STATE OF NEW JERSEY

In the Matter of Edward McMahon, Gloucester County, Department of Emergency Response CSC DKT. NO. 2022-2054 OAL DKT. NO. CSV 01913-22	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: MARCH 15, 2023

The appeal of Edward McMahon, Public Safety Telecommunicator, Gloucester County, Department of Emergency Response, of his removal, effective January 31, 2022, on charges, was heard by Administrative Law Judge Tricia M. Caliguire (ALJ), who rendered her initial decision on January 20, 2023. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of March 15, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

In his exceptions, the appellant makes myriad arguments, none of which are persuasive or require extended discussion. However, the Commission makes the following comments. In this matter, it was found that the appellant violated a Last Chance Agreement (LCA) and that, coupled with the sustained infractions in this matter, supported his removal from employment. The Commission notes that the terms of the LCA, along with including language and terms regarding any future disciplinary action, imposed a six-month suspension, effective October 16, 2020. 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. In this matter, regardless of the existence of the LCA, given the sustained misconduct and the fact

that the appellant had a previous six-month suspension, the longest suspension permitted under Civil Service law and rules, less than two years prior to the current infraction, his removal is warranted applying the tenets of progressive discipline. Accordingly, the Commission finds that removal is the proper penalty as, when viewed in conjunction with the appellant's disciplinary history, it is not so disproportionate to the offense as to be 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 affirms that action and dismisses the appeal of Edward McMahon.

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
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 01913-22
AGENCY DKT. NO. 2022-2054

IN THE MATTER OF EDWARD J. MCMAHON, GLOUCESTER COUNTY, EMERGENCY RESPONSE DEPARTMENT.

Edward J. McMahon, appellant, pro se

Jose A. Calves, Esq., for respondent, Gloucester County, Emergency Response Department (Brown & Connery, LLP, attorneys)

Record Closed: December 19, 2022 Decided: January 30, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Appellant Edward J. McMahon (McMahon) appeals the decision of respondent Gloucester County, Emergency Response Department (Department), to remove McMahon from his position as a public safety telecommunicator for alleged 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)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other

sufficient cause, specifically, violation of a rule, regulation, policy, procedure, order, or administrative decision.

PROCEDURAL HISTORY

On January 20, 2022, respondent served appellant with a Preliminary Notice of Disciplinary Action (PNDA), charging him with 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)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violations of the Gloucester County COVID-19 Health and Safety Policies (COVID-19 Policies) and of the County Human Resources Manual (HR Manual).

A departmental hearing was held on January 31, 2022, and, on February 23, 2022, respondent issued a Final Notice of Disciplinary Action (FNDA) to appellant, sustaining all charges against him, with notice that he would be removed from employment effective January 31, 2022. Appellant filed an appeal on February 25, 2022, and the Civil Service Commission (CSC) transmitted this matter on March 11, 2022, to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On April 22, 2022, the parties appeared for a telephone prehearing conference; appellant was accompanied by Michael Blaszczyk (Blaszczyk), President of Communication Workers of America (CWA), AFL-CIO, Local 1085. Blaszczyk stated that his participation was limited to notifying me that CWA 1085 was no longer representing appellant in this matter. Accordingly, the prehearing conference was rescheduled to permit appellant time to retain counsel. At the subsequent telephone prehearing conference, on June 21, 2022, appellant stated that he had not retained counsel and intended to file a motion to dismiss and therefore, further proceedings were not scheduled.

On June 30, 2022, appellant filed a motion for dismissal of the FNDA on the grounds that respondent failed to issue the FNDA within twenty days of the disciplinary

hearing. On July 11, 2022, respondent submitted a letter brief in opposition to the motion for dismissal. Appellant filed a reply brief in further support of the motion for dismissal on July 15, 2022, and on August 10, 2022, an order was issued denying the motion to dismiss.

The hearing began on September 16, 2022, via Zoom Video Communications, Inc. (Zoom), a remote audio-video platform licensed by the OAL for use during the COVID-19 emergency. At the close of the first day's proceedings, appellant moved to call his treating physician to testify about his potential diagnosis of post-traumatic stress syndrome (PTSD). By letter order dated September 20, 2022, this motion was denied.

