STATE OF NEW JERSEY

In the Matter of Caristina Nunez, Trenton, Department of Housing and Economic Development	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket No. 2021-1024 OAL Docket No. CSV 02247-21	

ISSUED: AUGUST 23, 2023

The appeal of Caristina Nunez, Clerk 1, Bilingual in Spanish and English, Trenton, Department of Housing as Economic Development, removal, effective December 22, 2020, on charges was heard by Administrative Law Judge Jeffrey N. Rabin (ALJ), who rendered his initial decision on June 30, 2023. Exceptions were filed on behalf of 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 August 23, 2023, adopted the ALJ's Findings of Facts and Conclusions and his recommendation to uphold the removal.

As indicated above, the Commission has thoroughly reviewed the exceptions filed in this matter and finds most do not require extensive comment. Nevertheless, the Commission makes the following comments. In her exceptions, the appellant argues that the ALJ's substituted his findings of fact for the stipulated findings of fact, and that he relied on his substituted facts in finding that removal was appropriate. The Commission rejects this contention. Even assuming, *arguendo*, the accuracy of the argument, the Commission's review of the penalty is *de novo*. 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 his initial decision, the ALJ found the appellant's infractions egregious, and upheld her removal without regard to progressive discipline. He stated:

> Appellant took improper advantage of a hybrid Covid work schedule to collect public salary while she was on vacation in the Dominican Republic. She misrepresented that she was at home and misrepresented that she had been performing her work duties. She committed a theft of salary by submitting incorrect timesheets. She risked exposing her coworkers to Covid-19 by travelling to a high-risk country without first advising her supervisors, then did not cooperate with her employer's attempts to conduct contact-tracing.

The Commission agrees that the totality of the misconduct in this matter is sufficiently egregious to support the penalty of removal. Suffice it to say, the appellant's actions in this matter fall well short of what is expected of a public employee and the penalty imposed is neither disproportionate to the offenses 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 appeals of Caristina Nunez.

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 23RD DAY OF AUGUST, 2023

Allison Chris Myers

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 02247-21
AGENCY DKT. NO. 2021-1024

IN THE MATTER OF CARISTINA NUNEZ, CITY OF TRENTON, DEPARTMENT OF HOUSING AND DEVELOPMENT.

Seth Gollin, Esq., for Caristina Nunez, appellant (AFSCME Union staff attorney)

Charles R.G. Simmons, Esq., for City of Trenton, Department of Housing and Development, respondent (Simmons Law, L.L.C., attorneys)[1]

Record Closed: August 30, 2022 Decided: June 30, 2023

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

STATEMENT OF THE CASE

Appellant, Caristina Nunez (appellant or Nunez), has appealed the removal from her position by respondent, City of Trenton, Department of Housing and Development (City or respondent). She has been charged with 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 - N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty - N.J.A.C. 4A:2-2.3(a)(7); and Other Sufficient

[1] Respondent-counsel Simmons substituted in place of Stephen Trimboli, of Trimboli & Prusinowski. Respondent's case was argued by John P. Harrington, Esq., of Trimboli & Prusinowski.

Cause - N.J.A.C. 4A:2-2.3(a)(12), for allegedly submitting false timesheets, failing to quarantine after travelling overseas, and failing to cooperate with the respondent's City Health Officer. Appellant seeks reinstatement to her job as Clerk 1, Bilingual in Spanish and English, City of Trenton Department of Housing and Development.

PROCEDURAL HISTORY

On December 22, 2020, respondent served appellant with a Final Notice of Disciplinary Action (FNDA), charging her with 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 - N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty - N.J.A.C. 4A:2-2.3(a)(7); and Other Sufficient Cause - N.J.A.C. 4A:2-2.3(a)(12), seeking the removal from her position at the City of Trenton Department of Housing and Development, effective December 22, 2020. On February 8, 2021, appellant filed an appeal with the Civil Service Commission, Division of Appeals and Regulatory Affairs, who transmitted the matter to the Office of Administrative Law (OAL), where it was filed on February 24, 2021, as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Hearings were held via Zoom, due to the continuing Covid-19 pandemic protocols, on May 16, 2022, and May 20, 2022. After delays caused by the pandemic, the date for issuance of this Initial Decision was extended nunc pro tunc until January 12, 2023, May 25, 2023, and again July 11, 2023.

