In the Matter of Raymond Smith, Monmouth County
CSC Docket No. 2010-3437
OAL Docket No. CSV 6605-10
(Civil Service Commission, decided February 22, 2012)

The appeal of Raymond Smith, a Senior Carpenter with Monmouth County, of his removal, effective April 23, 2010, on charges, was heard by Administrative Law Judge Ronald W. Reba (ALJ), who rendered his initial decision on January 17, 2012. Exceptions and cross exceptions were filed on behalf of the appointing authority and the appellant.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on February 22, 2012, accepted and adopted the ALJ's Findings of Fact, but did not adopt the ALJ's recommendation to modify the appellant's removal to a six-month suspension. Rather, the Commission upheld the removal.

DISCUSSION

The appellant was removed, effective April 23, 2010, on charges of conduct unbecoming a public employee, discrimination that affects equal employment opportunity, including sexual harassment (*N.J.A.C.* 4A:2-2.3(a)9), other sufficient cause, and violations of the Monmouth County Policy regarding workplace etiquette, sexual and other unlawful harassment, employee conduct and work rules, workplace violence prevention, and prohibiting workplace discrimination and harassment. Specifically, the appointing authority asserted that while on a job site, the appellant used racial slurs, stating that "This is like we're all working like niggers" and told Ryan Abbott, a Carpenter, that "I forgot who I was working with. I say it all the time to Joey he's a guinea wop and he doesn't get offended." It was also asserted that, after Abbott reported the appellant to their supervisor, the appellant called Abbott a "fucking whining pussy" and a "fucking asshole." The appellant also told Abbott to meet him after work and said, "When I get done with you you're going to take a lot of sick time! . . . I didn't say anything to you! Stay out of my business! I wasn't talking to you. I didn't call you a nigger! I called Joe a nigger and guinea wop!" Upon the appellant's appeal to the Commission, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

As set forth in the initial decision, the ALJ found that on February 12, 2010, the appellant and three co-workers, including Abbott, were assigned to shovel cement at one of the County's museums. While shoveling the cement, the appellant exclaimed that they were working like a "bunch of niggers." Thereafter, Abbott reported the appellant to their supervisor, who warned the appellant against using such language. After leaving the supervisor's office, the appellant confronted

Abbott, calling him a "pussy." The appellant wanted to meet after work and told Abbott that he should expect to use sick days, insinuating that Abbott was going to be injured. Abbott reported this second incident and an investigation followed, which substantiated the incidents. The appellant testified at OAL that he did in fact say the "N" word but that it was just a "foolish outburst" in reaction to getting some cement in his eye. He believed that Abbott was conspiring to get him fired. On cross examination, the appellant indicated that he would not use that type of language again. However, he could not guarantee that he would not use improper language under times of stress. Moreover, the ALJ found that there was a prior incident in 2008 where the appellant referred to Abbott as a "nigger slave." The appellant received a five-day suspension for his conduct and the personnel director informed him by letter that Monmouth County has a "zero tolerance" for the use of the "N" word under any circumstances regardless of the race of the employee uttering the word. It is noted that both the appellant and Abbott are Caucasians. However, the ALJ indicated that, upon his review of the policies of Monmouth County, he could not find "zero tolerance" language stating that the use of the "N" word would automatically subject an employee to termination. He construed the letter from the personnel director as "merely serv[ing] as a warning to Mr. Smith that Monmouth County would not put up with any type of improper language in the workplace, discriminatory or otherwise." Based on the foregoing, the ALJ concluded that the appellant's conduct constituted conduct unbecoming a public employee and upheld that charge.