The parties appeared for a telephone conference on October 4, 2022, during which additional evidentiary rulings were made on-the-record. The hearing concluded on October 18, 2022, and the record remained open for the parties to provide post-hearing submissions after the receipt of the transcripts. The post-hearing briefs were filed on December 19, 2022, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The issues in this matter are whether on January 16, 2022, appellant failed to wear a face mask in his place of employment in violation of COVID-19 policies adopted by the County during the COVID-19 public health emergency and whether on the same day, appellant gave a discourteous response to a management directive. Further, should respondent prove these allegations, whether the proposed penalty of removal is appropriate.

Based on the documents submitted by the parties in this matter, the following **FACTS** are undisputed and accordingly, I **FIND**:

1. Prior to January 31, 2022, appellant was employed by respondent as a public safety telecommunicator (PST).

2. As a result of an incident allegedly occurring on January 16, 2022, respondent conducted an investigation and on January 20, 2022, issued the PNDA to appellant.

3. Appellant timely requested a departmental hearing, which was conducted on January 31, 2022. Appellant was represented at the hearing by Blaszczyk.

4. Respondent determined to sustain the charges in the PNDA. The FNDA, dated February 23, 2022, was issued to appellant.

5. Appellant timely filed this appeal.

Testimony

Respondent called three witnesses; appellant testified on his own behalf and called two witnesses. The following is not a verbatim recitation of the testimony, but a summary of testimonial and documentary evidence found relevant to the above-described issues.

Reed Merinuk (Merinuk) testified on behalf of respondent. He is employed by the Department as the Deputy Director of Emergency Response, a position he has held for seven years. In this position, he is responsible for employee discipline and is familiar with the County's COVID-19 policies.

Merinuk identified the various emails sent to all Department staff regarding County policies adopted in response to the COVID-19 health emergency. (R-1.)

On June 9, 2021, the County issued an updated COVID-19 policy, which stated in pertinent part:

> Fully vaccinated people are considered to be those who have received their final Covid-19 vaccination at least two weeks (14 days) ago. Pursuant to New Jersey Executive Order 242 & 243, beginning June 4, **employees who are able to verify**

> **they are fully vaccinated, may forego masking and social distancing requirements while in the workplace.**
>
> [R-1 at 016-17 (emphasis in original).]

On December 28, 2021, Dawn Lippincott, assistant to the County Administrator, sent all department heads a new policy to be shared with all employees.[1] (Id. at 010-11.) Due to "an increase in the number of confirmed COVID-19 cases in [the County]," all employees were immediately required to adhere to the following:

> **ALL STAFF** are required to wear face coverings indoors, when social distancing is not possible and while frequenting or traversing indoor common areas of county office buildings. This includes . . . bathroom facilities, common hallways, lunch/break rooms, etc. As has been required to date, face coverings continue to be required in . . . governmental facilities[.]
>
> [R-1 at 010 (emphasis in original).]

Merinuk described a "face covering" as a mask that covers the face from nose to chin; using a hand or sleeve to cover the face is not enough. Merinuk stated that throughout the pandemic, he has interpreted the term "face covering" the same way and knows of no exceptions made to this policy.

Merinuk identified an excerpt from the HR Manual describing inappropriate behavior of employees as, in pertinent part:

> Failure to treat all clients/residents, visitors, and fellow employees in a courteous manner.
>
> Behavior or conduct which is offensive, undesirable or is subject to disciplinary action.
>
> Insubordination or the refusal by an employee to follow management's instructions regarding job-related matters.
>
> Disregarding safety or security regulations.

[1] Merinuk stated that the December 28, 2021, policy was posted in the cafeteria and dispatch room and emailed to all staff. Tr. (September 16, 2022) (T-1), at 19.

> Conduct unbecoming a County employee.
>
> [R-2.]