FACTUAL DISCUSSION

Joint Stipulation of Facts

1. Nunez was employed by the City as a Clerk 1 (Bilingual) functioning primarily as a receptionist in the Department of Housing and Economic Development.

2. Nunez travelled outside of the United States to the Dominican Republic from September 30, 2020, through October 7, 2020.

3. Nunez was not working in her City Hall office in the Department of Housing and Economic Development from September 30, 2020, through October 18, 2020.

4. Nunez submitted timesheets to the City stating that she worked a full-workday on September 30, October 2, and October 6, 2020.

5. Nunez submitted timesheets to the City stating that she worked a full-workday on October 8, 14 and 16, 2020.

6. Nunez reported to work at the office in City Hall on October 19, 2020.

Testimony for respondent

Yvette Graffie-Cooper was a respondent's Health Officer. She discussed a demonstration regarding detoxification. Regarding the within matter, she explained that she dealt with Covid-19 protocols. There were post-travel quarantine rules. She had to perform contact tracing regarding appellant's vacation travel to the Dominican Republic. Employees were required to advise respondent if they had travelled to states listed as high risk. Per Exhibit R-12, the Covid safety checklist covered travel outside the United States. Per Exhibit R-9, as of October 2020, the Dominican Republic was listed by the Centers for Disease Control (CDC) as a Level 3 High Risk zone, and therefore appellant was required to advise her supervisor of her destination. An employee was required to use their own accumulated sick or vacation time for any required quarantine. No other employees were allowed to visit you while you were quarantining.

Graffie-Cooper contacted appellant upon her return from vacation, but appellant did not cooperate and did not provide information as to her vacation, such as travel dates, which were important in calculating quarantine dates. Graffie-Cooper knew from photos and social media that appellant had been out of the country on her vacation. Another employee had tested positive, so contact-tracing was required; that employee had visited appellant's home sometime during October 16 through 17.

Appellant had been in the Dominican Republic September 30 through October 7, 2020; therefore, a fourteen-day quarantine would have been through October 21, 2020. Yet she returned to the office on October 19, 2020.

Employees were on a special hybrid work schedule due to the pandemic. Per Exhibit R-21, a June 2, 2020, memorandum, and Exhibit R-22, an October 26, 2020, memorandum, directed that when not working in the office, an employee was to be working at home and had to be available.

Elizabeth James was an administrative assistant in appellant's department. Appellant was a receptionist, handling incoming phone calls, intaking rent payments, greeting members of the public, and performing clerical and filing duties. When James was working at home, calls would be forwarded to her home, but that was not the case with appellant.

Employees were required to give five days' notice of vacation time and advise their supervisor if they were leaving the country, because they would then be subject to quarantine rules.

Appellant was on the "AB" hybrid schedule. The appellant worked in the office on Tuesdays and Thursdays on the first week, and Monday, Wednesday, and Friday on every second week. Per Exhibit R-21, a "team that is not working in the building is working from home and must be available," meaning when working from home on AB, the employee had to be in their home. In Fall 2020, appellant was to be in the office September 29 and October 1, as well as October 5, 7 and 9; appellant was scheduled to work from home on October 6 and 8. Appellant only signed up for vacation days for the days she was scheduled to be in the office, those being October 5, 7 and 9, meaning that she did not take vacation time off on the days she was scheduled to work at home. She stated she was returning to the office October 19, and took one personal day on October 13, and did not explain where she would be on October 14, 15 or 16. On her time sheets, appellant put down 7.0 hours of sick time for October 1, 2020, even

though she was in the Dominican Republic, not sick, on that date. Appellant did not request vacation time for October 1, 2020.

On her timesheet, appellant reported that she worked from 8:30 a.m. until 4:30 p.m. on October 2, 6 and 8, even though she was in the Dominican Republic on those dates.

James never saw a request from appellant to leave the country on vacation, and appellant's supervisor never approved travel out of the country for appellant. To work remotely, an employee needed to request a phone and/or laptop; appellant did not make this request and was not given a cellphone or laptop for working remotely.

