



STATE OF NEW JERSEY

In the Matter of Michelle Sampson,
Upper Township, Department of
Recreation and Public Health

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC Docket No. 2023-281
OAL Docket No. CSV 06873-22

ISSUED: DECEMBER 20, 2023

The appeal of Michelle Sampson, Senior Emergency Medical Technician, Upper Township, Department of Recreation and Public Health, removal, effective July 29, 2022, on charges, was heard by Administrative Law Judge Carl V. Buck, III (ALJ), who rendered his initial decision on November 13, 2023. Exceptions were filed on behalf of the appellant and a reply 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, the Civil Service Commission (Commission), at its meeting on December 20, 2023, aside from as noted below, adopted the Findings of Fact and Conclusion as found in the initial decision and the recommendation to uphold the removal.

Initially, the Commission notes that the ALJ made incorrect references regarding charges not part of the current matter, which appears to be a transpositional error, or what is commonly known as a "copy and paste" type error. However, it is clear this error did not detract in any way from the ALJ's findings regarding the actual charges levied in this matter, or on his conclusions made therefrom. As such, the Commission, in its *de novo* review, does not adopt any of the erroneous references, but nonetheless finds such error does not otherwise affect its affirmance of the remainder of the ALJ's decision.

Otherwise, the Commission finds the ALJ's decision thorough and comprehensive. In this regard, it rejects the appellant's exceptions as unpersuasive with most not requiring discussion. However, the Commission makes the following comments. The appellant argues that the ALJ improperly relied on hearsay unsupported by a residuum of competent evidence. Hearsay evidence is admissible

before the Office of Administrative Law as long as some legally competent evidence exists to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. See *N.J.A.C. 1:1-15.5(b)* (also known as the Residuum Rule). See also, e.g., *Matter of Tenure Hearing of Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). In this matter, the Commission finds that the portions of the testimony of the appointing authority's witness, which provided details from documents authored by and interviews of the individual who made the allegations against the appellant regarding the nature and extent of the affair, was admissible. Initially, as this evidence clearly constituted admissions against interest by the individual who made the allegations, that evidence could be admitted directly, even absent a residuum, pursuant to *N.J.R.E. 803(c)*. Moreover, even if not considered admissible under *N.J.R.E. 803*, that evidence was supported by a residuum of competent evidence. Specifically, the appellant herself admitted to, albeit to a lesser degree, much of the conduct alleged by the individual, which provides the residuum. While she disputes the continuation of the affair past a certain date, as well as some of the alleged conduct, the ALJ found that the preponderance of the credible evidence did not support her contentions. Upon its *de novo* review, the Commission finds no reason to question the ALJ's determinations in this regard, or his findings and conclusions made therefrom.

In this regard, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. See *Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." See also, *In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. See *N.J.S.A. 52:14B-10(c)*; *Cavaliere u. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or his findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable.

Similar to its assessment of the charges, the Commission's review of the penalty is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the

underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In her exceptions, the appellant argues that the removal should be modified. In essence, the appellant attempts to minimize the nature of her misconduct and argues she engaged in minor "technical" violations of the appointing authority's policy. The Commission disagrees. In this regard, the ALJ found:

Under a progressive discipline analysis, Sampson's prior disciplinary history must be considered, and she has no prior disciplinary history, which is a substantial mitigating factor to consider for progressive discipline.

However, appellants willful disregard of Township policies, and the negative effects deriving therefrom and the cascading effect of appellants action (or lack of action in disregard of the dictates of the dating policy) support the imposition termination. The concept of progressive discipline may be disregarded in certain circumstances. This is one of those circumstances. After having considered all of the proofs offered in this matter and the impact upon Upper Township in consequence of the appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significant to warrant a penalty of removal. Therefore, I **CONCLUDE** that the imposition of removal is an appropriate penalty for these violations.

The Commission agrees with the ALJ that the appellant's misconduct is egregious and supports the penalty of removal. While the Commission acknowledges the appellant's prior lack of a major disciplinary record, the appellant's egregious actions in this matter fall well short of what is expected of a public employee, especially one who served in a supervisory capacity and whose duties dealt with the health and welfare of the public. Notwithstanding the appellant's attempts to justify, rationalize or minimize the serious nature of her misconduct, the Commission finds that her actions were egregious and wholly inappropriate. The appellant's actions would clearly tend to undermine the public trust and as such, the Commission finds the penalty of removal neither disproportionate to the offense 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 Michelle Sampson.