Merinuk stated that refusing to comply with the County mask policy, refusing to wear a mask, and arguing with a supervisor are all actions that would violate the above sections of the HR Manual. If an employee had an issue or a concern with any County policy, he or she could work through their union, or go to Merinuk directly, to address such concerns. Merinuk said he had an "open-door" policy to address issues raised by employees and also stated that the grievance procedure is available. During the course of the pandemic, other employees asked for modifications to the social distancing and cleaning requirements and respondent worked with those employees. It is, however, inappropriate to engage in an argument with a supervisor in the workplace over such concerns. Merinuk described that behavior as unprofessional, discourteous, and a distraction in the workplace. He stated that it is also a violation of the HR Manual for a supervisor to speak discourteously to a member of his or her staff.

Merinuk stated that the dispatch room, where appellant worked, is a high stress environment as 911 calls from every municipality in the County are dispatched from there. These calls vary from simple requests to homicides. It is important to have order in the room and disrespect toward a superior can lead to chaos; all employees must see and understand that the supervisor is in charge. Merinuk stated:

> [O]nce there is a lack of discipline in the room it spreads and then you have other employees who feel like if one person can get away with being insubordinate to an employee [sic], the employee right next to them sees that behavior and it does become contagious, so it's important for us to make sure that all employees understand that the supervisor in the room is the person they need to be paying attention to and that they need to, you know, follow their guidance. So, we try to stop the negative behavior as much as possible.
>
> [T-1 at 44.]

Merinuk identified the Disciplinary Memorandum regarding appellant in which appellant's disciplinary history is summarized. (R-3.) Using principles of progressive

discipline, respondent determined that the appropriate discipline for the incident in which appellant was involved on January 16, 2022, is termination. Merinuk noted that between October 2013, and September 2020, appellant was disciplined six times for insubordination and/or discourteous behavior. (Id. at 003-04.)

Merinuk identified the Last Chance Agreement appellant entered with respondent on October 14, 2020, in settlement of a disciplinary action in which respondent was seeking termination. The Last Chance Agreement provides, in pertinent part:

> After entering into this Agreement, for a period of three (3) years from the date [appellant] returns to work, [he] shall not engage in any activity that involves incompetency, inefficiency, failure to perform duties, insubordination, conduct unbecoming a public employee and/or neglect of duty. Any such conduct shall constitute a material breach of this Agreement, and shall constitute just cause for McMahon's permanent removal from employment.
>
> [R-4.]

Merinuk stated that the Agreement was limited to three years because respondent hoped appellant's actions would improve and did not want the potential loss of his job to "hang it over [appellant's] head" indefinitely. T-1 at 41.

Summer Bajewicz (Bajewicz) testified for respondent. She is employed by the Department as a Lieutenant and Shift Supervisor, a position she has held since September 2020. Her duties are managing the shift, supervising PSTs, assigning seats, scheduling, and supervising calls. She is aware of the policy requiring face coverings that was in effect on January 16, 2022, stating that it was posted in the workplace and had been emailed to all employees. (R-1 at 010.)

On January 16, 2022, Bajewicz was working in the Clarksboro dispatch center with appellant. It was a very busy night as there had been an ice storm; although Bajewicz typically does not sit in the same room as the PSTs, she did on that night, sitting in front of appellant and to his right. Prior to the incident, and after the incident, appellant wore his mask when he left his desk.

Appellant left the dispatch room through the door that leads to the restrooms. Bajewicz saw him coming back into the dispatch room without a face covering. She stated that appellant had nothing on his face, not his hands, elbow or sleeve. Bajewicz said to appellant, "please remember to wear your mask as there is a mask policy in effect." T-1 at 78.

Appellant responded, "I forgot. I had to go to the bathroom but if the administration doesn't have to wear a mask, I'm not wearing my mask. Write me up, I'll fight it and I'll win."[2] T-1 at 78-9. Then, appellant put his mask on at his desk.

Bajewicz stated that appellant spoke to her in a loud and argumentative manner. She believes his action was a distraction in the small room on a busy night with other PSTs around. She believes appellant's action was discourteous.

Bajewicz stated that had appellant raised his complaint regarding wearing masks or complained that other persons were not wearing masks with her later, he would not have been disciplined. He could have reported violations of the policy by other persons, but he did not. If he had, Bajewicz stated that she would have addressed his concerns.