Steven Ponella was a Personnel Officer for respondent. The Exhibit R-7 Travel Policy was given to all employees. Self-quarantining for fourteen days was required after travel to restricted areas, although out of country travel itself did not require quarantining. The Exhibit R-7 revised travel memorandum did not include foreign countries as high-risk places for which quarantining was required. Failure to quarantine was a violation of employee rules, as was failing to cooperate with contact-tracing.

When working from home on the AB schedule, an employee was to be available to go into the office if required. Sick time could not be used when an employee was on vacation.

Although the stipulated facts were that appellant was in Dominican Republic on October 7, social media posts indicated she was still there on October 8, 9, 10, 12 and 16.

Andre Daniels is the current director of respondent but was not in that position during the time period in question.

Testimony for appellant

Terrance Chew worked for Trenton's security office, not in appellant's department and not under the same supervisor. He travelled to the Dominican Republic twice in 2020 and was made to quarantine upon his return, despite receiving a letter indicating that quarantining was only required for travel to certain high risk U.S. states. He was not required to advise his supervisor that he was travelling out of country.

Ron McMullen was a union representative, not a Trenton employee. He had handled some cases involving appellant. There was a fourteen-day quarantine policy, but he knew of one employee who was not required to quarantine.

Daniel Roach was a real estate manager for respondent. . He knew appellant, but she did not report to him.

Appellant had not been issued a city cellphone or laptop and was not permitted to conduct city business on her personal cellphone. There was no log of what work appellant might have performed while she was in the Dominican Republic. He could not recall what work appellant might have performed while she was in the Dominican Republic.

Roach was not familiar with travel rules or quarantine rules. He was not familiar with Exhibit R-12, which specifically asked if the employee was travelling out of country.

Nancy Ugalde had been a health inspector in the Trenton Health Department. She was not in Trenton when the July 30, 2020, travel memorandum was posted. She did not work in Trenton at the same time as appellant and was there only a year and a half. She was not familiar with respondent's rules in general, nor quarantine rules. She had no knowledge regarding appellant in October 2020.

Appellant **Caristina Nunez** worked for the respondent, answering the phone and handling rent payments. She worked for temporary directors, then director Delile.

Being "available" during the AB schedule meant being available by telephone and did not mean you had to be available to go into the office. She knew of one employee who was called into the office on a remote day, and when they could not go in, they had to use a sick or vacation day. She did not receive a city cellphone or laptop and handled work emails on her personal cellphone. She provided no records of work she conducted while in the Dominican Republic and did not say whether she had an international calling plan for her cellphone.

The quarantine rules did not say quarantining was required when travelling to Dominican Republic. Employees need not divulge where they are going on vacation. Appellant has made timesheet errors in the past, but they were always corrected by Ms. James. Appellant later testified that there were no errors made in her timesheets.

Appellant went to the Dominican Republic because her grandmother had recently suffered a stroke. She performed city work while in the Dominican Republic. She was back in the United States on October 7, 2020. She claimed that Exhibit A-5 (R-20) showed that she made cellphone calls to Trenton on September 30, October 1, October 2, October 5 and October 7, although the logs showed no cellphone calls to Trenton on October 6 and 8, the days in question, and the logs themselves did not support her claim. The office called her on September 30, but she did not return the call, even though she was to be working remotely. Appellant said she did work on that day, but then later flew to the Dominican Republic on that day. On October 1 she took a sick day while on vacation, to help her sick grandmother (although she travelled with her mother, who could have taken care of her grandmother). She could not remember who she spoke with at City when she called from the Dominican Republic.

On October 6 she received two City phone calls during her eight-hour workday. The work she did while in the Dominican Republic was checking her emails and texts. She emailed Mr. Capasso on October 2 at 4:13 p.m., stating that she did not have access to Edmonds (a work computer system) while she was "home." Appellant did not receive any calls from the public between September 30 and October 7.

She returned to work remotely from her home near the City, on October 8. She handled twenty phone calls that day. She then took a vacation day on October 9; there was a holiday on October 12;and she used a personal day on her birthday, October 13. Her next day in the office was October 19. She could not recall where she was on October 14 or 16 (which were remote workdays) and she took a sick day on October 15.

