STATE OF NEW JERSEY

In the Matter of Marybeth Harrell, Camden County, Board of Social Services	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2022-235 OAL Docket No. CSV 08299-21	

ISSUED: MARCH 15, 2023

The appeal of Marybeth Harrell, Clerk 2, Camden County Board of Social Services, of her removal, effective July 22, 2021, on charges, was heard by Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on February 13, 2023. Exceptions were filed by the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, including a thorough review of the exceptions, the Civil Service Commission (Commission), at its meeting on March 15, 2023, adopted the ALJ's Findings of Facts and Conclusion and his recommendation to uphold the removal.

Upon its *de novo* review of the ALJ's thorough and well-reasoned initial decision as well as the entire record, including the exceptions filed by the appellant, the Commission agrees with the ALJ's determinations regarding the charges, which were substantially based on his assessment of the credibility of the witnesses. In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by

sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri u. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appellant are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. Specifically, the ALJ found the appellant "offered inaccurate, self-serving testimony. She contradicted herself throughout her testimony." Ultimately, the ALJ "found that appellant's testimony completely lacked credibility." The Commission finds nothing in the record to question this determination or the findings and conclusions made therefrom.

Similar to its review of the underlying charges, the Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown,* 191 *N.J.* 474 (2007).

In this matter, the Commission agrees with the ALJ's recommendation to uphold the removal. The record indicates the appellant had three prior minor disciplines since 2014, and a major discipline, a six working day suspension, in 2019, all for attendance-related infractions. Given that some of the current infractions were also attendance-related, when coupled with the other serious infractions committed by the appellant in this matter, removal is warranted as it is neither disproportionate to the offenses committed nor shocking to the conscious.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore upholds that action and dismisses the appeal of Marybeth Harrell.

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 15TH DAY OF MARCH, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 08299-21
AGENCY DKT. NO. 2022-235

IN THE MATTER OF MARYBETH HARRELL, CAMDEN COUNTY BOARD OF SOCIAL SERVICES.

Marybeth Harrell, appellant, pro se, and **Stephen Johnson**, President, CWA Local 1084, pursuant to N.J.A.C.1:1-5.4(6)

Charles Gavin Opperman, Esq., for respondent

Record Closed: October 21, 2022 Decided: February 13, 2023

BEFORE **JEFFREY N. RABIN,** ALJ:

STATEMENT OF THE CASE

Appellant, Marybeth Harrell (Harrell or appellant), an employee of respondent, the Camden County Board of Social Services (Camden or respondent) appeals from the determination of respondent that she be removed for insubordination, discrimination, harassment, conduct unbecoming a public employee, and other sufficient cause under N.J.A.C. 4A:2-2.3, N.J.A.C. 4A:2-2.5(a)(1), as well as violations of respondent's Anti-discrimination and Anti-Harassment Policy #7.5.

PROCEDURAL HISTORY

Respondent served appellant with the required 31-A notice on April 22, 2021, pursuant to N.J.A.C. 4A:2-2.5(a)(1), seeking the immediate suspension and removal of appellant. Appellant was also provided with written notice of her rights to present her story and defenses as required under Cleveland Board of Education v. Loudermill, et al. 470 U.S. 532 (1985) ("Loudermill Notice"). After a first adjournment of a disciplinary hearing, appellant requested a second adjournment, which respondent did not agree to. The disciplinary hearing was held on July 22, 2021, which appellant failed to appear for. As such, the requested discipline under the 31-A was entered by default and on July 22, 2021, respondent issued a Final Notice of Disciplinary Action (FNDA) sustaining the charges and the removal of appellant from her position.

Appellant filed a timely notice of appeal, and the Division of Appeals and Regulatory Affairs of the Civil Service Commission transmitted the case to the Office of Administrative Law, where it was filed on October 5, 2021. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. After numerous delays, a hearing was held on August 4, 2022, via Zoom due to the ongoing Covid-19 pandemic. After written summations were received from the parties, the record closed on October 21, 2022, and the date for issuance of this Initial Decision was extended until January 19, 2023, and again to March 6, 2023.

