of training her or looking something up. When he did this, R.M. was uncomfortable with his proximity and would lean away from him in

an effort to get him out of her personal space. This continued to occur, even after R.M. had been there for four months. Playford did not do this to Moore, only R.M. R.M.'s attempts to physically distance herself from Playford were observed by her co-workers and Playford's direct supervisor, Laffey.

On two occasions, Playford brought R.M. food — a McDonald's shake and Twizzlers. He did not bring anyone else these treats, just R.M. The fact that he brought R.M. treats was observed and even commented upon by R.M.'s coworkers. His attentions made R.M. feel uncomfortable and singled out.

About a month after she started, Playford sent her a "friend" request on Snapchat. She had never told him she had an account and was troubled by his request. She ignored the request. Two months after she started, while in the rest room, Playford banged on the door. When she came out of the bathroom, he asked her if he had scared her when he banged on the door. His actions again made R.M. uncomfortable — not only was he aware that she had gone to the bathroom, but he had gone out of his way to bang on the bathroom door and made a point of letting her know it was him.

Playford also observed R.M. when she was out with a friend at a local establishment. He sent her a drink. He did not approach her table or engage her in conversation that night, however the next day, he commented on her driving/parking skills. This was done in the presence of R.M.'s co-workers.

R.M. was again made to feel uncomfortable when Playford commented about a tattoo on her thigh. She had worn a dress that day and Playford was clearly looking at her thigh. He was sitting at the time at her desk, and then proceeded to tell her about his tattoos.

The last incident occurred on November 8, 2021, when Playford approached her from behind and put his hands on her shoulders and messaged them, then trailed his left hand down her shoulder and his right hand down her back before backing away. Playford's actions were observed by Schubert who also saw R.M.'s reaction to Playford putting his hands on her shoulders. The following day, upset and disturbed at what had

occurred the prior day when Playford put his hands on her shoulders and back, R.M. reported the incident to the building supervisor and subsequently to Laffey.

R.M. never disclosed how uncomfortable Playford's actions and/or comments made her feel or how inappropriate they were. She did not know how to handle the situation and the job was important for her family. There was nothing consensual on R.M.'s part. At no time did she solicit or welcome Playford's attention and/or physical contact.

Township employees receive a copy of the manual when they are hired. Playford received his in 2006. (R-4.) The policies in the manual, include among other things, Workplace Violence, General Anti-Harassment, Anti-Sexual Harassment, and Training/Education/Travel Reimbursement. (R-5.)

Every two years, the Township mandates managerial and supervisory training. Playford is a supervisor and required to attend the mandatory training sessions. On February 16, 2021, March 10, 2021, and May 18, 2021, he was notified that he was required to attend the training sessions and the dates offered. (R-7–9.) Part of the training dealt with sexual harassment and discrimination. Despite being given multiple notices of the training dates, Playford failed to attend the mandatory training.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A.

11A:1-2(b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2-2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

In the instant matter five charges were sustained against the appellant in the FNDA. Specifically:

> Charge 1: Violation of N.J.A.C. 4A:2-2.3(a)(1) — Incompetency, inefficiency, or failure to perform duties;
>
> Charge 2: Violation of N.J.A.C. 4A:2-2.3(a)(2) — Insubordination;
>
> Charge 3: Violation of N.J.A.C. 4A:2-2.3(a)(6) – Conduct unbecoming a public employee;
>
> Charge 4: Violation of N.J.A.C. 4A:2-2.3(a)(9) — Discrimination that affects equal employment opportunity, including sexual harassment;
>
> Charge 5: Violation of N.J.A.C. 4A:2-2.3(a)(12) — Other sufficient cause including but not limited to violation of Lower Township Policies — General anti-harassment, workplace

violence, anti-sexual harassment, continuing education procedure.

Charge 1: N.J.A.C. 4A:2-2.3(a)(1) — Incompetency, inefficiency, or failure to perform duties; Charge 2: N.J.A.C. 4A:2-2.3(a)(2) — Insubordination; Charge 5: N.J.A.C. 4A:2-2.3(a)12 — specifically Personnel Policies and Procedure Manual — continuing education procedure.