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 20TH DAY OF DECEMBER, 2023



Allison Chris Myers
Chairperson
Civil Service Commission

Inquiries
and
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Nicholas F. Angiulo
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Civil Service Commission
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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 06873-2022

AGENCY DKT. NO. 2023-281

**IN THE MATTER OF MICHELLE SAMPSON,
UPPER TOWNSHIP DEPARTMENT OF
RECREATION AND PUBLIC HEALTH.**

Louis M. Barbone, Esq., for appellant, Michelle Sampson (Jacobs & Barbone, P.A., attorneys)

Jeffrey P. Catalano, Esq., for respondent, Upper Township Department of Recreation (Parker McCay, P.A., attorneys)

Record closed: March 30, 2023

Decided: November 13, 2023

BEFORE **CARL V. BUCK III, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Michelle Sampson (Sampson), was employed by respondent, Upper Township, Department of Recreation and Public Health (Township), as the Chief Emergency Medical Technician (CHIEF). On March 29, 2021, the Township filed a Preliminary Notice of Disciplinary Action (PNDA1) against Sampson alleging a violation of the Township's Employee Dating Policy (Dating Policy or Policy), and other violations under N.J.A.C. 4A:2-2.3(a). The additional charges included incompetency, inability to perform (her) duty, conduct unbecoming, neglect of duty and misuse of public property. (R-1.)

The PNDA was based on two complaints:

- 1) a January 12, 2021, complaint from EMT Mikhaila Hemby (Mikhaila); and
- 2) a January 19, 2021, complaint from EMT John "Marc" Hemby (Hemby).

PNDA1 indicated an intent to terminate Sampson effective April 21, 2021.

The Township filed a second Preliminary Notice on June 16, 2022, (PNDA2), adding a charge of a violation of N.J.A.C. 4A:2-2.5(a)(1) stating Sampson was unfit for duty and that an immediate suspension was necessary. On July 29, 2022, the Township filed its Final Notice of Disciplinary Action (FNDA) sustaining the charges and terminating Sampson effective July 29, 2022.

Sampson appealed, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 10, 2022, to be heard as a contested case. N.J.S.A. 52:14B-1 to 14B-15; N.J.S.A. 52:14F-1 to 14F-13. Prehearing telephonic conferences were conducted with counsel. A discovery schedule was established, and hearing dates set down. Hearings were held on January 11, 2023, and February 1, 2023, via the Zoom platform. The record remained open for the submission of written summations. Written summations were received, and the record closed on March 30, 2023. Requests for extensions for issuance of this Initial Decision were requested and granted.

STIPULATIONS OF FACT

The parties agreed to a "Stipulation of Facts" dated January 2, 2022, and a "Revised Stipulation of Facts" dated January 31, 2022, which were set forth in individually numbered paragraphs and admitted into evidence as J-1. Those stipulations are set forth, verbatim, which I adopt and **FIND as FACT:**

1. On March 29, 2021, the Township filed a Preliminary Notice of Disciplinary Action against Sampson alleging a violation of the Township's dating policy as well as various violations pursuant to N.J.A.C. 4A:2-2.3(a), including

incompetency, inability to perform duty, conduct unbecoming, neglect of duty and misuse of public property.

2. The Preliminary Notice of Disciplinary Action was based on two complaints: 1) one received on January 12, 2021, from EMT Mikhaila Hemby and 2) a second received by the Township January 19, 2021, from EMT, John "Marc" Hemby. The Township also interviewed Mr. Hemby on two occasions: January 19, 2021, and February 1, 2021.
3. The Township's Preliminary Notice indicated an intent to terminate the appellant's position effective April 21, 2021.
4. The Township then filed a second Preliminary Notice on June 16, 2022, expanding the charges to include a violation of N.J.A.C. 4a:2-2.5(a)(1). Appellant admits the Notice was served upon her.
5. Sampson acknowledges that John Marc Hemby filed an employee complaint but denies the accuracy and veracity of that complaint.
6. A disciplinary hearing was held before Hearing Officer Brian Trelease, who was appointed by the Township. On July 28, 2022, Hearing Officer Trelease found that Sampson violated the Township's Employee Dating Policy and Civil Service Regulations. Hearing Officer Trelease also upheld the penalty of the termination of Sampson's employment.
7. Sampson filed the instant appeal of her termination with the Civil Service Commission. While she admits violating the Township's employee dating policy, she appeals the Hearing Officer's determination as to the other violations and the discipline imposed.
8. The parties acknowledge that the Township has an employee dating policy which is contained in the Township's Employee Manual and will be one of the Township's exhibits.