However, with regard to the penalty, the ALJ evaluated the foregoing findings and determined that, although the appellant's conduct was objectionable, he did not direct his outburst to any individual who belonged to a protected class. Moreover, the ALJ reviewed prior disciplinary cases "where the facts are at least as egregious as those in the immediate matter" and the penalty of removal was modified to a suspension. Additionally, the ALJ stated that the appellant did not have a disciplinary history except for a prior five-day suspension for using the "N" word and he performed his job for a number of years without a problem. It is noted that personnel records indicate that the appellant was appointed by Monmouth County on March 20, 2006. Thus, the ALJ concluded that removal was excessive and that a six-month suspension was a more appropriate penalty. Furthermore, he suggested that the appellant undergo "whatever evaluation is necessary regarding his ability to perform the duties of his position before returning to work." The ALJ also recommended that the appellant waive back pay, if the appointing authority allowed, and undergo anger-management therapy.

In his exceptions, the appellant contends that the ALJ did not consider witness testimony that he did not engage in a physical confrontation with Abbott. He states that he and Abbott maintained a reasonable distance from each other, which demonstrates his state of mind and absence of any intent to harm Abbott. Further, the appellant submits that he testified that there were infrequent

"combative moments" with Abbott despite working with him for four years. However, the ALJ failed to take that into account. Moreover, the ALJ did not consider that a witness was uncertain as to why Abbott was offended or upset by the appellant's statement and Abbott is not a member of a protected class. The appellant also asserts that the ALJ omitted the testimony that he had no intent to offend or insult Abbott. Additionally, he submits that there was testimony that a co-worker used the "N" word but only received a verbal warning and Abbott did not complain about that co-worker. Furthermore, the appellant states that a co-worker assaulted him in 2009 and the parties in that matter were only directed to attend counseling. In contrast, the appellant is being removed for much less in this case. Moreover, the appellant argues that he should not be compelled to waive back pay, except for the period of his six-month suspension, as it would be at odds with the back pay rules. Thus, the appellant requests that the ALJ's recommendation to waive back pay not be adopted and he be reinstated.

In its exceptions, the appointing authority argues that the ALJ has overlooked the fact that the appellant "has been completely unrepentant about his conduct." It emphasizes that the appellant testified that if he is permitted to return to work, he may use "that type of language" again. The appointing authority contends that the ALJ did not consider whether it would be in the best interest of the public if the appellant returns to the Park System. There would always be a question as to whether the appellant can be trusted with co-workers of various racial backgrounds. The appointing authority also stresses that the "N" word may be the most offensive racial slur in the English language, as it expresses racial hatred and bigotry. In addition, it maintains that the cases cited by the ALJ did not involve employees who had made racial slurs, especially on multiple occasions, as in the appellant's case. Further, it states that most of the employees in the cases cited by the ALJ were long-term employees. The appellant in the present matter only has a few years of service. Moreover, the appointing authority argues that the appellant's use of the term "pussy" while threatening Abbott that he would need to use sick time is sufficient, standing alone, to impose severe discipline. Additionally, the appointing authority maintains that it is irrelevant whether an African American heard the racial slur. Therefore, it contends that the appellant's use of a racial slur, his prior discipline for the same conduct, and his verbal assault of Abbott provide ample grounds for his removal.

Further, in its cross exceptions, the appointing authority submits that the issue is not whether the appellant had the intent to inflict injury on Abbott. Rather, the issue is whether a reasonable person would have taken the appellant's statements as verbal threats. The appointing authority contends that the ALJ reasonably determined that the statements were threats. Moreover, it agrees with

the ALJ that the appellant should waive back pay if he is reinstated given the egregiousness of his conduct.[1]