On the charge of "Incompetency, inefficiency, or failure to perform duties," "incompetency" has been defined as a "lack of the ability or qualifications necessary to perform the duties required of an individual . . . [and a] consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomaver v. Plainfield Police Dep't, OAL Dkt. No. CSV 09921-98, Initial Decision (December 1999), https://njlaw.rutgers.edu/collections/oal/html/initial/csv 9921-98_1,html, (internal citation omitted), adopted, Merit Sys. Bd. (January 24, 2000), https://njlaw.rutgers.edu/collections/oal/final/csv09921-98.pdf. "Inefficiency" has been defined as the "quality of being incapable or indisposed to do the things required" of an employee in a timely and satisfactory manner. Glenn v. Twp. of Irvington, 2005 N.J. AGEN LEXIS 35, *2, Initial Decision (February 25, 2005), adopted, Merit Sys. Bd. (May 23, 2005), https://njlaw.rutgers.edu/collections/oal/final/csv5051-03.pdf. "Failure to perform duties" has been defined as "failure to take an action reasonably anticipated from the duties of the position as set forth in the civil service regulations and job description." In re Fernandez, Camden County Bd. of Soc. Servs., 2014 N.J. AGEN LEXIS 229, *34 LEXIS 229, *34, adopted, Comm'r (June 18, 2014), https://njlaw.rutgers.edu/collections/oal/final/csv00652-12_html.2021 N.J CSC LEXIS 518, *30-31.

On the charge of "insubordination," the Civil Service Commission utilizes a more expansive definition of insubordination than a simple refusal to obey an order. In re Chaparro, Initial Decision (November 12, 2010), modified, CSC (March 18, 2011) (citing In re Stanziale, A-3492-00T5 (App. Div. April 11, 2002), <http://njlaw.rutgers.edu/collections/courts/> (appellant's conduct in which he refused to provide complete and accurate information when requested by a superior constituted insubordination)); In re Lyons, A-2488-07T2 (App. Div. April 26, 2010), <http://njlaw.rutgers.edu/collections/courts/>; In re Moreno, CSV 14037-09, Initial

Decision (June 10, 2010), modified, CSC (July 21, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Bell, CSV 4695-09, Initial Decision (May 12, 2010), modified, CSC (June 23, 2010), <http://njlaw.rutgers.edu/collections/oal/>; In re Pettiford, CSV 8804-07, Initial Decision (March 13, 2008), modified, Merit System Board (May 21, 2008), <http://njlaw.rutgers.edu/collections/oal/>. (Moreno, Bell, and Pettiford all concerning disrespect of a supervisor.)

On the charge of "other sufficient cause," there is no definition in the New Jersey Administrative Code for other sufficient cause; it is generally defined as all other offenses caused and derived as a result of all other charges against appellant. There have been cases when the charge of other sufficient cause has been dismissed when "[r]espondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 09122-99, Initial Decision (February 22, 2006), adopted, Merit System Bd., (April 5, 2006), https://njlaw.rutgers.edu/collections/oal/.

Appellant asserts that insufficient evidence was presented in this matter to sustain the charges of incompetency, inefficiency, or failure to perform duties as found under N.J.A.C. 4A:2-2.3(a)(1). No argument was put forth on the charge of insubordination other than he successfully completed the exact same training two years prior. He concedes however, that he failed to take the mandatory training in 2021.

Starting with the last point first — the fact that appellant took the mandatory training two years prior does not help his cause. If anything, it underscores his utter disregard for the importance of the training particularly in light of his position as a supervisor, and the charges put forth in the present matter.

I disagree with the appellant that there was insufficient evidence presented to support the charges of failure to perform duties and insubordination. It is undisputed that over a four-month period — from February 2021 through to May 2021, appellant, who is a supervisor, was repeatedly reminded of the mandatory training requirement. Notably, this training included the very issues for which he was charged. The excuse that he was too busy to sit at his own desk and at his own computer to take the training falls far short

of an explanation or excuse. He didn't follow-up with anyone to say he was too busy, or seek additional training dates that may be available, instead he just ignored the mandate.

What is particularly troublesome with his explanation of being too busy, is the fact that for almost four months, he had time to sit at R.M.'s desk with his feet up several times a day. While some of that time may have included fielding business calls, there appeared to be plenty of time to discuss favorite McDonald's shakes, candy preferences and tattoos. He also had time to play pranks such as pounding on the bathroom door while his direct report was using the facility. Appellant's attempts at deflection — e.g., the Township did not provide him any other notices past May 2021, are just that, deflection. Such an excuse demonstrates an inability to take responsibility for his own actions or lack thereof, by failing to attend the mandatory training.