9. On February 3, 2021, Sampson provided a recorded statement to the Township wherein she admits that she violated the Township's employee dating policy by virtue of her failure to report the existence of her former relationship with a co-employee John M. Hemby.
10. At the time appellant was served with the Preliminary Notice on March 29, 2021, she was a senior emergency medical technician employed by the Township since initially hired in June of 2006 as an emergency medical technician. Appellant was thereafter promoted to the position of senior emergency medical technician and held that position until December of 2019. She was then appointed as the Chief EMT in Upper Township on November 25, 2019. The Township then by resolution appointed her Chief January 1, 2021. Appellant was then terminated as Chief and demoted back to the position of senior EMT by way of resolution on February 22, 2021.
11. Appellant has no record of any disciplinary infraction with the Township.
(J-1.)

FACTUAL DISCUSSION AND FINDINGS

TESTIMONY

There are several aspects of this matter which were presented by the parties and made plain from the testimony and documentary evidence entered in this matter. They are presented as follows:

Rhonda Sharp (Sharp) serves as tax collector, personnel officer and claims coordinator for Upper Township and testified for Township. At the time of the incident, she was the assistant personnel director. She testified to appellant's history with the Township as well as his history of Hemby. She testified to a complaint filed by Mikhaila and a subsequent complaint against the Township filed by Hemby. An investigation began and Hemby was interviewed on January 19, 2021, and February 1, 2021.

Sharp was present for and provided information on Hemby's interviews of January 19, 2021, and February 1, 2021.

In his initial interview Hemby stated that he and Sampson began having a "sexual/physical" relationship while she was a Senior EMT. Transcript 1, p. 21, Ins. 16-25. (Referencing R-4.) Hemby stated that the "sexual/physical" relationship occurred at the EMS building and other places on Township property. Transcript 1, p. 22, Ins. 10-24. (Referencing R-4.) Hemby stated that he and Sampson engaged in sexual intercourse numerous times at the Upper Township EMS building while they were on duty between 2016 and 2019. Transcript 1, p. 22, Ins. 10-24¹. (Referencing R-4.) Sexual encounters were also referenced "As for locations in the building, it happen (sic) in the front room, meeting room, full timers office, the bay in the main building, the rear building and in the trucks" and "Also the chief's office". These sexual encounters were verified by Hemby and Sampson by way of text messages and photographs seen in R-7. This included, but were not limited to, the following:

1. A May 7, 2020, text in which Hemby asks Sampson why she is using this phone (referring to her work phone); Sampson responds by sending a picture of herself from her personal phone on a Facetime call.
2. A May 12, 2020, text in which Sampson sends a picture of herself from her personal phone on a Facetime call and asks Hemby if he can Facetime on her work phone. Hemby advises Sampson that this phone (referring to Sampson's work phone) makes him nervous.
3. A May 24, 2020, text in which Hemby states "Guess you're really busy today. Went from talking about kissing me to nothing." Sampson replies, "Ur sending that on my work cell."

¹ "Transcript -" referring to the first day of the hearing.

4. Multiple texts on August 7, 2020, in which Sampson tracks Hemby's family's return from vacation as their plane lands and Hemby waits for them at the airport. Sampson asks Hemby whether he is still waiting. He responds, "Yes babe."
5. Multiple texts on August 8, 2020, in which Hemby asks Sampson to Facetime; he says he would liked (sic) to see her before work that morning.

(R-7.)