Appellant was not the only employee who Bajewicz had to remind to wear their mask; he was the only one to react as he did. If other employees had responded the same way, they too would have been disciplined.

Krystle Hernisey (Hernisey) is a PST with the Department, a job she has held since approximately July 2021. On January 16, 2022, she worked in the small dispatch room with appellant and Bajewicz. Hernisey faced the wall, appellant sat behind her, facing her back. She did not recall if the night was busy or not.

[2] On cross-examination, Bajewicz stated that she did not recall her exact words that prompted appellant to say "write me up." She said it may have been, "I don't make the policies, I just follow them," or it may have been "I will write you up." T-1 at 88-9.

Hernisey recalled the incident of January 16, 2022. She heard appellant come into the dispatch room from the direction of the restrooms. Hernisey heard Bajewicz say something about appellant's mask, and he responded with a statement about the administration. It sounded like an argument; appellant was loud and Hernisey heard some back and forth.

Hernisey called the incident "slightly distracting," but did not look up and kept on working. She knew appellant prior to working as a PST from the firehouse, where she saw him a "handful" of times. Based on those interactions, she would describe him as loud.

Appellant testified on his own behalf. He stated that on January 10, 2022, Bajewicz and William Holmstrom (Holmstrom), Senior PST, reviewed the County mask policy with the PSTs. Bajewicz stated that it was standard policy to wear masks in common areas and Holmstrom added that masks had to be worn whenever employees stood up, even if that meant while they stood at their own standing desks. On this same date, Holmstrom spoke with various dispatchers at the dispatchers' desks and Holmstrom was not wearing a mask at the time. Appellant stated that he and Bajewicz saw Holmstrom doing this.

On another occasion, Jack D'Angelo, Deputy Director of Emergency Response, spoke to a group of emergency response staff without wearing a face mask.

On January 16, 2022, appellant was assigned to cover Zone 8; his partner was Michael Miller. Appellant went to the rest room without a mask, a distance of about ten feet. He realized that he forgot his mask, so he used his collar to cover his face. He did not see any other way to get back to his desk. Bajewicz commented that he was not wearing a mask, so he showed her his mask.

Appellant admits to commenting that the administration was making Bajewicz enforce a rule that they did not follow, stating that he was frustrated by the blatant disregard of the rules by the administration. Appellant conceded that he reacted poorly to Bajewicz's statement that she would write him up the next time he failed to wear a

mask, admitting that his words were discourteous and threatening. But he believes Bajewicz overreacted as well. Appellant described being frustrated by the continuing changes in the County's COVID-19 policies and says he felt threatened by Bajewicz's statements.

On January 19, 2022, Holmstrom gave appellant the disciplinary paperwork dated January 18, 2022. (R-3.) Sean Leighton, County Fire Marshall, was also present and was not wearing a mask. To appellant's knowledge, Leighton was not spoken to or disciplined for this violation of the policy.[3]

Appellant did not file complaints regarding the alleged violations of COVID-19 policies by administration officials or request that action be taken to address such violations. Appellant stated that he did speak with Blaszczyk, his union president, and heard from him that other employees also complained and, shortly after that, the policy was recalled.[4]

After being dismissed, appellant began seeking treatment with William Summers, M.D., Psy.D. (A-2.) Treatment began February 3, 2022, but there was a break due to appellant losing his health insurance. Appellant introduced two letters from Dr. Summers, the second over respondent's objection, stating that as of January 16, 2022, appellant may have been suffering from PTSD related to work-related incidents.

With respect to his disciplinary history, appellant generally believes he has been wrongly targeted by the administration and was unfairly "painted as a bad employee." T-1 at 128. He noted that he could have appealed his prior discipline, but in each case did

[3] During cross-examination, respondent asked appellant if he was aware of whether any other Department employees were disciplined due to violations of COVID-19 policies. Appellant did not have such knowledge, but prior to the second hearing date, he obtained a letter from Blaszczyk stating as union president, he had no recollection of employees other than appellant being so disciplined. (A-3.) Respondent objected to admission of this letter. While appellant had no obligation to research the question posed to him during cross-examination, he did conduct such research and the letter was admitted. Note that appellant did not claim that the Department treated him differently with respect to COVID-19 policies but he contends that over the years, he has been unfairly targeted and "painted as a bad employee."

