



STATE OF NEW JERSEY

In the Matter of Ana Castillo, Passaic
City, Department of Public Safety

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2020-577
OAL Docket No. CSV 12063-19

ISSUED: AUGUST 23, 2023

The appeal of Ana Castillo, Fire Fighter, Passaic City, Department of Public Safety, six working day suspension, on charges, was heard by Administrative Law Judge JoAnn LaSala Candido (ALJ), who rendered her initial decision on July 7, 2023. Exceptions were filed on behalf of both parties and a reply to exceptions was filed on behalf of the appointing authority.

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 and reply filed by the parties, the Civil Service Commission (Commission), at its meeting on August 23, 2023, adopted the ALJ's Findings of Fact and Conclusions and her recommendation to reverse the six working day suspension.

As mentioned above, the Commission has thoroughly reviewed the exceptions filed in this matter and finds them unpersuasive in all respects. The appointing authority's exceptions argue that the ALJ did not consider other misconduct charges and the appellant's exceptions argue that the ALJ should have also found the other employee involved in the altercation committed "statutory sexual harassment" under the New Jersey Law Against Discrimination (LAD). The Commission rejects these assertions.

The ALJ found that, based on her assessment of the incident and the appellant's actions, that the appellant was not the aggressor and only responded with profanities after being subjected to same. Ultimately, the ALJ found that:

Although petitioner did engage in this verbal altercation with Gomez, her behavior does not rise to the level of misconduct deserving

of discipline. Her culpability is mitigated by the fact that she was not the aggressor in this argument with Gomez. Gomez admitted that petitioner did not address him directly, that he advanced on her first, and that he called her "a piece of shit." Feeling threatened, she then reciprocated with profanities.

Accordingly, while the ALJ did not explicitly list all of the charges that were proffered, her ultimate findings clearly support that none of the appellant's actions were violative of any charges sufficient to support disciplinary action. After its *de novo* review, the Commission agrees.

Regarding the appellant's exceptions, as the conduct of the other employee is not the subject of the disciplinary appeal, it would be wholly inappropriate to make a finding as to that employee's conduct under the LAD. Moreover, in this case, even if such a finding was appropriate, it would be unnecessary to reverse the charges against the appellant as the ALJ's other findings in that regard provide sufficient basis to do so. If the appellant believes she was subject to discrimination or retaliation under the LAD, she would be required to pursue that claim in the proper forum.

Since the six working day suspension has been reversed, the appellant is entitled to six working days of back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. She is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning counsel fees are finally resolved.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified and reverses that action. The Commission further orders that the appellant be granted six working days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced as provided for in *N.J.A.C.* 4A:2-2.10(d)3. The Commission also orders reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12(a). Proof of income earned, and an affidavit in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Pursuant to *N.J.A.C.* 4A:2-2.12(b), the parties shall make a good faith effort to

resolve any dispute as to the amount of counsel fees.

The parties must inform the Commission, in writing, if there is any dispute as to counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to R. 2:2-3(a)(2). After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 23RD DAY OF AUGUST, 2023



Allison Chris Myers
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 12063-19

AGENCY DKT. NO. 2020-577

**IN THE MATTER OF ANA CASTILLO, CITY OF
PASSAIC, DEPARTMENT OF PUBLIC SAFETY,**

Michael Bukosky, Esq., for petitioner (Loccke, Correia, & Bukosky, attorneys)

Brian M. Hak, Esq., for respondent, City of Passaic (Eric M. Bernstein & Associates, LLC,
attorneys)

Record Closed: June 19, 2023

Decided: July 7, 2023

BEFORE **JoANN LASALA CANDIDO, ALAJ:**

STATEMENT OF THE CASE

Petitioner, Ana Castillo, appeals the determination by respondent, the City of Passaic, Department of Public Safety ("City"), suspending her without pay from her position as a firefighter for the City for a period of six days effective September 5, 2019, based on disciplinary charges stemming from a verbal altercation with a fellow firefighter on July 25, 2018.