Despite Graffie-Cooper testifying that the two of them had spoken before, appellant testified that she had never spoken with Graffie-Cooper before and did not know who she was. Graffie-Cooper said they spoke on October 19, but that was not true. Ms. Marie Karme later explained to appellant who Graffie-Cooper was and that she was responsible for contact-tracing, and thereafter appellant spoke with Graffie-Cooper on October 21. Appellant had quarantined four or five times previously and was told she was required to quarantined after her recent trip to the Dominican Republic. She was tested for Covid-19, and it was negative. Graffie-Cooper was harassing her in an accusatory tone during their phone calls of October 23 and 24.

No colleague ever came to her home on October 16 or 17.

Appellant testified that she had never seen Exhibit R-12, the safety checklist, until the litigation. She never saw Exhibit R-10, the quarantine chart, although she later testified on cross-examination that she did receive R-10 from Delile on October 16, 2020. She had looked at CDC travel guidelines, and as of September 30, 2020, the United States had no quarantine requirements. Any City policy regarding quarantines was only for travel within the United States, and was advisory, not mandatory.

Exhibit R-18 is appellant's vacation request form, submitted September 23, 2020. She requested vacation days on October 5, 7 and 9, and a personal day on October 13. She stated she would be returning on October 19. She could not recall why she chose October 19 as her return-to-work date. She could not explain why she bought plane tickets to fly out September 30 and home October 7, yet put down October 19 as her return-to-work date.

Appellant testified that employees required to quarantine had to use their own accumulated sick or vacation time, but later testified that they could use "covid time," which was how she did it the five previous times she had to quarantine. The health officer had never asked her what date she had returned from vacation; she only asked if appellant if she had quarantined properly, and appellant told her that she had been back for two weeks.

Appellant assumed she could work her remote days in the Dominican Republic. She sent an email (Exhibit R-17) to work but never disclosed she was in the Dominican Republic. When asked why she did not just sign up for five vacation days, she said she wanted to work remotely. Employees cannot take sick time in advance except for appointments and procedures. You cannot take sick time in advance to care for family members.

ADDITIONAL 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. den., 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).

Respondent's witnesses

Yvette Graffie-Cooper was knowledgeable as to Department of Health and Covid-19 protocols. She testified in a calm, forthright manner. She spoke clearly and appeared honest and well-prepared. She was asked to testify about a demonstration video, but the video turned out to be irrelevant in substance to the within matter, and therefore her statements regarding that video did not serve to impeach her testimony. I found her to be a credible witness.

Elizabeth James was a good witness, who answered directly and displayed good general knowledge about her workplace. While she was not particularly good with details, she showed great familiarity with City forms and timesheets.

Steven Ponella answered only what he was asked and was knowledgeable about City policies and forms and job descriptions.

Andre Daniels testified in a calm, direct manner, and appeared knowledgeable. But he was not in appellant's department at the same time as her, and never stated that the receptionist's job description when he was there was the same as appellant's job duties. I gave his testimony no weight.

Appellant's witnesses

Terrance Chew answered directly but could not recall many details. I gave his testimony little weight.

Ron McMullen failed to answer questions directly and had trouble recalling many details. He offered several confusing and hearsay-laden answers and became somewhat difficult during cross-examination. He was not a credible witness.

Daniel Roach answered directly and appeared knowledgeable. He was not familiar with the safety checklist nor the quarantine chart. He was also not familiar with many City policies. He testimony about Valentine differed from Mr. McMullen's regarding whether Valentine had to quarantine. Roach specifically stated that he was not familiar with City travel quarantine rules. His travel was not outside of the country, so he could not be expected to know the quarantine rules for international travel. He also failed to testify as to what work appellant performed while she was in the Dominican Republic. His testimony received little weight.

Nancy Ugalde did not work for respondent at the same time as appellant, and not in the same department. She only worked for Trenton for a year and a half. She offered no substantive testimony. She was not with Trenton when the various travel and quarantine memoranda were issued. She often failed to answer the questions asked of her. She was not in a position to offer credible responses as to which employees received certain forms and policies and checklists. I cannot give her testimony any weight.