[4] Appellant offered no evidence to support these hearsay statements. Respondent introduced evidence of policies that did change over the course of the pandemic.

not on the advice of his union representative who told him he would "lose anyway," so he should settle.

Appellant identified the Last Chance Agreement which he signed. (R-4.) He did not review it line by line, but conceded that in Section 11 of the Agreement, he acknowledged reading the entire document. Appellant admits he had the right to read the agreement more carefully but relied on the summary provided by Blaszczyk. He did know that he was subject to termination at the time he entered the agreement, and in settlement of that discipline, he served a six-month suspension and agreed that another major discipline in the next three years would result in termination.

Cole Devone (Devone) testified on behalf of appellant. He is a PST. On the night of January 16, 2022, Devone was working in the same dispatch room as appellant with about four other PSTs.

Devone stated that on January 16, 2022, he saw appellant walking toward the back door but, before he reached the door, appellant realized he was not wearing his mask and returned to his desk to get it.[5] Devone also recalled a conversation between appellant and Summer that followed; he described it as a conversation, not a "yelling match."

Devone stated that before and after the incident of January 16, 2022, he routinely saw appellant wearing his face mask while at work.

Michael Miller (Miller) testified on behalf of appellant. Miller works for the Department as a PST part-time and also holds a full-time position as an officer with the Gloucester Township Police Department.

Miller recalled that on January 16, 2022, he was sitting at a desk facing the door. He saw appellant returning to the dispatch room from the hallway through the door facing Miller's desk. Appellant was not wearing a face covering. He heard Bajewicz ask

[5] The exchange during direct examination made clear that Devone recalled a separate incident where appellant left his desk without his mask and quickly retrieved it once he realized his mistake. T-2 at 13-14.

appellant to wear a mask and words were exchanged between them. Miller does not recall exactly what was said but does recall that both persons were speaking.

Miller stated that he forgot to wear his mask and he remembers seeing appellant wearing a mask. Other employees also forgot to wear their masks and had to be reminded to put them on. Miller described his own reaction to such direction as being apologetic and courteous.

Discussion and Additional Findings

Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' story in light of its rationality or 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). 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).

While the decision in this matter must only be based on the record, it will be difficult for anyone reviewing the events of January 16, 2022, to ignore our shared COVID-19 experience, including observing masking, sanitizing and social distancing measures in all public places, including workplaces. Based on the testimony of all the witnesses, it is clear that by January 2022, when many people had been vaccinated against COVID-19, the employees at the County 911 dispatch center were no longer required to wear masks at their desks but were required to wear masks when they left their desks. It is also clear, from the testimony of all the witnesses, that many employees left their desks without wearing a mask, just as appellant did on January 16, 2022, and most of the time, these employees simply forgot to wear their masks.

All the witnesses, including appellant, were credible. Appellant in particular impressed me with his enthusiasm and attempts to find another angle by which his conduct should be viewed. Consider his motion to dismiss based on a technicality and his late-filed exhibits, introduced to shore up deficiencies in his case perceived when

counsel for respondent asked him questions for which he did not know the answer. But such pluck cannot excuse his failure to observe proper workplace decorum.

Appellant introduced testimony that most of the time, his colleagues saw him wearing his mask when he was not at his desk. His colleagues testified that they also forgot their masks from time to time. There is no dispute that on January 16, 2022, appellant left his desk at least one time without wearing a mask.[6] I believe his explanation that he forgot to put the mask on when he went to the restroom. In her testimony, Bajewicz stated that she asked appellant to "remember to wear his mask," which is an acknowledgement that on this occasion, she thought he had forgotten the mask. Had he simply apologized when his supervisor, Bajewicz, noted his error, laughed at himself, or even just nodded his head to indicate that he understood her point, it appears unlikely that discipline would have followed.

I believe appellant that he observed superiors in the workplace without masks and I believe him when he calls this frustrating.[7] I also believe respondent's witnesses that there was a mechanism in place for any employee to complain about the uneven application of County policies, including the COVID-19 policies.