PROCEDURAL HISTORY

On November 18, 2018, the City issued a Preliminary Notice of Disciplinary Action (PNDA) charging petitioner with: (1) statutory misconduct in violation of N.J.S.A. 40A:14-19, (2) violations of N.J.A.C. 4A:2-2.3(a)(6) and (a)(12), including conduct unbecoming a public employee and other sufficient cause; and (3) violations of City personnel policies, practices, and/or procedures and violations of City fire department rules and regulations. The specifications in support of the charges stated, in pertinent part:

- (2) On or about July 25, 2018, you were washing dishes in the Firehouse kitchen and you were speaking with your nephew, Firefighter Nelson Castillo ("FF N. Castillo"), who was sitting in the couch area.
- (3) Referring to other firefighters, you said to your nephew on multiple occasions something to the effect of "don't talk to them, they only act like they are your friends and then talk behind your back."
- (4) FF Gomez overheard your comments to FF N. Castillo and FF Gomez responded by saying "keep me out of your conversation."
- (5) You stopped what you were doing in the kitchen area and approached FF Gomez in an aggressive and menacing manner while shouting and cursing at him.
- (6) You made instigating comments to FF Gomez to the effect of "do something" and "what are you going to do?" and you made derogatory and insulting statements to FF Gomez, including calling him a "pussy" and referring FF Gomez's wife and daughter.
- (7) You continued to approach FF Gomez in an aggressive manner, and it appeared as if you were going to physically strike FF Gomez.
- (8) Lt. Pearson then separated you and FF Gomez and advised you to calm down.

R1 (specifications from the Final Notice of Disciplinary Action which mirrors the PNDA.)]

A departmental hearing was held on June 13, 2019, and a Final Notice of Disciplinary Action (FNDA) was issued on August 1, 2019, suspending petitioner for a period of six working days effective September 5, 2019. Petitioner appealed, and on August 29, 2019, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.A.C. 5:25-2.5(b)3.

A hearing was initially scheduled for December 11, 2019. Prior to the hearing date, petitioner advised that she had received military orders and was to report for duty by December 2, 2019. Petitioner requested that this matter be placed on inactive status. Following multiple additional adjournments while petitioner was on military leave, and with no objection, a hearing was held on April 12, 2023. The parties submitted post-hearing briefs on June 19, 2023, on which date the record closed.

TESTIMONY

A summary of the evidence offered in support of, and in opposition to, the charge against petitioner follows. The testimony outlined is not intended to be a verbatim report of the testimony of all the witnesses. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented.

Lenin Gomez

Firefighter Lenin Gomez, who was directly involved in the confrontation with petitioner, testified on behalf of the City. On the date of the incident, July 25, 2018, Gomez was a temporary acting lieutenant at the Eastside Firehouse, but not Castillo's supervisor. He stated that Castillo was in the kitchen at the sink washing her Tupperware speaking loudly and complaining as she usually does about other firefighters. It appeared to Gomez that she was looking directly at him when she was speaking negatively about how bad it is at the firehouse. There were five firefighters in the kitchen area. He worked with Castillo for about three months. Gomez was about twelve feet from her next to a chair and her relative.

Gomez testified that on the date of the incident he had had enough of her complaining. There was too much negativity and when she was complaining she referred to "you guys" and not speaking directly to her family member. Gomez heard her say "why are you talking to them... the minute you leave the room they're going to talk shit about you, that's the way they are over here." Castillo was looking directly at him. He didn't want to be around Castillo's shameful comments and negative comments that bring the fire department down. He wanted her to keep his name out of her mouth. Gomez told her to keep him out of her negative shameful comments. He started walking towards her and stopped when about six feet apart. Castillo told Gomez she was not talking to him. He called her "a piece of shit" and she "got in his face" and said, "do something pussy, what's you going to do." Gomez stated that no one wanted to address her bad behavior and her use of profanities, and she was hard to be around. Lieutenant Pearson got in between Gomez and Castillo and advised them to cut it out and Gomez walked away. He had no control of her behavior but wanted to address her negative comments. Gomez worked with Castillo during training.

Victor Oliver

Firefighter Victor Oliver testified for respondent. He is in his sixth year as a firefighter at the Eastside Firehouse. He testified that he was by the refrigerator on the morning in question, after inspecting the rigs, when Gomez and petitioner started screaming at each other. He initially saw Firefighter Castillo, but she left his field of vision so that he could only hear the argument. He did not remember exactly what was said or who approached whom, but he recalled that they were both shouting obscenities until someone got between Gomez and petitioner and broke them up. Oliver did not think there was a risk of the argument becoming physical.

Jonathan Pearson

Lieutenant Jonathan Pearson testified for respondent. He has been with the Passaic Fire Department for 13 years and a lieutenant for five. He was Acting Lieutenant and petitioner's supervisor on the day of the incident. Pearson was the only officer in the building at the time and was doing roll call. He went to the pantry to get something when he heard a commotion and saw Gomez and petitioner "going at each other." They were both "heated" and "saying profanities" in equal measure. Pearson further testified that he got in the middle of them, sent them to opposite sides of the room, and then called the deputy chief as per protocol. He was not concerned the argument would turn physical.