Sampson controlled the schedule for Hemby, Mikhaila and Jimmy (Samson's husband). Transcript 1, p. 44. (Referencing R-4.) Hemby stated that "the installation dinner for the Mamora (sic) firehouse for a couple years, you know, Michelle would schedule Jimmy and Michelle or Jimmy and Mikhaila to work together. So, it would give us, you know, the opportunity to be alone at that point. You know, she kind of controlled that part of it." Transcript 1, p. 44, Ins. 10-17. (Referencing R-4.)

Sampson became chief EMT on December 1, 2019. After Sampson became Chief, Hemby testified that they no longer engaged in sexual intercourse; however, Hemby admitted that they still engaged in other sexual acts. Transcript 1, p. 29, Ins 9-25. Hemby admitted that while there was no intercourse while Sampson was chief EMT, they engaged in "sexual contact kissing", that there was "physical contact between the two of us" and that they would "kiss, touch along – stuff along those lines." Transcript 1, p. 29, Ins 9-25.²

In 2019, Sampson attempted to end their relationship. (Exhibits R-10 and R-11.)

² No specificity as to exactly what these descriptive phrases constituted were made during this hearing.

On May 19, 2020, Sampson provided Hemby with a copy of notes from Deputy Chief Melissa Coker (Coker) of a meeting that Coker was planning to have with Sampson on June 2, 2020. Transcript 1, p. 63-65. (Referencing R-7.)

Sharp also testified to an interview of appellant on February 3, 2021, where appellant acknowledged the claim of Mikhaila and the contents of the claim. Appellant also acknowledged the employee dating policy and the penalties for violating the policy. Appellant testified to a number of text messages and emails between she and Hemby which contained photographs which appellant stated were at least three years old. Appellant stated that, regarding Mikhaila's employment request for a full-time position, that if appellant has been still having an affair with Hemby, that appellant would have tried to hire Mikhaila for a full-time position – in order to have knowledge and control of Mikhaila's whereabouts. However, appellant and Hemby had ended their relationship by that point. Appellant stated that she received a picture of Hemby with a handful of pills in his hand stating that appellant could explain to Hemby's children why he wasn't there the next day. That night Hemby went to appellant's house and was seen in a video camera/doorbell threatening to ring appellant's doorbell to tell appellant's husband about their affair, wake up the neighborhood, and take other action making statements such as "You're lucky I didn't fucking drive him that cocksucker's truck right through the fucking front door 20 years ago." Hemby appeared to be intoxicated in the video.

Sharp testified to a number of other text messages between appellant and Hemby most of which were from 2020. A number of these Sharp felt were Hemby's reaching out to appellant with Hemby being upset because appellant was not providing Hemby with

the attention that Hemby wanted. Hemby was also upset that Mikhaila did not get hired for the full-time position. These included:

1. A May 7, 2020, text in which Hemby asks Sampson why she is using this phone (referring to her work phone); Sampson responds by sending a picture of herself from her personal phone on a Facetime call.
2. A May 12, 2020, text in which Sampson sends a picture of herself from her personal phone on a Facetime call and asks Hemby if he can Facetime on her work phone. Hemby advises Sampson that this phone (referring to Sampson's work phone) makes him nervous.
3. A May 24, 2020, text in which Hemby states "Guess you're really busy today. Went from talking about kissing me to nothing." Sampson replies, "Ur sending that on my work cell."
4. Multiple texts on August 7, 2020, in which Sampson tracks Hemby's family's return from vacation as their plane lands and Hemby waits for them at the airport. Sampson asks Hemby whether he is still waiting. He responds, "Yes babe."
5. Multiple texts on August 8, 2020, in which Hemby asks Sampson to Facetime; he says he would liked (sic) to see her before work that morning.

(R-7 and R-13.)

Michelle Sampson (Sampson), the appellant testified on her own behalf. She testified to her background and employment with the Township, becoming a full time EMT in 2006. She became a senior EMT in 2016 with additional responsibilities as a supervisor to other EMTs under then chief EMT Jay Potter. She became chief EMT on December 1, 2019, and was in charge of staff, policies, procedures, discipline and scheduling. She served as chief until February 2021 when she was dismissed from that position and returned to work approximately a month and a half later under the title of

senior EMT. She is also a certified 911 dispatcher, a telecommunicator and instructor with CPR certification. She is a volunteer firefighter in several local communities. She is the northern EMS coordinator for Cape May County.