The person who appeared to be most affected by appellant's outburst is Bajewicz, the person to whom he directed it. None of the other employees who testified (even for respondent) seemed to notice and they certainly did not state that the incident interfered with their work.

Though respondent did not introduce evidence of appellant's "anger management" issues, appellant discussed them to show that as of January 16, 2022, he was suffering from as-yet undiagnosed PTSD. Respondent repeatedly objected to any discussion of PTSD and to the admission of Dr. Summer's letters but, as was stated during the hearing, Dr. Summers was unable to confirm this diagnosis in October 2022, much less prior to

[6] While appellant initially tried to say that he pulled his shirt up over his mouth and nose when he realized he had forgotten his mask, he wisely abandoned this course and sure enough, every witness who observed the January 16, 2022 incident stated that appellant had nothing covering his face.

[7] Interestingly, no one—including appellant—testified that the masking policy was inconvenient or obtrusive, only that it was easy to forget to put the mask on.

January 2022, and his letters were weighed appropriately. Further, there is no evidence that appellant requested, much less was denied, an accommodation for this condition.

In summary, I **FIND**:

As of January 16, 2022, the County required all employees, regardless of vaccination status, to wear face masks in the workplace whenever they left their desks. All employees, including appellant, had notice of this policy.

The HR Manual requires employees to treat all fellow employees in a courteous manner.

Appellant failed to observe the County's COVID-19 policies on January 16, 2022, for a brief period of time. This failure was not intentional or in blatant disregard of the policies. Appellant simply forgot to put his mask on when he left his desk to go to the restroom.

When Bajewicz observed appellant's non-compliance, she addressed appellant in a non-confrontational manner, reminding him to wear his mask any time he left his desk as was within her authority and obligation to do.

Appellant responded to Bajewicz, his supervisor, in a loud, argumentative, and discourteous manner.

Appellant was not the only Department employee to forget to wear a face mask in the workplace. There was no evidence presented by either party that any other employee reacted to being reminded to wear his or her mask in a discourteous manner.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12-6 (Act), and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2, are designed in part "to encourage and reward meritorious performance by employees in the public service and to retain and separate

employees on the basis of the adequacy of their performance." N.J.S.A. 11A:1-2(c). An employee may be subject to discipline for several reasons, including incompetency, inefficiency or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); insubordination, N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee, N.J.A.C. 4A:2-2.3(a)(6); and neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). Major discipline for such infractions may include removal, disciplinary demotion, or suspension for more than five working days at any one time. N.J.A.C. 4A:2-2.2(a).

The Act protects classified employees from arbitrary dismissal and other onerous sanctions. See, In re Shavers-Johnson, CSV 10838-13, Initial Decision (July 30, 2014), adopted, Comm'n. (September 3, 2014), https://njlaw.rutgers.edu/collectionS/oal/; Investigators Ass'n v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30, 41 (App. Div. 1974); Scancarella v. Dep't of Civil Serv., 24 N.J. Super. 65, 70 (App. Div. 1952). In attempting to determine if a penalty is reasonable, the employee's past record may be reviewed for guidance in determining the appropriate penalty for the current specific offense. "The evidence presented and the credibility of the witnesses will assist in resolving whether the charges and discipline imposed should be sustained; or whether there are mitigating circumstances, which . . . must be taken into consideration when determining whether there is just cause for the penalty imposed." Shavers-Johnson, Initial Decision, https://njlaw.rutgers.edu/collections/oal/. Depending upon the incident complained of and the employee's past record, major discipline may include suspension or removal. See, West New York v. Bock, 38 N.J. 500, 519 (1962) (describing progressive discipline).

As the Merit System Board (predecessor to the Commission) has long maintained, "the OAL and the Board are not strictly bound by the terms set forth in [a Last Chance Agreement], since neither entity was a party to the settlement." In re Collins-Cole, CSV 7601-00, Final Decision (February 3, 2003), http://njlaw.rutgers.edu/collections/oal. However, a Last Chance Agreement in which the parties agree to a penalty for a subsequent offense is "a significant factor to be considered, along with . . . prior disciplinary history, when determining the appropriate penalty" for that subsequent offense. In re King, CSV 11696-08, 2009 N.J. AGEN LEXIS 904 at *6, Final Decision (March 25, 2009).