Pearson instructed both firefighters to submit a report to the Battalion Chief based upon protocol. He stated that petitioner performed the ordinary duties of a firefighter up to standard. Pearson did not recall any incidents of a firefighter being disciplined for using profanity, although he acknowledged that he is not in a position to know.

Patrick Trentacost

Chief Patrick Trentacost testified on behalf of the City. He has been with the Passaic Fire Department for 37 years, 17 of which he has served as chief. He was on vacation on the day in question and did not witness the incident involving petitioner. Trentacost reviewed the fire department's manual of rules and regulations and testified that petitioner violated Sections 44, 45, 98, 99, and 100. Section 44 addresses "respect for superior officer." Section 45 requires members to be "quiet, civil, [and] orderly." Section 98 provides that "[m]embers shall not do anything which may bring discredit to the department." Section 99 prohibits members from using "indecent or uncivil language." Section 100 provides that "[m]embers shall not engage in any

altercation.” Trentacost testified to petitioner’s disciplinary history, detailing prior incidents of “the same type of behavior” in 2016 and 2018. Trentacost felt that petitioner should have faced a harsher penalty based on her previous record and the concept of progressive discipline having had an agreed three-day suspension from 2017 based upon the same type circumstances and a written warning reduced to a verbal warning in 2016 for conduct unbecoming.

Sean Allen

Sean Patrick Allen testified on behalf of Castillo. He is the vice president of the Firefighters Union and has been a member of the Union for twenty-eight years. Allen stated that he was not aware of any firefighter being disciplined for use of profanity during a dispute of the disciplines that he was aware of. He testified that he was not present at the firehouse on the date of this incident. Allen felt it unfair that Castillo was disciplined and not Gomez since they both went at each other.

Allen confirmed that Castillo was disciplined in 2018 for having an argument with a City police officer. Prior to that incident she received a Written Reprimand that was reduced to a Verbal Warning for conduct unbecoming.

Juan Bravo

Juan Bravo testified on behalf of Castillo. He has been a firefighter for fourteen years. Bravo was present at the firehouse in the kitchen on the date of the incident. Bravo felt that Gomez, as a supervisor, should have known better than to be involved in a verbal altercation because as a supervisor, he should have diffused the situation and not approached her. He testified that it was his belief that Gomez was the aggressor. There are arguments at the firehouse often, but this was different once Gomez and Castillo got face-to-face and could possibly get physical.

Ana Castillo Ramos

Petitioner testified on her own behalf. She has been with the Passaic Fire Department for nine years and was the only female firefighter when she was hired in May 2014. On the date of the incident, petitioner states that she was cleaning dishes while two other firefighters made breakfast. Her nephew, Nelson, also a firefighter, began talking about his family and buying a

house while other members were in the kitchen. She told him not to talk about his personal things to others in the department because they may act like a friend, but they are not. Petitioner testified that it was clear that she was speaking directly to her nephew. Gomez heard her comment and said to her to "keep my name out of your mouth." Petitioner responded she wasn't talking to him, and Gomez proceeded to walk towards her while shouting obscenities.

Petitioner stopped doing the dishes and took one or two steps towards Gomez, who was by then right in front of her. They got in each other's faces. Gomez called petitioner "a piece of shit" and, according to petitioner, "a fucking bitch." Petitioner asked why he would call her that when he has a wife and daughter, and she called him "a pussy." She testified that she was unaware Gomez was acting as a supervisor on the day in question. They never worked together and he was never her supervisor.

Petitioner recalled how a previous female firefighter, Gloria, left the department after suing for sexual harassment and felt she "didn't want to get pushed around like Gloria did." Castillo felt that she was always having to defend herself being the only woman firefighter and she was intimidated by the way Gomez approached her. She had no prior history with Gomez, besides a comment he made about her not wanting to train.

Petitioner testified as to her prior discipline. She stated that in 2016, when she arrived home from work at about 9:00 p.m., there were about five police officer vehicles in front of her two-family home. Her sister and nephew reside on the second floor. She yelled to her sister in Spanish asking what was going on. A police officer took offense to the yelling and petitioner called her Chief to tell him what happened. He arrived at her home, and she was suspended. Petitioner states that her Union attorney suggested she settle for a three-day suspension, and she took his advice. She is currently serving in the Army and is assigned to the Pentagon.

FINDINGS OF FACT

Based upon a consideration of the testimonial and documentary evidence presented and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following factual discussion as **FACT**.