During her time as chief, an opening for two full-time EMS employees was open. She stated that this was in 2020. Mikhaila, then a part time employee, applied for a position but was not hired for a full-time position. Sampson was involved with the interview process and recommended that two other candidates be hired. Mikhaila filed a complaint with the Township on January 12, 2021, alleging discrimination. (R-2.)

On January 17, 2021, Hemby filed a complaint with the Township alleging a reduction in hours and requesting a return to work. (R-3.)

On February 3, 2021, at a meeting with the township administrator, Scott Morgan (Morgan) and Sharp she was made aware of a complaint filed by Hemby. At that meeting, Sampson told Morgan and Sharp that she (Sampson) was having an affair with Hemby that had ended a year ago. Sampson knew about the dating policy but had not told her supervisor, the chief or business administrator about the affair during the time of the affair.

Sampson denied manipulating the schedule to allow for her and Hemby to serve together or have Mikhaila and her Sampson's husband serve together.

Sampson referenced several instances where Hemby sent improper messages or acted inappropriately, and Sampson continued to engage with Hemby via text message. After alleged incidents in August 2019 when Hemby sent a text message saying, "It's going to get bad fast". On June 28, 2020, Hemby went to Sampson's house while intoxicated and threatened to ring the doorbell (R-14) and disclose their sexual relationship to her husband, Jim. Despite this incident, Sampson did not report her relationship with Hemby to the Township. Transcript 2, p. 76, Ins 1-4. After the Ring Video incident from June 28, 2020, Hemby sent a message to Sampson after Mikhaila did not receive her promotion in October 2020 stating, "This isn't done yet, and if it costs us everything, then that's what I'm going to do". Eight days after the Ring Video incident, on July 6, 2020, Sampson sent a text to Hemby, sending a picture of Sampson's location to

Hemby. (R-7.) Eight days later, Sampson texts Hemby, asking Hemby to guess what she made her son dinner. (R-7.)

On August 7, 2020, Sampson texts with Hemby, indicating that she is tracking Hemby's family's return from vacation as their plane lands as Hemby waits for them at the airport. Sampson asks, "U alone"; Hemby responds "Yes" and that "Clearly I got left for a TV show." (R-7.) Sampson asks Hemby whether he is still waiting. He responds, "Yes babe." On August 8, 2020, Hemby states that he would have liked to see Sampson this morning. (R-7.)

Ten days later, on August 18, 2020, Sampson texted Hemby asking whether Hemby would be a "character witness" for her if the "bullshit with Steinthal continues." Transcript 1, p. 83, Ins 4-13. (Referencing R-7.)

When Mikhaila applied for a full-time EMT position, Sampson participated in the interview process in October and recommended candidates to the Township Committee stating she recommended the two male applicants that were hired, John Britain and John Carter and did not recommend Mikhaila for the promotion. Transcript 1, p. 38, Ins 21-23; Transcript 2, p. 67, Ins. 13-17.

On December 29, 2020, Mikhaila filed a lawsuit against the Township alleging gender discrimination. (R-17.) Mikhaila alleged that failure to hire her was due in part to Sampson's relationship with Hemby. In her Second Amended Notice of Tort Claims, dated February 9, 2021, Mikhaila alleged that "Supervisor Michelle Sampson is having an extramarital affair with [Hemby]. Associational Quid Pro Quo sexual harassment retaliation, tortious inference with prospective economic opportunities, alienation of affection." (R-20.) The ultimate settlement of Mikhaila's claim was \$120,000. (R-18.)

Prior to facing employee complaints, Sampson never reported her sexual relationship with Hemby to the Township. Transcript 2, p. 67, Ins. 1-5.

The Township's Investigation

On January 1, 2021, Mikhaila had discovered that Sampson and Hemby were having an affair. On January 12, 2021, Mikhaila filed an Employee Complaint Form against Sampson and Hemby. (R-2.) According to Mikhaila's complaint, Hemby would be willing to speak with the Township to confirm the affair.

On January 17, 2021, Hemby filed an employee complaint form. (R-2.) According to Hemby's complaint form, he came forward because he wanted to return to work, claiming that Sampson was holding their terminated relationship against him. He alleged that he and Sampson had a "sexual/physical" relationship and as a result Sampson scheduled him for fewer work hours. At the time Hemby filed his complaint, Sampson held the chief position.