Upon its *de novo* review, the Commission agrees with the ALJ's Findings of Fact. It is undisputed that the appellant used the "N" word and afterward confronted Abbott for reporting him. The appellant attempts to mitigate his actions by testifying that it was a "foolish outburst" and argues that he did not direct the word to a member of a protected class. However, regardless of Abbott's race, the term is clearly a derogatory racial reference and in violation of *N.J.A.C.* 4A:2-2.3(a)9. *See e.g., In the Matter of George Gibbs* (MSB, decided January 12, 1999) (Despite the fact that there was no evidence that an African American heard the appellant's use of the "N" word, the ALJ concluded that the appellant's remark constituted conduct unbecoming a public employee and his use of a racially derogatory term was in contravention with *N.J.A.C.* 4A:2-2.3(a)9). Moreover, *N.J.A.C.* 4A:7-1.1(g) provides that in local service, an appointing authority may establish policies and procedures for processing discrimination complaints. In the present case, as indicated in the appointing authority's discrimination policy, it is committed to providing a work environment free from all forms of discrimination. The appellant has violated this policy with his use of the "N" word and was well aware that the appointing authority has "zero tolerance" for using this derogatory term under any circumstances. The appellant was advised of the latter in 2008 when he previously used the "N" word. Furthermore, contrary to the appellant's arguments, he threatened Abbott with physical harm. His statements cannot be construed as anything else but a threat of physical injury. It makes no difference whether the appellant actually would have gone through with his threat. Under these circumstances, the appellant exhibited unbecoming conduct and he is guilty of all the charges levied against him.

Regarding the penalty, the ALJ commented that the appointing authority's policies did not contain "zero tolerance" language and automatic removal for the use of the "N" word. While the ALJ is correct in this regard, it is clear that the appointing authority's discrimination policy, which aims to provide a work environment free from all forms of discrimination, prohibits the type of language used by the appellant. Further, "zero tolerance" ordinarily refers to an agency's right to take either disciplinary action, if appropriate, or other corrective action, to address *any* unacceptable conduct that violates a certain policy. It does not necessarily mean that an employee would be removed for a single prohibited act, but it does mean that the employee's conduct will not be tolerated. However, in this

[1] The appellant challenged the timeliness of the appointing authority's cross exceptions. However, the appointing authority indicates that it received the appellant's exceptions on January 30, 2012, which the appellant does not dispute. Thus, the appointing authority's cross exceptions were due on February 6, 2012, which is consistent with the computation of time as set forth in *N.J.A.C.* 1:1-1.4. Therefore, the appointing authority's cross exceptions, which were filed on February 6, 2012, were within the required five-day time period of *N.J.A.C.* 1:1-18.4(d) and have been considered.

case, the only appropriate penalty for the appellant is removal. In this regard, the Commission's review of the penalty is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In the instant matter, the appellant was employed for only approximately four years and was already previously disciplined for using the "N" word. As noted above, the fact that no African Americans were in the group when the appellant made the comment does not serve to mitigate his conduct. Furthermore, the appellant testified that he could not guarantee that he would not use improper language at work under times of stress. The appellant clearly has not learned his lesson nor does he appear to be remorseful for what he said. Moreover, the appellant's verbal threats to Abbott cannot be tolerated. He takes a cavalier attitude toward the situation, arguing that he did not actually intend to harm Abbott when he threatened him. However, this only further shows that the appellant has no remorse over what he did. Consequently, the appellant's record and the seriousness of his conduct reveal no mitigating circumstance. Accordingly, the removal of the appellant was proper.

As a final note, the ALJ indicated that the appellant should consider waiving back pay if allowed by the appointing authority. It is not clear why the ALJ made this suggestion. Nonetheless, if there is no evidence of a delay in the administrative proceedings caused by the employee, his or her back pay award cannot be denied other than for the period of suspension. *See Steinel v. City of Jersey City*, 193 *N.J. Super.* 629 (App. Div. 1984), *aff'd*, 99 *N.J.* 1 (1985). Furthermore, a denial of back pay beyond a six-month period would be inconsistent with the statutory provision of *N.J.S.A.* 11A:2-20, which limits suspensions to six months. Therefore, it was not proper for the ALJ to suggest that the appellant waive back pay after the proposed six-month suspension.

ORDER

The Commission finds that the appointing authority's action in removing the appellant was justified. The Commission, therefore, affirms that action and dismisses the appeal of Raymond Smith.

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