Petitioner credibly testified that she was working at the East Side Firehouse in Passaic on the morning of July 25, 2019. While she was washing dishes in the kitchen after breakfast, petitioner began speaking to her nephew Nelson Castillo, also a firefighter. Nelson was talking about his family and buying a house. Petitioner, concerned that her nephew was revealing too much about his personal life, said words to the effect of "don't say your personal things to people in here because they may be like your friend and they are not" or "why are you talking to them?" Firefighter Lenin Gomez, serving as acting lieutenant that day but unbeknownst to petitioner, heard petitioner's comments and took offense, believing she was indirectly disparaging him and the other firefighters. Gomez was initially about 12 feet away when he heard petitioner's comments. He cut that distance in half by approaching first and told petitioner to "keep my name out of your mouth." Petitioner told him that she wasn't talking to him. Petitioner turned to face him and stepped a few steps forward, and they got in each other's faces. They insulted each other, with Gomez calling petitioner "a piece of shit" and petitioner calling him "a pussy" and daring him to "do something."

Lt. Pearson got between Gomez and petitioner and separated them when they were two to three feet apart. The argument did not turn physical. Petitioner and Gomez never worked together, and he was not her superior. Arguments and profanity are commonplace in a firehouse and are ordinarily not subject to major discipline. Gomez signed his incident report with his temporary title, and he was not disciplined for his role in the incident.

LEGAL DISCUSSION

Petitioner's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to -12-6 (the Act), and its implementing regulations, N.J.A.C. 4A:1-1.1 to -10-3.2. A public employee who commits a wrongful act may be subject to major discipline for a wide variety of offenses connected to his or her employment. N.J.A.C. 4A:2-2.3(a). Major discipline for such offenses may include removal, disciplinary demotion, or suspension or fine for more than five working days at any one time. N.J.A.C. 4A:2-2.2(a). Generally, permanent, and part-paid members of the fire department may only be disciplined for just cause. N.J.S.A. 40A:14-19.

In an appeal from a disciplinary action or ruling by an appointing authority, the appointing authority bears the burden of proof to show that the action taken was appropriate. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); N.J.S.A. 11A:2.21; N.J.A.C. 4A:2-1.4(a). The authority must show by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). That is, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Conduct Unbecoming

N.J.A.C. 4A:2-2.3(a)(6) does not define "conduct unbecoming a public employee." Courts have interpreted the phrase as having an "elastic" meaning, encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that tends to destroy public respect in the delivery of governmental services. Karins v. Atl. City, 152 N.J. 532 (1998); see also In re Emmons, 63 N.J. 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)). The determination of what constitutes conduct unbecoming is primarily a question of law and is made on a case-by-case basis. Id. at 553.

It is not disputed that these firefighters got into a verbal altercation. Although Gomez was in a temporary superior role on that morning, petitioner was unaware of that. There is nothing in the record to provide proof she was notified of his acting role on that date. Gomez was the aggressor when he approached petitioner. Petitioner felt threatened. Witnesses testified that arguments and profanity are commonplace in a firehouse and that they are ordinarily not subject

to major discipline. Accordingly, I **CONCLUDE** that respondent has not met its burden of proof on the charge of conduct unbecoming a public employee.

Other Sufficient Cause

Petitioner was also charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." This catch-all provision of the code means that a finding of misconduct deserving of discipline need not "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, 39-40 (App. Div. 1992) (citing references omitted).

Although petitioner did engage in this verbal altercation with Gomez, her behavior does not rise to the level of misconduct deserving of discipline. Her culpability is mitigated by the fact that she was not the aggressor in this argument with Gomez. Gomez admitted that petitioner did not address him directly, that he advanced on her first, and that he called her "a piece of shit." Feeling threatened, she then reciprocated with profanities. Thus, I **CONCLUDE** that the charge of other sufficient cause is not substantiated.

ORDER

Based on the foregoing, I hereby **ORDER** that the charges against petitioner be **DISMISSED**. I further **ORDER** that petitioner be awarded back pay for the period of her suspension.

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.



July 7, 2023

DATE

JoANN LASALA CANDIDO, ALAJ

Date Received at Agency:

July 7, 2023

Date Mailed to Parties:

July 7, 2023

ljb

APPENDIX

Witnesses

For Respondent:

Lenin Gomez

Victor Oliver

Jonathan Pearson

Patrick Trentacost

For Petitioner:

Sean Allen

Juan Bravo

Ana Castillo Ramos

Exhibits

For Respondent:

R1 Final Notice of Disciplinary Action

R2 Gomez Report/Statement

R3 Pearson Report/Statement

R4 Castillo Disciplinary History

R5 Excerpts of Department General Rules and Regulations

For Petitioner:

P1 Castillo Report/Statement