FACTUAL DISCUSSION

Testimony for respondents

Lizzette Estevez was appellant's supervisor. Appellant did clerical work, such as collecting caseloads from the first floor and delivering them to the second and third floors. At 9:15 a.m. on March 26, 2021 (Incident date), Estevez asked appellant to go upstairs for a work assignment. Appellant did not go upstairs and did not perform the assignment, stating that the information technology (IT) representative needed her, and that she would do the work at 10:00 a.m. Estevez said appellant did not need to be

there for the IT person, but appellant then walked out to take her fifteen-minute morning break; appellant did not return from her break for more than one hour. Later, appellant went to Estevez's office, said she did not need to be there. She referred to Ben the IT person several times as the "oriental guy." Estevez asked her to refer to the IT person as Ben but appellant continued sating "oriental guy." Estevez felt offended by appellant's use of the term "oriental guy," felt she was being harassed by appellant, and that appellant was acting in a confrontational and aggressive manner towards her. Appellant, who had a history of insubordination, never did the assignment that day, and Estevez reported appellant to her supervisor, Christine Colbert, via email. (R-Exhibit B). In the past, appellant also had excuses for not getting her work done. Appellant did not always follow instructions or adhere to the chain of command. Appellant had created the file tracking spreadsheet system used then, but they have since changed the system. Estevez was the only person who heard appellant use the word "oriental."

Testimony for appellant

Marybeth Harrell testified on her own behalf. She had been a clerk for nine years, inputting intake files. She created the file tracking spreadsheet system used then. On the Incident date, she arrived at work at 8:53 a.m. and spent approximately thirty-five minutes working on Kronos timesheets. Estevez asked her to go up to the third floor; appellant responded by asking if she could finish with Kronos, and Estevez said yes.

Ben the IT guy came to her first-floor desk to swap out her computer. Ben needed appellant's password to start her new computer. She asked to finish with Kronos, and Ben said he would come back in fifteen minutes, at approximately 9:38 a.m. Estevez then sent appellant a message saying she needed to see her, and she then went up to the third floor. She started working on mail, but then suffered an anxiety attack; she said she was going on break, but then left work at 11:30 a.m. Nobody else covered her work while she was out sick or on vacation.

Her work shift was 8:30 a.m. until 4:30 p.m. She clocked in on time on the Incident date. Her work records on Kronos were shown in R-Exhibit F. She had a

series of unpaid absences plus Family Medical Leave (FMLA) from September 17 through 20, 2019. She used FMLA because she was the primary caregiver for her sick mother, although her mother did not live with her. Her mother had no medical needs, but she was ninety-nine years old. Appellant's use of FMLA was to deal with her mother's broken femur in 2016 and asthma in 2020.

Respondent hired Desiree to help with appellant's workload, to ensure that work was not left undone or incomplete.

Appellant had been cited for time and attendance violations in the past. She had "sporadic" attendance in 2020, especially in January 2020. She tested positive for Covid-19 on January 25, 2020, although R-Exhibit F, her Kronos timesheets, indicated she tested positive on January 27, 2020. Appellant could not explain why she had attendance issues January 1 through March 18, 2020, but she was not at work every day, some days using FMLA. She could not recall when she returned to work, but when she did she was not part of the new Covid-19 hybrid scheduling. She used 105 hours of sick time in 2020. She could not recall how many hours she worked in a year, but if returned to her job she would be able to work the required minimum of thirty-two hours per week. R-Exhibit F indicated she averaged 23.97 hours per week in 2020.

Kronos indicated she was on "discretionary leave" from September 17, 2020, through November 30, 2020, but she did not recall any discretionary leave. She had been in the office between August 4, 2020, and December 4, 2020, but later stated she had not been at work from August 5, 2020, through December 3, 2020.

She stated she tested positive for Covid-19 on January 29, 2021 (not January 25 or 27), and that she was at work January 1, 2021, through January 19, 2021, as well as January 21, 2021, through January 28, 2021. She later stated she was out of work on sick leave on January 22, 2021.

Appellant was out of the office February 5, 2021, through February 18, 2021, then went on a scheduled vacation February 22, 2021, through February 26, 2021. She

said she worked on March 1 and 2, 2021, but Kronos indicated she took sick time those days.

Appellant testified again regarding the Incident date: she arrived at work at 8:55 a.m., after calling to tell Estevez that she was going to be late. Kronos indicated that she punched in at 8:37 a.m. that day, but appellant says that was wrong; she arrived late because she had been helping her mother.