Respondent has charged appellant with 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)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, specifically, violation of a rule, regulation, policy, procedure, order, or administrative decision. If the charges against appellant are sustained, the appropriate penalty will be determined with due consideration of the Settlement and Last Chance Agreement he entered with respondent on October 14, 2020.

Incompetency, Inefficiency or Failure to Perform Duties

In general, incompetence, inefficiency, or failure to perform duties exists where the employee's conduct demonstrates an unwillingness or inability to meet, obtain or produce effects or results necessary for adequate performance. Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980). The fundamental concept is that an employee should be able to perform the duties of the position for which he or she was hired. Briggs v. Department of Civil Service, 64 N.J. Super. 351, 356 (App. Div. 1960) (employee must be qualified to perform the duties of the job as outlined by the appointing authority).

There was no evidence presented that appellant was unable or unwilling to perform the duties of a PST. I **CONCLUDE** that respondent has failed to prove by a preponderance of the credible evidence that appellant violated N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency or failure to perform duties.

Insubordination

Black's Law Dictionary 802 (11th Ed. 2019) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been used by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Similarly, the HR Manual description of "inappropriate employee behavior" includes "insubordination or the refusal by an employee to follow management's instructions regarding job-related matters." (R-2.) The above definitions incorporate acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

Appellant's discourteous response to Bajewicz on January 16, 2022, which included a statement which could be interpreted as a refusal to abide by her directions ("If the administration doesn't have to wear a mask, I'm not wearing my mask."), was an act of disobedience. His statement that should she "write [him] up" for such disobedience, he would fight the discipline is a challenge to Bajewicz's authority. I **CONCLUDE** that respondent has proved by a preponderance of the credible evidence that appellant violated N.J.A.C. 4A:2-2.3(a)(2), insubordination.

Conduct Unbecoming a Public Employee

There is no precise definition for "conduct unbecoming a public employee," and the question of whether conduct is unbecoming is made on a case-by-case basis. In re King, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), http://njlaw.rutgers.edu/collections/oal/. "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. Atl. City, 152 N.J. 532, 554 (1998); see also, In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 [quoting In re Zeber, 156 A.2d 821, 825 (1959)]. Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) [quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)]. Unbecoming conduct may include behavior which is improper under the circumstances; it may be less serious than a violation of the law, but which is inappropriate on the part of a public employee because it is disruptive of governmental operations.

The HR Manual also characterizes "conduct unbecoming a public employee" as inappropriate and therefore, a violation of the HR Manual. Further, an employee may be subject to discipline, including removal, for conduct unbecoming a public employee. (R-5.)

Appellant's conduct on January 16, 2022, toward Bajewicz—raising his voice at her, arguing with her regarding his obligation to follow County policies, challenging her authority—could adversely affect the morale or efficiency of a governmental unit. Appellant had other means to express his frustration with what he considered the uneven application of the COVID-19 policy; the means he chose were unprofessional and inappropriate. I **CONCLUDE** that respondent has met its burden of proving that appellant's actions on January 16, 2022, were conduct unbecoming a public employee in violation of N.J.A.C. 4A:2.3(a)(6) and the HR Manual.

Neglect of Duty

To prove neglect of duty, the employer must prove the employee did not perform an act required by his or her job title or was negligent in the discharge of that duty. Avanti v. Dept. of Military & Veterans Affairs, 97 N.J.A.R. 2d 564 (1996). Respondent did not

submit any evidence of the duties required of a PST, much less any evidence of the manner in which appellant failed to perform any specific aspect of his job. I **CONCLUDE** that respondent has failed to prove by a preponderance of the evidence that appellant violated N.J.A.C. 4A:2-2.3(a)(7), neglect of duty.

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/.