For the foregoing reasons, I **CONCLUDE** that respondent has met its burden of proving the charges of violation of N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency, or failure to perform duties); violation of N.J.A.C. 4A:2-2.3(a)(2) (Insubordination); and violation of N.J.A.C. 4a:2-2.3(a)(12) (Other Sufficient Cause — specifically continuing education procedure).

Charge 3: Violation of N.J.A.C. 4A:2-2.3(a)(6) — Conduct Unbecoming a Public Employee

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). 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) (citation omitted).

With the exception of the November 8, 2021, incident, if one were to look at each event individually, there is a tenuous argument that appellant's actions did not rise to the level of conduct unbecoming. However, you cannot look at appellant's argument in a vacuum. Each action by the appellant builds upon the other and paints a picture of an individual whose conduct became progressively inappropriate and invasive. For the first two weeks on the job, appellant, R.M.'s direct supervisor, called her "newbie." He wrote "newbie" instead of her name on the white board so that everyone coming in could see it. This only stopped when appellant's direct supervisor told him to stop. Thereafter, instead of calling her "newbie," appellant started calling her "cute," "too cute," or "sweet" on a daily basis. This was said to R.M. individually and in front of other office workers. Appellant used these terms of endearment only when he spoke to R.M. — a female and his direct report. Simultaneous with this, appellant started getting into R.M.'s personal space. He would stand right behind her chair and lean in. When he did this, R.M. tried, as much as possible, to lean away from the appellant. This was observed by other office workers and on one occasion, right after she had first started, was asked if she was ok. Given the fact that she was new on the job and didn't know how to handle the situation, R.M. told the office worker she was ok. If he wasn't standing behind her, appellant was sitting at her desk with his feet up — effectively blocking her ingress and egress. Once again, in R.M.'s personal space. Appellant did not do this to any of his other direct reports or office staff, only R.M. By his own admission, he could have stood elsewhere if he needed to look at R.M.'s computer screen but chose not to.

Then there was the incident of banging on the bathroom door. Again, if viewed in a vacuum, while childish and wholly inappropriate in the workplace, particularly by a supervisor, one could chalk it up to poor judgment. But when viewed with the other ongoing incidents — invasion of personal space, pet names, bringing food items for R.M. and no one else, a pattern of inappropriate conduct emerges. This is further evidenced when appellant made a point of bringing up a tattoo that was on R.M.'s thigh one day when she wore a dress. Obviously, this meant that the appellant looked at R.M.s legs, but also the fact that he felt it was appropriate to point out the tattoo and then proceed to tell her about his tattoos.

The tipping point however was when the appellant approached R.M. from behind and placed his hands on her shoulders, massaged them and then trailed them down her back and arm. While the appellant testified that he had put his hands on her shoulders to tell her how grateful he was for her assistance that day, even at face value, this does not excuse or justify the inappropriateness of his unsolicited and inappropriate touching of another person in the workplace.

In Bound Brook Bd of Educ. v. Ciripompa, 228 N.J. 4; 153 A.3d 931; 2017 N.J. Lexis 227; 2017 WL 677015, the Court stated:

> [P]roving hostile work environment is not necessary to satisfy the burden of showing unbecoming conduct. A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment.

Appellant's conduct in this case was not only violative of the Township's policies regarding anti-harassment and discrimination, it was also a 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. Id. at 40, citing In re Emmons, 63 N.J. Super. 136, 164 A.2d 184 (App.Div.1960).

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to violation N.J.A.C. 4A:2-2.3(a)(6) — Conduct Unbecoming a Public Employee.

Charge 4: Violation of N.J.A.C. 4A:2-2.3(a)(9) — Discrimination that affects equal employment opportunity, including sexual harassment; and Charge 5: Violation of N.J.A.C.4A:2-2.3(a)(12) — specifically Personnel Policies and Procedure Manual — Workplace Violence, Anti-Sexual Harassment and Anti-Harassment.

Appellant was aware of the township manual because it was provided to him in May 2006 when he was first hired. According to the appellant, while he didn't look at it every day, he always kept it on his desk. (T1:170-15-17.) The manual provides, among

other things, the Township's policy on workplace violence, general anti-harassment and training/education. Every two years, the Township requires all supervisors to attend mandatory training on various subject among which includes sexual harassment. The last training took place in 2019 which appellant attended.