Appellant, **Caristina Nunez**, testified in a direct manner, but I found most of her statements to be self-serving and lacking credibility. She stated that the requirement to be "available" on remote days could not have meant that one needed to be able to come into the office because not all employees lived in Trenton; however, those employees lived close enough so that they were able to commute to and from Trenton every time they were required to be in the office. She testified that her intention was to work while she was in the Dominican Republic, but she never requested a City

cellphone or laptop. She testified that she did actually do City work on her remote days while she was away, checking emails and taking notes, but failed to produce evidence of those notes, and offered no other evidence such as documents or worklogs, other than sparse telephone records, indicating that she had actually did City work while in the Dominican Republic. She said she worked on September 30 before flying to the Dominican Republic, but offered no proof; conversely, respondent records indicated that she received a phone call from work but never returned it. She never indicated whether she had an international cellphone calling plan for her time in the Dominican Republic. Appellant testified that only one time was a remote employee called into the office building, but that did not prove her contention that "available" could not mean having to be able to go into the office; rather, it belied the fact that the City was trying to keep employees from additional employee contact during a pandemic. Appellant testified that the quarantine rules only applied to travel within the United States, and that employees did not need to divulge where they were going on vacation, but that could not be true because an employee would have to fill out of a City form which requested information on whether they were planning on travelling abroad or within the United States.

Appellant never explained why she only took vacation days on the days she was scheduled to work in the office. She testified that she went to the Dominican Republic to care for her grandmother, and she took a sick day on October 1, but did not explain why she did not sign up for all sick days if she was going there to care for a sick relative. It seemed unlikely that she only received two phone calls in an eight-hour workday on October 6, and even less believable that she worked the entire day on October 2, when the only correspondence she participated in that day was at 4:13 p.m., in response Mr. Capasso's email of 2:43 p.m. Her response to Capasso was that she was at home but did not have full access to her computer programs, in essence saying she was unable to perform City work at that time. This was a false response, because she was in the Dominican Republic at that time and not at home and did not even request a City laptop to with her to do City work.

Appellant also had memory lapses about where she was on October 14 and October 16, and overall, there was confusion as to when she actually returned to the

United States. The joint stipulation of facts and appellant's own testimony was that she returned on October 7, but there was credible testimony at the hearing based on social posts indicating she was still in the Dominican Republic through at least October 16, 2020.

There were differences in the testimony of Graffie-Cooper and appellant as to their communications. Further, appellant insisted that she was not familiar with travel and quarantine requirements of her employer when she had already quarantined four or five times. She testified on direct-examination that she never received the quarantine chart, but on cross-examination admitted that she had received it.

Finally, appellant had signed up to return to work on October 19, but she never took official time off for October 15. She later signed up for a sick day on October 15, but it was clear that she never had any intention of being at work that day.

I did not find appellant to be a credible witness.

Therefore, based on the testimony, briefs, and a review of the evidence, I **FIND**, by a preponderance of the credible evidence, the following additional **FACTS**:

Appellant was a receptionist, handling incoming phone calls, intaking rent payments, greeting members of the public, and performing clerical and filing duties; her job duties also included receiving documents, forms and fees, filing and sorting checks, cash stubs and vouchers, wrapping packages for shipment, and hand-stamping documents.

City employees had to give five days' notice of vacation requests and had to advise their supervisor if they were travelling to states listed as high risk or out of the country; as of October 2020, the Dominican Republic was listed by the CDC as a Level 3 High Risk zone. Exhibit R-7, the revised travel memorandum, did not include foreign countries as high risk places for which quarantining was required. Other employees were not allowed to visit you while you were quarantining. Failure to quarantine, when required, was a violation of employee rules, as was failing to cooperate with contact-

tracing. Appellant did not cooperate and did not provide information as to her vacation when Graffie-Cooper was conducting contact-tracing. Travel information was important in calculating quarantine dates. If appellant had been in the Dominican Republic only September 30 through October 7, 2020, the fourteen-day quarantine would have been through October 21, 2020. Appellant returned to the office on October 19, 2020.