The Township investigated Hemby's allegations. Scott Morgan, Administrator, and Rhonda Sharp, then the Assistant Personnel Officer and at the time of the hearing the Personnel Officer, conducted the investigation on the Township's behalf.

During Hemby's interviews, he provided text messages, photographs, and other documentation that substantiated his sexual relationship with Sampson. The text messages provided, beginning in May 2020, including the following communications:

1. A May 7, 2020, text in which Hemby asks Sampson why she is using this phone (referring to her work phone); Sampson responds by sending a picture of herself from her personal phone on a Facetime call.
2. A May 12, 2020, text in which Sampson sends a picture of herself from her personal phone on a Facetime call and asks Hemby if he can (call her)
3. Facetime on her work phone. Hemby advises Sampson that this phone (referring to Sampson's work phone) makes him nervous.

4. A May 24, 2020, text in which Hemby told Sampson that he texted her an hour ago and that he will leave her alone because she is busy.
5. A May 24, 2020, text in which Hemby demonstrates the continuation of their relationship when Sampson served as Chief EMT, by saying "Guess you're really busy today. Went from talking about kissing me to nothing." Sampson replies, "Ur sending that on my work cell."
6. A June 26, 2020, text in which Sampson says that she is about to freak and forwards graphic photographs of her father's cancerous facial sores.
7. A July 6, 2020, text in which Sampson says that she is breaking.
8. Multiple texts on August 7, 2020, in which Sampson tracks Hemby's family's return from vacation as their plane lands and Hemby waits for them at the airport. Sampson asks Hemby whether he is still waiting. He responds, "Yes babe."
9. Multiple texts on August 8, 2020, in which Hemby asks Sampson to Facetime; he says he would liked to see her before work that morning.

R-7.)

Hemby supplied photographs of Hemby and Sampson in intimate settings. In one photograph, he and Sampson are cheek to cheek and there is a blanket in the photo with the two of them lying next to each other, seemingly on a bed. In another photograph, seemingly taken at the same time, Sampson and Hemby are kissing each other on the lips. Hemby's eyes are closed. The photographs were taken in 2017 or 2018. During her interview, Sampson advised that the photographs were taken in 2018, admitting that as documented in both pictures, she and Hemby were engaged in sexual activity. Hemby also supplied four photographs Sampson provided to Hemby of herself. In one photograph, Sampson puckers her lips to blow a kiss to Hemby. Another photograph of

Sampson shows her surrounded by pink hearts and yet another has a vine of pink hearts on the left and right sides of the picture.

As part of the investigation, Sampson was interviewed on February 3, 2021. When initially asked about the allegations that she and Hemby had sexual relations inside the confines of the EMS building from time to time, Sampson did not deny it, stating instead "I – I'd like to hear what he has." Transcript 1, p. 109, Ins. 17-18. (Exhibit 11.) As part of this interview, Sampson made several admissions:

1. Sampson admitted that the relationship with Hemby was of a sexual nature. Transcript 1, p. 108, Ins. 12-16; Transcript 2, p. 73, Ins. 17-19.
2. Sampson admitted that she violated the Township dating policy. Transcript 1, p. 117, Ins. 22-23.
3. Sampson admitted that her scheduling her and Hemby to the same shift "could have happened. Transcript 1, p. 121, Ins. 7-11.
4. Sampson admitted that the sexual activity happened while she was a senior EMT. Transcript 1, p. 133, Ins. 6; *see also* Transcript 2, p. 40, Ins. 23-25; Transcript 2, p. 73, Ins 13-16.
5. Sampson admitted that the allegations of having sexual relations with Hemby in the EMS building "could have happened." Transcript 1, p. 133 Ins. 6; Transcript 2, p. 74, Ins. 9-10.

The PNDA was issued to Sampson on July 6, 2020. It listed three administrative charges being major discipline, conduct unbecoming a public employee, and other sufficient cause. (J-2.) The incident giving rise to the charges was set forth in the PNDA as:

On June 12, 2020, Mr. Sampson was caught on video camera putting a student's bicycle onto his work vehicle. The student reported the missing bicycle to the Office of Campus Public

Safety on June 17, 2020. Mr. Sampson called Katherine Hibbert, Associate Director of Facilities Management on June 18, 2020, to confess to stealing a student's bicycle.