In pertinent part, the Township's "Workplace Violence Policy" states:

> The Township will not tolerate workplace violence. Violent acts, or threats made by an employee against another person or property are cause for immediate dismissal and will be fully prosecuted. This includes any violence or threats made on Township property, at Township events or under other circumstances that may negative affect the Township's ability to conduct business.
>
> Prohibited conduct includes:
>
> - . . . Committing acts motivated by, or related to, sexual harassment or domestic violence.

In pertinent part, the Township's General Anti-Harassment Policy states:

> It is the Township's policy to prohibit harassment of an employee by another employee . . . on the basis of actual or perceived sex . . . While it is not easy to define precisely what harassment is, it includes 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 written, printed or physical conduct . . . Violation of this harassment policy will subject employees to disciplinary action, up to and including immediate discharge.

The Township's Anti-Sexual Harassment Policy states in pertinent part:

> It is the Township's policy to prohibit sexual harassment of an employee by another employee, management representative . . . The Township prohibits sexual harassment from occurring in the workplace or at any other location at which Township sponsored activity takes place . . . The purpose of this policy is not to regulate personal morality or to encroach upon one's

> personal life, but to demonstrate a strong commitment to maintaining a workplace free of sexual harassment.
>
> Unwelcome sexual advances, requests for sexual favors and other verbal, physical or visual conduct of a sexual nature constitute harassment when:
>
> - Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
>
> - Submission to or rejection of such conduct by an individual is used as the basis for an employment decision affecting the individual; or
>
> - Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.
>
> . . . Sexual harassment may include unwanted sexual advances; offering employment benefits in exchange for sexual favors; visual conduct (leering, making sexual gestures, displaying of sexually suggestive objects or pictures, cartoons or posters); verbal sexual advances, propositions or requests; verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual; suggestive or obscene letters, caricatures or representations of persons using electronically or physically altered photos, drawings or images; notes or invitations; and/or physical conduct (touching, assault, impeding or blocking movements.)
>
> . . . Violation of this sexual harassment policy will subject employees to disciplinary action, up to and including immediate discharge.

Appellant asserts that the respondent has failed to establish a prima facie case of hostile work environment based on sexual harassment. Citing to Lehmann v. Toys R'Us, Inc., 132 N.J. 587 (1993), appellant claims that the respondent failed to demonstrate that the alleged conduct (1) would not have occurred but for the employee's gender; (2) that it was severe or pervasive enough; (3) to make a reasonable woman believe that; (4) the conditions of the employment are altered and the working environment is hostile or abusive. Id. at 603-04.

Similar to the arbitrator in Bound Brook, appellant imposes a sexual harassment analysis, when such an analysis is ill-suited in this context. The issue in Bound Brook, was whether an arbitrator in a tenure proceeding, exceeded his authority in determining that the board of education failed to prove that the defendant engaged in conduct unbecoming a tenured teacher. The Court found that the arbitrator had in fact exceeded his authority when he impermissibly converted the charge of unbecoming conduct into one of sexual harassment. The Court found that:

> "The Lehmann standards for hostile-work environment, sexual harassment claims arise in an entirely different context - under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10;5-1 to -42 . . . The New Jersey Law Against Discrimination (LAD), was enacted to protect not only the civil rights of individual aggrieved employees but to protect the public's strong interest in a discrimination-free workplace. [citation omitted] . . . In Lehman, we established the standard for a cause of action for hostile work environment sexual harassment claims under the LAD. . . [citation omitted.] That standard however is not implicated in a termination hearing under the TEHL.[2] None of the female employees affected by defendant's actions are suing the District-employer for turning a blind eye to sexual harassment in the workplace. The instant matter is not an employee versus-employer dispute that requires application of the Lehmann standard. Indeed, that standard distorts the evaluator method pertinent to this matter making it inappropriate for consideration here."
>
> [emphasis added], Id. at 17-18.

Similar to Bound Brook, the instant matter is not one of employee versus-employer. The issue here is whether appellant's actions were in violation of N.J.A.C. 4A:2-2.3(a)(9) (Discrimination that affects equal employment opportunity, including sexual harassment), and the Township's policies under N.J.A.C. 4A:2-2.3(a)12) (Other sufficient cause — specifically, the Township's policies as it relates to General Anti-Harassment, Workplace Violence, and Anti-Sexual Harassment).