She met Ben at approximately 9:38 a.m. She was able to "remember everything that happened on March 26." Estevez had asked her the day before to update Kronos, so she started working on Kronos. As usual, she had trouble entering time into Kronos that day. That day she told Estevez she would go to the third floor as soon as she finished Kronos. She would have just left her computer password on her desk for the IT guy, but that was against County rules. She normally took a break from 9:45 a.m. until 10:00 a.m., but on the Incident date took only a five-minute smoke break.

Ben said at 9:38 a.m. that he would allow her to finish with Kronos then he would return to swap out her computer; then appellant went for her break. She did not give Ben her password at 9:38 a.m.

When she went to see Estevez, she referred to Ben as "the IT guy," because Estevez kept asking what his name was and she could not recall it. She never used the term "oriental." Estevez had actually been "baiting" her by telling her not to say oriental.

Appellant had to go under a doctor's care due to the Incident and used sick time from March 29 through April 8, 2021. She returned to work on April 9, the day before she was suspended.

She missed the disciplinary hearing of July 22, 2021, because she did not receive notice of the rescheduled date until two business days prior, and then her brother died.

Appellant had access to her work email from home after her suspension, but never went into it, and that is why she never received the PNDA emailed to her on April 22, 2021. But she did have an email exchange with an Esther Rosado on June 23, 2021, using her work email. She could not recall if her union, which had been representing her since April 22, 2021, ever gave her notice of the July 22, 2021, disciplinary hearing. However, as confirmed in R-Exhibit C, page 13, appellant sent an email dated July 16, 2021, to Christine Colbert, confirming she was aware of the July 22, 2021, disciplinary hearing, and stating she needed to reschedule because she needed to visit a relative. She did not write that her brother was ill.

Rebuttal testimony for respondent

Benedicto Domaoal was a Data Processing Technician in the IT department, acting as a computer troubleshooter. On the Incident date he was assigned to replace appellant's old computer with a new one. He met with appellant at 10:30 a.m.; he knows the time because of the date stamp from when he transferred appellant's files. He asked for her permission to access her files; she gave her permission and gave him her password, and he input it. The new computer setup took five minutes, which he did while she waited; he told appellant she did not have to wait there but could go about her work, but she stayed there. He did not need her password for the setup, but would need it later for the transfer of her files. He said he would come back in an hour to do the file transfer; when he returned an hour later, she was not there, so he just finished the transfer.

FINDINGS OF FACT

Credibility:

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66

N.J.Super. 1 (App. Div.1961). A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Further, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), cert. denied, 10 N.J. 316 (1952). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

Lizzette Estevez answered clearly and in a straightforward manner. She said what she knew and was clear when she did not know an answer. She was able to answer questions after documents refreshed her recollection. I found her to be a credible and believable witness.

Benedicto Domaoal answered clearly and succinctly, and I found him to be an honest, credible witness.

Marybeth Harrell offered inaccurate, self-serving testimony. She continually contradicted herself throughout her testimony. She failed to address her conversation with Estevez on the morning of the Incident date during direct examination, which was the basis of her termination, until questioned about it on cross-examination. When appellant finally denied saying "oriental," she then claimed that Estevez had been bating

her by telling her not to say "oriental." Her recollection of her conversations with Estevez on the Incident date did not match Estevez's recollection.

Appellant testified that she took only a five-minute smoke break on the morning of the Incident date, not her full fifteen-minute break, when in fact she disappeared from her desk for over an hour.

On direct examination appellant introduced her "anxiety" defense, but produced no medical testimony or report to confirm she had anxiety issues. She was unable to recall details regarding the Incident date or her work history. At one point she testified that she came into work on time on the Incident date, despite the Kronos records indicating she clocked in at 8:37 a.m. for her 8:30 a.m. shift, which was seven minutes late; but later appellant testified that she had called Estevez to tell her she would be late that morning, because she had to help her mother, and actually arrived at 8:55 a.m. She later attempted to excuse her attendance history and the discrepancies in her testimony by asserting, without other proof, that the Kronos time records system was inaccurate.

At one point appellant testified that there was nobody who ever covered her work when she was out. But later she testified that a woman named Desiree helped with her workload. Instead of explaining her numerous time and attendance violations, she merely claimed that the department had been "targeting her."