Employees were on a special hybrid work "AB" schedule due to the Covid-19 pandemic. When not working in the office, employees were "considered working from home and are to be available." Appellant was in the office Tuesdays and Thursdays every first week, and Monday, Wednesday, and Friday every second week. In Fall 2020, appellant was to be in the office September 29 and October 1, as well as October 5, 7 and 9, 2020. Appellant was scheduled to work from home on October 6 and 8, 2020. Appellant only signed up for vacation days for the days she was scheduled to be in the office, those being October 5, 7 and 9, 2020, meaning that she did not take vacation time on the days that she was scheduled to work at home. Appellant stated that she was returning to the office on October 19, 2020. Appellant took a personal day on October 13, 2020. On her time sheets, appellant put down 7.0 hours of sick time for October 1, 2020, even though she was in the Dominican Republic, not sick. Appellant did not request vacation time for October 1, 2020. On her timesheet, appellant reported that she worked from 8:30 a.m. until 4:30 p.m. on October 2 and 6, even though she was in the Dominican Republic on those dates. Appellant never advised her supervisor that she was to be travelling outside the country during her vacation. In order to work remotely, an employee needed to request a phone and/or laptop, which appellant did not request so she was not given a cellphone or laptop for working remotely. Appellant reported to Mr. James Capasso on October 2, 2020, that she was home, when she was still in the Dominican Republic.

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).

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 was found to preponderate if it established the reasonable probability of the fact alleged and generated a reliable belief that the tendered hypothesis, in all human likelihood, was 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).

Appellant has been charged with 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 - N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty - N.J.A.C. 4A:2-2.3(a)(7); and Other Sufficient Cause - N.J.A.C. 4A:2-2.3(a)(12).

These charges stem from the assertions that appellant failed to quarantine for fourteen days after returning from the Dominican Republic, and that she improperly requested vacation time and submitted improper timesheets meant to corroborate her vacation request, stating she had worked several full days when she was on vacation and had not been working.

Regarding the quarantining, appellant was required to advise her supervisor in her vacation request that she was travelling out of the country and to a place that at that time was considered a high Covid-19 risk area. She failed to so advise her supervisor; if so advised, the supervisor could have formalized a requirement for appellant to quarantine upon her return to the United States. Respondent did not learn about appellant's travel to a foreign country until appellant's social media posts were viewed and it was determined that she had been out of the country.

Respondent relied on its various memoranda to confirm its quarantine policies, but none of those memoranda specifically required quarantining when travelling out of the United States or specifically to the Dominican Republic. Those memoranda only referenced high-risk states in the United States. Accordingly, I **CONCLUDE** that respondent failed to meet its burden of proof that City policy required quarantining when returning from a trip to the Dominican Republic, and that therefore appellant did not violate the respondent quarantine policy. Further, I **CONCLUDE** that respondent did not meet its burden of proving that a Covid-19-positive co-worker was at appellant's house at some time during October 16 or 17, 2020, which might have required appellant to quarantine.

However, I **CONCLUDE** that respondent met its burden of proving that respondent's travel checklist required appellant to advise her supervisor that she was planning to travel out of the country and to a country considered at high risk for Covid-19, and that appellant failed to so advise her supervisor. I **CONCLUDE** that respondent met its burden of proving that appellant was not cooperative with Ms. Graffie-Cooper in her attempts to conduct contact-tracing for the purpose of complying with Covid-19 protocols. I further **CONCLUDE** that appellant's failure to advise her supervisor about travelling out of country and failure to cooperate with respondent's attempts at contact-tracing constituted Insubordination per N.J.A.C. 4A:2-2.3(a)(2) and Other Sufficient Cause per N.J.A.C. 4A:2-2.3(a)(12).

Regarding appellant's vacation requests and submission of time sheets, it appears clear that appellant was attempting to take a three-week vacation while using only three vacation days and one personal day.

Due to the Covid-19 pandemic, City employees were on a special hybrid work "AB" schedule, whereas every first week appellant was scheduled to work in her office building on Tuesday and Thursday, and then every second week she would work in the office on Monday, Wednesday, and Friday. Based on that schedule, appellant was to be in the office building on September 29 and October 1, as well as October 5, 7 and 9, 2020, and was scheduled to work from home on September 30, October 6 and 8, 2020.