Based upon appellant's actions as more fully set forth above, there is no question that appellant's unsolicited attention towards R.M., was isolated to her alone. His conduct

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included unwelcome jokes and teasing at her expense; repeated violation of her personal space; referring to R.M. as "cute," "too cute" or "sweet"; untoward attention and unwanted touching. His conduct constitutes sexual harassment and are in clear violation of the Township's policies on workplace, violence, general anti-harassment and anti-sexual harassment.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to violations of N.J.A.C. 4A:2-2.3(a)(9) (Discrimination that affects equal employment opportunity, including sexual harassment), and N.J.A.C.4A:2-2.3(a)(12) (Other Sufficient Cause — specifically Personnel Policies and Procedure Manual — Workplace Violence Policy, Anti-Sexual Harassment Policy, and Anti-Harassment Policy).

While I have determined that a Lehmann analysis is not applicable in the instant matter, for the sake of completeness, a brief analysis under Lehman arrives at the same conclusion.

The Court in Lehmann, established a four-prong test under which the plaintiffs must show that "the complained-of conduct: (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered, and the working environment is hostile or abusive." Lehmann at 603-04.

Sexual harassment cases are generally divided into two categories: quid pro quo sexual harassment and hostile work environment sexual harassment. Quid pro quo sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. It involves an implicit or explicit threat that if the employee does not accede to the sexual demands, he or she will lose his or her job, receive unfavorable performance reviews, be passed over for promotions, or suffer other adverse employment consequences. By contrast, hostile work environment sexual harassment occurs when an employer or fellow employees harass an employee because of his or her sex and create a hostile work environment for that employee. Lehmann at 601.

The first element requires the plaintiff to demonstrate by a preponderance of the evidence that she suffered discrimination because of her gender. Id. at 605. When the harassing conduct is sexual or sexist in nature, the but-for element is automatically satisfied. Id. If the conduct is not sex-based on its face, a plaintiff must make a prima facie showing that the conduct more likely than not, occurred because of her gender. Id. This may be achieved by showing that the harassing conduct was accompanied by harassment that was obviously sex-based or by showing that only women suffered from the harassing conduct. Ibid. Once a plaintiff establishes a prima facie case, she invokes a rebuttable presumption that the harassment occurred because of her gender. Id. at 605-606.

The second, third, and forth prongs of the test are interdependent although somewhat separable. The second requirement is that the allegedly harassing conduct be severe or pervasive. The Court adopted this disjunctive standard and rejected the conjunctive "regular and pervasive" one created in Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990). The Court was concerned that the "regular and pervasive" requirement would bar actions based on a single, extremely severe incident or perhaps those based on multiple but randomly occurring incidents. To this end, the Court stated that "[a]lthough it will be a rare and extreme case in which a single incident will be so severe that it would, from the perspective of a reasonable woman, make the working environment hostile, such a case is certainly possible." Lehmann, at 606-07. However, the Court pointed out that the fact patterns of many reported cases suggest that most claims are based on numerous incidents of harassment which suffice to state a claim when taken collectively, although they would not be severe enough if considered individually. Therefore, courts "must consider the cumulative effect of the various incidents," rather than considering each incident alone. Id.

The Court then considered the requisite level of harm that a plaintiff must show and concluded that the conduct complained of must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Id. at 608. The Court emphasized that it is the harassing conduct which must be severe or pervasive — not its effect on the plaintiff or the work environment. Id.

at 606 (citing Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)). Thus, a plaintiff need not demonstrate that she suffered serious psychological harm or an economic loss to have a viable claim. Id. at 609-10.