Respondent determined that sufficient cause charges are attributable to appellant for his failure to wear a mask, in violation of the COVID-19 policies, and for his discourteous response to his supervisor, in violation of the HR Manual. Given that, as stated above, there is no evidence that appellant intentionally failed to wear a mask on January 16, 2022, I **CONCLUDE** that he did not violate the COVID-19 policies. But his loud and intemperate response to his supervisor was a violation of the employee code of conduct found in the HR Manual and I therefore **CONCLUDE** that appellant did violate the HR Manual and is therefore in violation of N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause.

PENALTY

The CSC's review of penalty is de novo. N.J.S.A. 11A:2-19 and N.J.A.C. 4A:2-2.9(d) specifically grant the Commission authority to increase or decrease the penalty imposed by the appointing authority. Typically, the Board considers numerous factors, including the nature of the offense, the concept of progressive discipline and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Depending on the conduct complained of and the employee's disciplinary

history, major discipline may be imposed. West New York v. Bock, 38 N.J. at 523-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. Here, respondent urges application of the penalty agreed to by the parties, that being removal from employment, when they entered the Last Chance Agreement on October 14, 2020.

The New Jersey Supreme Court has established that an employee who enters into a last chance agreement is bound by its terms despite the fact that termination may be the agreed upon penalty for its violation. Watson v. City of East Orange, 175 N.J. 442 (2003) (despite some ambiguity, last chance agreement upheld where employee failed to meet his obligations under the agreement). The Supreme Court stated that last chance agreements are construed in favor of appointing authorities because to do otherwise "would discourage their use by making their terms meaningless." Id. at 445 citing Golson-El v. Runyon, 812 F.Supp. 558, 561 (E.D.Pa.) (while the penalty appeared harsh in relation to the infraction given the employee's medical condition, the court should not reinterpret the terms of the last chance agreement that the employee voluntarily entered and instead, must abide by its terms and consequences).

In the Last Chance Agreement at issue here, appellant agreed to refrain from engaging "in any activity that involves . . . insubordination [and] conduct unbecoming a public employee." (R-4.) He presented no evidence that he was coerced into signing; he signed the agreement with an understanding of its terms, "of his own free will," and he was represented in settlement discussions by his union. Ibid. I **CONCLUDE** the Last Chance Agreement is clear as to its requirements and as to the consequences of a violation and is enforceable.

The record reflects that appellant's conduct was not in compliance with the Last Chance Agreement by his failure to comply with the standards of employee conduct outlined in above cited regulations and the HR Manual. I **CONCLUDE** that the penalty of removal from employment is appropriate and should be **SUSTAINED**.

ORDER

Respondent Gloucester County, Emergency Response Department, has proved by a preponderance of the credible evidence the following charges against appellant Edward J. McMahon as contained in the FNDA dated February 23, 2022: 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; and N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause due to the violations of the HR Manual. Therefore, I **ORDER** that these charges be and are hereby **SUSTAINED**. Accordingly, I **ORDER** that the penalty of removal of appellant from the position of public safety telecommunicator imposed for the charges is hereby **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 30, 2023
DATE

Tricia M Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

APPENDIX

WITNESSES

For appellant

Edward J. McMahon

Cole Devone

Michael Miller

For respondent

Reed Merinuk

Summer Bajewicz

Krystle Hernisey

EXHIBITS

For appellant

A-1 Emails from Gloucester County Staff regarding COVID-19 Policies, dated June 9, 2021, and August 31, 2021

A-2 Letter of Dr. William L. Summers, PsyD, dated September 14, 2022

A-3 Letter of Michael Blaszczyk, dated October 5, 2022

A-4 Letter of Dr. William L. Summers, PsyD, dated October 5, 2022

For respondent

R-1 Emails from Gloucester County Staff regarding COVID-19 Policies, dated January 5, 2022

R-2 Gloucester County Human Resources Manual, Chapter 7, Section 2

R-3 Disciplinary Memorandum to Edward J. McMahon, dated January 20, 2022

R-4 Last Chance Agreement, dated October 14, 2020

R-5 Gloucester County Human Resources Manual, Chapter 7, Section 3

R-6 CWA Contract with Gloucester County

R-7 Hearing Report, dated February 17, 2022