When appellant requested her vacation on September 23, 2020, she only requested vacation days for October 5, 7 and 9, 2020, those being the days she was scheduled to be in the office building. If she had indicated she was travelling out of the country, her supervisor would have seen that appellant was attempting to be away on vacation on October 2, 6 and 8 without signing up for vacation time on those days. Instead, appellant's supervisor was led by appellant to believe that appellant was not working on October 5, 7 and 9, 2020, and would be at home working on October 2, 6 and 8, 2020. This is borne by the fact that appellant was not authorized to perform City work from a foreign country. The City's AB hybrid schedule rules clearly stated that when not working in the office, employees were "considered working from home and are to be available." Although appellant attempted to dissect the meaning of the word "available," it was obvious that appellant was not available to physically go into the office building if need be on October 2, 6 and 8, because she was in a foreign country. The common sense meaning of the word "home" would be that she was to be working from her residence near the City of Trenton on her "home" days.

Appellant was a receptionist. Her responsibilities included matters that could only be handled in person. She was responsible for intaking rent payments, greeting members of the public, and performing clerical and filing duties. She was charged with receiving documents, forms, and fees. She was responsible for filing and sorting checks, cash stubs, and vouchers. She was charged with wrapping packages for shipment, and hand-stamping documents. None of these responsibilities could have

been handled via cellphone from the Dominican Republic.

Further, appellant never advised her supervisor that she intended on performing City business from a foreign country. She never requested a City cellphone. She never requested a City laptop computer from which she might be able to perform some of her duties. She offered no evidence that she performed any of her job duties for seven hours per day on October 2, 6 and 8, despite submitting a timesheet indicating that she did work seven hours each of those days. On her own calendar (Exhibit R-16), appellant indicated "work from home" on October 2, 6 and 8. In an email of October 2, appellant told someone that she was unable to access a certain computer program from home, despite the fact that she was physically in the Dominican Republic at that time and did not even have a City laptop computer with her. She did not take a vacation day on September 30, claiming, without evidence, that she worked that day, when in fact that was the day she flew to the Dominican Republic.

Appellant planned this twenty-day vacation in advance, knowingly being away from work for twelve workdays but only signing up for three vacation days and one personal day. She put down October 19 as her return to the office date, and therefore had no intention of being in the office on October 15 as scheduled, yet she did not sign up for a sick day until after she returned to the United States. She started her vacation on a workday, September 30, without taking September 30 as a vacation day. She called out sick on October 1, even though she was not sick and was already in the Dominican Republic at that time, despite a City rule prohibiting the use of sick time while on vacation. She claimed to have worked from home on October 2, when in fact she was not working and was in the Dominican Republic on vacation. She took a vacation day on Monday, October 5, but then did not take a vacation day on Tuesday October 6, rather claiming to be working from home despite being physically in the Dominican Republic at that time. She took a vacation day on October 7, but again falsely claimed to be working from home on October 8 despite being in the Dominican Republic on that date. She took a vacation day on Friday October 9, and had Monday October 12 off from work for Columbus Day. She then took a personal day on October 13. She could not recall where she was on October 14 or 16 (which were to be a remote workdays), and she later took a sick day on October 15. Because appellant put down her return-to-

work date as October 19, it was her intention from the beginning not to work on October 14 through 16, 2020. Appellant was unable to explain why she chose October 19 as her return-to-work date, or why she bought plane tickets to fly out September 30 and home October 7, yet put down October 19 as her return-to-work date.

I **CONCLUDE** that respondent met its burden of proving that appellant did not comply with City vacation request protocols, and that appellant misrepresented facts to respondent via falsified records by submitting timesheets seeking full day's pay for working "from home" on September 30, October 2, and October 6, 2020, and for requesting to be paid a sick day on October 1, while she was actually on vacation in the Dominican Republic. I further **CONCLUDE** that appellant's failure to comply with respondent vacation request protocols, failure to perform her work duties on scheduled workdays, and her misrepresentations resulting in receiving full pay for days she did not work, constituted Failure to Perform Duties per N.J.A.C. 4A:2-2.3(a)(1), Insubordination per N.J.A.C. 4A:2-2.3(a)(2), Neglect of Duty per N.J.A.C. 4A:2-2.3(a)(7) and Other Sufficient Cause per N.J.A.C. 4A:2-2.3(a)(12).