Finally, the Court turned to the reasonable woman standard. In analyzing whether the conduct in question is severe or pervasive enough to alter the conditions of employment and create a hostile work environment for a female plaintiff, the court "shall consider the question from the perspective of a reasonable woman." Id. at 611-12; see also Lynch v. New Deal Delivery Serv., Inc., 974 F. Supp. 441, 450-51 (D.N.J. 1997); Woods-Pirozzi v. Nabisco Foods, 290 N.J. Super. 252, 267 (App. Div. 1996); Baliko v. Stecker, 275 N.J. Super. 182, 190 (App. Div. 1994). The Court discussed its reasons for preferring an objective standard over a subjective one as follows:

> We choose an objective standard, first, because . . . [a]n objective reasonableness standard better focuses the court's attention on the nature and legality of the conduct rather than on the reaction of the individual plaintiff, which is more relevant to damages.
>
> Secondly, an objective standard provides flexibility. As we noted above, much conduct that would have been considered acceptable twenty or thirty years ago would be considered sexual harassment today. As community standards evolve, the standard of what a reasonable woman would consider harassment will also evolve. . .
>
> Thirdly, we choose an objective rather than a subjective viewpoint because the purpose of the LAD is to eliminate real discrimination and harassment. "It would not serve the goals of gender equality to credit a perspective that was pretextual or wholly idiosyncratic." [citation omitted.] A hypersensitive employee might have an idiosyncratic response to conduct that is not, objectively viewed, harassing. Allegations of such non-harassing conduct do not state a claim, even if the idiosyncratic plaintiff perceives her workplace to be hostile, because the complained-of conduct, objectively viewed, is not harassment, and the workplace, objectively viewed, is not hostile.
>
> Lehmann at 612-13.

The Lehmann court went on to state:

> Of course, the subjective reaction of the plaintiff and her individual injuries remain relevant to compensatory damages. However, a plaintiff's subjective response is not an element of a hostile work environment sexual harassment cause of action.
>
> We emphasize that only claims based on the idiosyncratic response of a hypersensitive plaintiff to conduct that is not objectively harassing would be barred by the reasonable woman standard. The category of reasonable women is diverse and includes both sensitive and tough people. A woman is not unreasonable merely because she falls toward the more sensitive side of the broad spectrum of reasonableness. Nor should "reasonable" be read as the opposite of "emotional." Perhaps because "reasonable" contains the word "reason," some have interpreted reasonableness as requiring a Vulcan-like rationality and absence of feeling. The reasonable woman standard should not be used to reject as unreasonable an emotional [*614] response to sexual harassment. On the contrary, such a response is normal and common. Only an idiosyncratic response of a hypersensitive plaintiff to conduct that a reasonable woman would not find harassing is excluded by the reasonable woman standard.
>
> Id. at 613.

With the above in mind and turning to the facts in the instant matter, it is clear that appellant's actions were limited to R.M. — a female. It is undisputed that the only person that he routinely called "cute," "too cute" or "sweet" was R.M. She is the only person he went out of his way to bring special treats. She is the only person whose personal space he repeatedly violated. She is also the only person whom he approached from behind and proceeded to massage/caress her shoulders. But for R.M.'s gender, I do not believe that the complained upon conduct would have occurred.

Appellant's conduct was also severe and pervasive enough to make a reasonable woman believe that the conditions of her employment were altered and the working environment hostile or abuse. From the start, appellant singled R.M. by calling her "newbie." This only changed after his supervisor told him to stop which he did. Instead,

he started referring to her as "cute," "too cute" or "sweet." This was said daily, and on several occasions, in front of other co-workers. Thereby making her feel singled out and uncomfortable.

Appellant also immediately, consistently, and continuously encroached on R.M.'s personal space. Multiple times a day, he would lean in and/or over R.M. on the premise that he was training her or looking something up on her computer. This occurred even after she had been there for four months. When he did this, R.M. would lean away from the appellant in an effort to distance herself from him. Appellant's actions and R.M.'s reactions were observed on several occasions by other staff members. Notably, R.M.'s primary trainer was Moore whose desk was in close proximity to R.M. Also of equal importance was the fact that appellant had his very own office with his very own computer down the hall. If he needed to take calls or look things up on the computer, he could have done so in the privacy of his own office.

On this last point, several times a day, appellant would sit at R.M.'s desk and prop his feet up which effectively blocked her ingress and egress. According to appellant, many times he was on his phone while sitting at her desk. As noted above, he had his own office where he could conduct business. To get by, R.M. either had to stand up to get him to move or squeeze by. In either event, in order to get in and out of her workspace, she was required to engage him to move.

All of appellant's conduct was inappropriate and left R.M. feeling uncomfortable and singled out. What ultimately led R.M. to report appellant's conduct was the incident of November 8, 2021, when he came up behind her, placed his hands on her shoulders and messaged them, then trailing one arm down her back and the other down her arm. This conduct was so inappropriate and upset her so much so that she reported the incident to his supervisor the following day.