Appellant testified that she was at work January 1, 2021, through January 19, 2021, as well as January 21, 2021, through January 28, 2021, but she later stated she was out of work on sick leave on January 22, 2021. But then appellant gave various contradictory answers regarding having contracted Covid-19, stating that she was absent January 1 through March 18, 2020, which absences were due to Covid-19. However, she stated that she tested positive on January 25, 2020, and later, that she had tested positive on January 27, 2020, then January 29, 2020; these dates were weeks after she began her period of unexplained absences. Further, it was submitted that the first Covid-19 diagnosis in New Jersey was March 4, 2020, at which point appellant admitted she did not know why she was out of work for those three months,

but she had been available to work. That statement was further contradicted by evidence that she had actually used some FMLA during that period.

Appellant claimed to have been in the office working on August 4, 2020, through December 4, 2020. Then when asked where she had been for August 5, 2020, through December 3, 2020, she stated that she had not been in the office working, contradicting her previous statement.

She claimed she was her elderly mother's primary caregiver, but later admitted that her mother did not live with her, and that her mother had no medical needs. Later, in explaining why she signed up for FMLA, she testified that her mother had a broken femur during her 2016 FMLA period and asthma during the 2020 FMLA period. She did not explain why she used FMLA in 2019. This also contradicted her testimony that she used FMLA in January 2020 while she had Covid-19.

At one point appellant stated she worked 356 hours in 2019, which for a fifty-two-week work year totaled less than seven hours of work per week. Kronos indicated she worked 1,198.5 hours in 2020, which was twenty-four hours per work week. She then stated she was not sure whether she would be able to work a thirty-two-hour work week, as required. At that point in cross-examination, appellant grew tired of answering questions and began immediately and repeatedly saying, "Not sure."

Finally, appellant testified that she had access to her work email after she was suspended from her position but that she never went into her work email, which was why she never received the Preliminary Notice of Disciplinary Action (PNDA) dated April 22, 2021, which was emailed to her work email address. Yet the records indicated that appellant had been using her work email. (R-Exhibit C, page 11.) Additionally, her union began representing her on April 22, 2021, meaning she must have had notice of the PNDA. She also testified that she had only been given two days' notice of her disciplinary hearing scheduled for July 22, 2021; yet on July 16, 2021, six days before the hearing, appellant emailed Christine Colbert, Estevez's supervisor, to tell her that she knew of the July 21 hearing date but that she needed to visit a relative and needed

to reschedule the hearing a second time. She also failed to mention that her brother was ill.

I ultimately found that appellant's testimony completely lacked credibility.

Therefore, after reading the testimony and reviewing the evidence, I **FIND,** by a preponderance of the credible evidence, the following **FACTS**:

Appellant's job description was the performance of clerical work, primarily collecting caseloads from the first floor and delivering them to the second and third floors; appellant had a history of insubordination towards Estevez; appellant had been cited for time and attendance violations in the past, and had a sporadic attendance history, with many absences that she could not explain or where she disagreed with what had been reported in the Kronos record-keeping program; at 9:15 a.m. on March 26, 2021 (the "Incident date"), appellant's supervisor, Lizzette Estevez, asked appellant to go upstairs for a work assignment; appellant did not go upstairs and did not perform the assignment, stating that the IT representative needed her, and that she would do the work at 10 a.m.; appellant walked out of the meeting with Estevez and went to take her fifteen-minute morning break, but took a break lasting more than one hour; appellant did not meet with Ben Domaoal the IT person until 10:30 a.m., who did not need her to stay with him while he replaced her old computer for a new computer, and who told appellant that she could just go about her work day; appellant did not return to working but waited with Ben while he replaced her computer, which took five minutes; Ben would only need appellant to enter her computer password later when he was ready to transfer her files onto her new computer; appellant then went to meet again with Estevez; while meeting with Estevez, appellant several times referred to Domaoal as the "oriental guy"; Estevez asked appellant to refer to the IT person as Ben but appellant continued saying "oriental guy"; Estevez felt offended by appellant's use of the term "oriental guy"; Estevez felt she was being harassed by appellant, and that appellant was acting in a confrontational and aggressive manner towards her; appellant never did the assignment that day, and Estevez reported appellant to her supervisor, Christine Colbert, via email; when Ben returned later to transfer appellant's files, she was no longer in the office.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The issue is whether the respondent acted properly in terminating appellant's employment.