Finally, appellant was charged with "Conduct unbecoming a public employee," under N.J.A.C. 4A:2-2.3(a)6. 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)).

Having a government employee falsifying records and collecting pay for work she did not perform would certainly destroy public respect in the delivery of governmental services. Further, travelling to a country deemed a high risk for a communicable disease during a health pandemic, without disclosing this to the proper authorities, then refusing to cooperate in the remediation of such potential exposure to disease, would put everyone at her work office at risk of being exposed to Covid-19. This would certainly offend publicly accepted standards of decency. I **CONCLUDE** that appellant's failure to comply with respondent vacation request protocols, failure to comply with Covid-19 protocols, failure to perform her work duties on scheduled workdays, and her misrepresentations resulting in receiving full pay for days she did not work, constituted conduct unbecoming a public employee.

PENALTY

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

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, progressive discipline is not a fixed and immutable rule to be followed without question. In re Carter v. Bordentown, 191 N.J. 474 (2007). The determination of a penalty is subjective and follows 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.

Appellant took improper advantage of a hybrid Covid work schedule to collect public salary while she was on vacation in the Dominican Republic. She misrepresented that she was at home and misrepresented that she had been performing her work duties. She committed a theft of salary by submitting incorrect

timesheets. She risked exposing her coworkers to Covid-19 by travelling to a high-risk country without first advising her supervisors, then did not cooperate with her employer's attempts to conduct contact-tracing.

As argued by respondent, theft of time/public salary, covered under "Other Sufficient Cause," subjected appellant to major discipline, pursuant to N.J.A.C. 4A:2-2.3(a)(12). Theft of time by a public employee was a recognized form of fraudulent activity warranting major discipline, citing examples set forth in Maxwell-Abebe v. Newark Housing Authority, OAL Docket No. CSV-1824-00 (Initial Decision 2001) and Spenser v. Newark Housing Authority, OAL Docket No. CSV-9780-00 (Initial Decision 2002). Combined with her insubordination and conduct unbecoming a public employee, appellant has been rendered unsuitable for continuation in her position, without having to apply progressive discipline.

I CONCLUDE that the termination of appellant's employment with the City of Trenton was appropriate.

DECISION AND ORDER

I hereby **ORDER** that the charges of 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 - N.J.A.C. 4A:2-2.3(a)(6); Neglect of Duty - N.J.A.C. 4A:2-2.3(a)(7); and Other Sufficient Cause - N.J.A.C. 4A:2-2.3(a)(12), be **SUSTAINED**.

I **FURTHER ORDER** that respondent's termination of appellant's employment with the City of Trenton be **SUSTAINED**.

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.

June 30, 2023 _____

DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JNR/lam

APPENDIX

WITNESSES

For appellant

Terrence Chew

Ron McMullen

Daniel Roach

Nancy Ugalde

Caristina Nunez

For respondent

Yvette Graffie-Cooper

Elizabeth James

Steven Ponella

C. Andre Daniels

EXHIBITS

For appellant

A-1 Demonstration video

A-2 Appellant's time sheet, dated October 10, 2020

A-5 Appellant's T-Mobile call log

For respondent

R-1 PNDA, dated November 6, 2020

R-2 FNDA, dated December 22, 2020

R-3 Termination discipline, dated December 22, 2020

R-4 Final decision of hearing officer

R-5 Quarantine begin/end dates

R-6 Appellant's quarantine email

R-7 CDC state Covid rates

R-8 CDC state Covid rates updated

R-9 Dominican Republic high risk note

R-10 Change notice, dated October 16, 2020

R-11 City employee document, dated October 21, 2020

R-12 Safety checklist

R-13 Airport video

R-14 9/13-9/26/2020 time sheet

R-15 9/27-10/10/2020 time sheet

R-17 Email correspondence with Mr. Capasso, dated October 2, 2020

R-18 October 5, 7, 9, 2020, Nunez PTO request

R-21 June 2020 AB schedule memo

R-22 AB schedule memo

R-23 Civil Service job description

BRIEFS

For appellant

Post-hearing Brief, dated August 29, 2022

For respondent

Post-hearing Brief, dated August 29, 2022