While appellant asserts that this Tribunal should not rely upon R.M.'s subjective perspective, quite frankly, R.M.'s subjective perspective is quite in line with that of a reasonable woman as set forth in Lehmann. Given the totality of appellant's conduct, there is no question that he created a hostile work environment for R.M. which was in

direct violation of the Township's policies prohibiting hostile work environments and sexual harassment.

Accordingly, I **CONCLUDE** that even under the Lehmann standards, the respondent has met its burden as it relates to violations of N.J.A.C. 4A:2-2.3(a)(9) (Discrimination that affects equal employment opportunity, including sexual harassment), and N.J.A.C.4A:2-2.3(a)(12) (Other Sufficient Cause — specifically Personnel Policies and Procedure Manual — Workplace Violence Policy, Anti-Sexual Harassment Policy, and Anti-Harassment Policy).

PENALTY

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties, it is not.

> [A] principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> 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. [citations omitted]
>
> In re Herrmann, 192 N.J. 19, 33-4 (2007).

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. North Princeton Developmental Center, 96 N.J.A.R. 2d. (CSV) 463, 465.

Here, appellant has one prior verbal warning in March 2021, for inappropriately speaking to one of his employees. Other than that incident, he has no other disciplinary history.[3] (R-12.) While this fact is a consideration, it is outweighed by other considerations such as the nature of the charges, the degree of misconduct, and the principals behind the Township's policies that prohibit a hostile work environment and sexual harassment in the workplace environment.

As more fully set forth above, appellant's conduct in this matter was nothing short of inexcusable. It is apparent that the appellant thought nothing of his actions, starting with his failure to take the mandatory training and rationale why he needed to repeatedly encroach on R.M.'s personal space, to referring to her in demeaning terms and inappropriately touching her. Such actions should not and cannot be condoned, or tolerated, in the workplace — particularly from someone in appellant's supervisory position.

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

[3] There appears to have been other alleged professional licensure violations however the issue was resolved via a settlement agreement in 2018. (R-13.)

ORDER

For the foregoing reasons, it is hereby **ORDERED** that appellant's appeal is **DENIED**, and that the Final Notice of Disciplinary Action, sustaining the charges of violations of N.J.A.C. 4A:2-2.3(a)(1) (Incompetency, inefficiency, or failure to perform duties), N.J.A.C. 4A:2-2.3(a)(2) (Insubordination), N.J.A.C. 4A:2-2.3(a)(6) (Conduct unbecoming a public employee), N.J.A.C. 4A:2-2.3(a)(9) (Discrimination that affects equal employment opportunity, including sexual harassment) and violation of N.J.A.C. 4A:2-2.3(a)(12) (Other sufficient cause including but not limited to violation of Lower Township Policies — General anti-harassment, workplace violence, anti-sexual harassment, continuing education procedure) is **AFFIRMED**.

It is further **ORDERED** that the Final Notice of Disciplinary Action dated February 14, 2022, providing for a penalty of a five-day suspension and removal , 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.

January 6, 2023
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency:

Date Mailed to Parties:

TBH/gd

APPENDIX

WITNESSES

For appellant

Gary Playford

For respondent

R.M.

Michael Laffey

Lisa Schubert

EXHIBITS

For appellant

None

For respondent

R-1 FNDA

R-2 Not in Evidence

R-3 Construction Official Job Description

R-4 Receipt of Personnel Policies and Procedures Manual

R-5 Pertinent parts of Lower Township Personnel Policy Manuel

R-6 Camera footage from November 8, 2021

R-7 Email notification of training, dated February 16, 2021

R-8 Email notification of training, dated March 10, 2021

R-9 Email notification of training, dated May 18, 2021

R-10 Snapchat screen shot

R-11 Keyboard Clerk job description

R-12 Lower Township Discipline for Gary Playford*

R-13 DCA Discipline Records for Gary Playford*

R-14 Still photo from November 8, 2021

R-15 Still photo from November 8, 2021

R-16 Still photo from November 8, 2021
R-17 Still photo from November 8, 2021
R-18 Still photo from November 8, 2021
R-19 Still photo from November 8, 2021
R-20 Still photo from November 8, 2021
R-21 Still photo from November 8, 2021

*Record held in reserve pending the Tribunal's initial determination on whether the charges would be upheld.