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6 and N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his or her duties. N.J.S.A. 1 1A:1-2(a). A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline, including removal. N.J.S.A. 1 1A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2. The general causes for such discipline are set forth in N.J.A.C. 4A:2- 2.3(a).

Respondent Camden County Board of Social Services brought a major disciplinary action against appellant due to her actions on the Incident date, citing her for insubordination, discrimination, harassment, conduct unbecoming an employee, and other sufficient cause under N.J.A.C. 4A:2-2.3, N.J.A.C. 4A:2-2.5(a)(1), as well violations of the respondent's Anti-discrimination and Anti-Harassment Policy #7.5. Appellant's filing of an appeal required the OAL to conduct a hearing de novo to determine the appellant's guilt or innocence as well as the appropriate penalty, if the charges were sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Respondent had the burden of proof to establish by a fair preponderance of the credible evidence that appellant was guilty of the charges. Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is found to preponderate if it establishes the reasonable probability of the fact alleged and generates a reliable belief that the tendered hypothesis, in all

human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. 487 (1962).

N.J.A.C. 4A:2-2.5(a) provides:

> **(a)** An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:**1.** An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. An employee who has been appointed on or after September 1, 2011, who does not have a principal residence in New Jersey and who has not received a residency exemption in accordance with P.L. 2011, c. 70, within one year of appointment, is defined by that statute as illegally holding and unqualified for employment, and therefore subject to immediate suspension as unfit for duty. However, a Preliminary Notice of Disciplinary Action with opportunity for a hearing must be served in person or by certified mail within five days following the immediate suspension.

N.J.A.C. 4A:2-2.3(a) provides:

> **(a)** An employee may be subject to discipline for: **1.** Incompetency, inefficiency or failure to perform duties; **2.** Insubordination; **3.** Inability to perform duties; **4.** Chronic or excessive absenteeism or lateness; **5.** Conviction of a crime; **6.** Conduct unbecoming a public employee; **7.** Neglect of duty; **8.** Misuse of public property, including motor vehicles; **9.** Discrimination that affects equal employment opportunity (as defined in 4A:7-1.1), including sexual harassment; **10.** Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor

> vehicles, and State and local policies issued thereunder; **11.** Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and **12.** Other sufficient cause.

Respondent Policy #7.5 provides in part:

> The Agency [respondent] does not tolerate any form of unlawful discrimination or harassment in the workplace because of a person's association with a protected class. The Agency expects all employees to treat other employees as well as guests and clients with respect and courtesy, both in their speech and their conduct. [...] 3. Unlawful harassment, including but not limited to sexual harassment, includes a wide range of both overt and subtle comments and conduct. Depending on the circumstances, it may include, but is not limited to, comments, jokes, insults, slurs, derogatory statements, drawings, pictures or cartoons, innuendos, other statements or conduct directed at or treatment of another based upon a protected class. Unlawful harassment can be verbal or written.

"Conduct unbecoming a public employee" is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

The facts are that appellant used the racial epithet of "oriental guy" to describe an agency co-worker who was Asian American. She continued to use the epithet even after being requested to stop and being made aware that the language was considered offensive by her supervisor. Appellant's actions were egregious enough to cause her supervisor discomfort. Further, Estevez testified that appellant had a history of insubordination, in addition to her insubordination on the Incident date, exemplified by her not performing the assignment given to her by her supervisor. Appellant did not do any work on the Incident date. She exceeded her contractual time limit for breaks, by taking a one-hour break instead of the authorized fifteen-minute break. She fabricated or misrepresented her basis for refusing to perform assigned tasks from her supervisor, by stating she was meeting with the IT person around 9:30 a.m. when she did not actually meet with him until 10:30 a.m. She lied about having to be present for the IT person to switch out her computers, because both Estevez and Domaoal told her that she did not have to be present for him to do his work. Appellant had been cited for violations related to attendance and absenteeism in the past.

Accordingly, I **CONCLUDE** that appellant was in violation of N.J.A.C. 4A:2-2.3(a) for her failure to perform her duties, insubordination, chronic or excessive absenteeism or lateness, conduct unbecoming a public employee, neglect of duty, and discrimination, based on her continued use of a racial epithet, and the within charges are hereby **SUSTAINED**.

I **CONCLUDE** that appellant violated Camden County Policy #7.5's prohibition of unlawful discrimination or harassment in the workplace, based on her comments to supervisor Estevez, and the within charge is hereby **SUSTAINED**.

PENALTY

Having met its burden of proving the above-referenced violations of regulations and county policy, this Court may then look to whether respondent acted properly in applying discipline against appellant in the form of termination of employment.

Where appropriate, concepts of progressive discipline involving penalties of increasing severity are used in imposing a penalty and in determining the reasonableness of a penalty. West New York v. Bock, 38 N.J. 500, 523-24 (1962). Factors determining the degree of discipline include the employee's prior disciplinary record and the gravity of the instant misconduct.

However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. See Henry v. Rahway State Prison, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter v. Bordentown, 191 N.J. 474 (2007). Absence of judgment alone can be sufficient to warrant termination if the employee is in a sensitive position that requires public trust in the agency's judgment. See In re Herrmann, 192 N.J. 19, 32 (2007). "There is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

The determination of a penalty is both subjective and fluid, following no specific formula. One may consider the seriousness of the infraction, the length of employment, the amount of training received, as well as prior disciplinary matters. West New York v. Bock, 38 N.J. at 523-24.

In the case of appellant Harrell, she had been employed by respondent for nine years, Her attendance history was spotty at best; there were many periods of absences that appellant was unable to either recall or explain at the hearing. She applied for FMLA, later claiming it was to take care of her mother, but her mother did not live with her and it appeared that appellant was not her primary caregiver. Appellant's claim of being a good worker was belied by her falling well below the average of thirty-two hours of work time per week, as required.

Further, the crux of this case was appellant's behavior on the Incident date. Although she testified that she came in to work on time, she clocked in twenty-three minutes late, and later changed her testimony to state that she called her supervisor to take a half-hour of personal time. She ignored an assignment given to her by her supervisor, and lied about why she would not comply with her supervisor's request. She took her morning break approximately one half-hour after starting her workday. She walked out of a meeting with her supervisor to take her break. She disappeared for an hour under the guise of taking her fifteen-minute morning break. She did not return to her desk at 11:30 a.m. to meet with the IT person, but rather left the building at 11:30 a.m. and went home, using four hours of sick time. On top of that, she acted aggressively and in a confrontational manner towards her supervisor, continuing to use a racial epithet against a fellow employee even after being told to refrain from using the term and after being told she was making her supervisor uncomfortable.

Considering the foregoing and the record in the present matter, including the appellant's attitude, disciplinary record and history of attendance and insubordination, and the nature of the job duties and the nature of the charges, I **CONCLUDE** that the respondent's action terminating appellant's employment be **AFFIRMED**.

DECISION AND ORDER

I **ORDER** that the charges of insubordination, discrimination, harassment, conduct unbecoming a public employee, and other sufficient cause under N.J.A.C. 4A:2-2.3, N.J.A.C. 4A:2-2.5(a)(1), as well as violations of the respondent's Anti-discrimination and Anti-Harassment Policy #7.5, be **SUSTAINED**. I **FURTHER ORDER** that respondent's termination of appellant's position as Clerk 2 with Camden County Board of Social Services be **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.

February 13, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: February 13, 2023

Date Mailed to Parties: February 13, 2023

JNR/dw

APPENDIX

LIST OF WITNESSES:

For appellant:

Marybeth Harrell, appellant

For respondent:

Lizette Estevez
Benedicto Domaoal

LIST OF EXHIBITS:

For appellant:

Post-trial Brief

For respondent:

R-Exhibit A	Various Correspondence
R-Exhibit B	Various emails from appellant and Estevez
R-Exhibit C	PNDA and Loudermill Notice
R-Exhibit D	Union letter, faxed June 10, 2021
R-Exhibit E	PNDA, FNDA, and various correspondence
R-Exhibit F	Kronos time records
R-Exhibit G	Camden County Non-discrimination Policy

BRIEFS

For appellant:

Post-trial Brief, dated October 21, 2022

For respondent:

Post-trial Brief, dated October 21, 2022