(J-2.)

The FNDA, which issued to Sampson on March 18, 2021, sustained the charges as stated in the PNDA, citing the same incident as set forth verbatim in the PNDA. (J-3, J-2.)

Sampson challenges the discipline imposed of removal, effective July 9, 2020. Stockton seeks to have the discipline of removal affirmed. Sampson contends removal is too harsh and not in line with progressive discipline.

Credibility analysis:

A fact finder is obligated to weigh the credibility of witnesses. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness's interest in the outcome, motive, or bias. 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).

Sharp testified in a direct and factual manner. No bias or ill will towards Sampson was detected or displayed. Her testimony is deemed credible; however, it must be noted that Sharp did not testify with "first-hand" knowledge of the majority of the events contended. Nor did the Township have Hemby testify for the Township's case. No negative inference is taken but the lack of any positive inference if Hemby had testified is also noted.³

³ Appellant contends that Hemby's refusal to testify and the township's lack of subpoena "requires an adverse inference against the believability of his testimony" per New Jersey Model Civil Jury Charges, 1.18. In this instance I disagree with that contention.

Sampson candidly admitted that she had had an affair with Hemby and had not complied with the Township's dating policy. She showed frankness and remorse in her actions and stated that the affair had ended when she became Chief. But it is uncontroverted that admission of the affair was only revealed to her superiors after the affair created collateral damage; to wit, the litigation brought by Hemby and Mikhaila.

There is still a question as to what is considered "sexual contact" and what was the actual timeline of the affair. Hemby's documentation/ interview and the messages between the two denote activity up to at least August 18, 2020 – thereby contradicting Sampson's statement that the affair ended before she became chief on December 1, 2019.

Based upon a review of the documentary evidence, and having heard the testimony of the witnesses, and having had the opportunity to observe the appearance and demeanor of the witnesses via Zoom, **I FIND** the following as further **FACTS**:

1. Sampson and Hemby were coworkers at all times.
2. An affair between the two was active for a period in 2007 and again from 2016 to 2018.
3. Sampson and Hemby engaged in exchange of text and other messages up to and including August 18, 2020, the substance of which is indicative of a continuing relationship between the two exceeding that of a supervisor/ employee relationship.
4. During the course of the affair Sampson was aware of the Township's dating policy and the repercussions for violating the policy.
5. During the course of the affair Sampson did not reveal the activity to any superior.

6. Sampson revealed to her superiors that an affair had occurred when interviewed on January 3, 2022.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee's rights and duties are governed by the Civil Service Act and regulations promulgated thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an inducement to attract qualified individuals to public service positions and is to be liberally construed toward attainment of merit appointments and broad tenure protections. Essex Council No. 1, N.J. Civil Service Association v. Gibson, 114 N.J. Super. 576, 581 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972), citing Mastrobattista v. Essex County Park Commission, 46 N.J. 138, 145, 147 (1965).

A civil service employee who commits a wrongful act related to their employment may be subject to discipline, which may be a reprimand, suspension, or removal from employment, depending upon the incident. N.J.S.A. 11A:1-2; 11A:2-6; 11A:2-20; N.J.A.C. 4A:2-2.2. Public entities should not be burdened with an employee who fails to perform their duties satisfactorily or if the employee engages in misconduct related to their duties. N.J.S.A. 11A:1-2(a); 11A:2-20. Thus, a public entity employer may impose major discipline upon a civil service employee, including termination/removal from their position. N.J.S.A. 11A:1-2; N.J.A.C. 4A:2-2.2.

The appointing authority employer has the burden of proof to establish the truth in a major disciplinary action brought against a civil service employee. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is by a preponderance of the credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); and see, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is considered to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) citation omitted. The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958).

The first issue in this proceeding is whether a preponderance of the credible evidence establishes that the appellant's actions constitute a violation of the charges set forth in the July 29, 2022 FNDA. If so, the second issue is whether the violation warrants termination of employment or a lesser penalty, if any.

Sampson is alleged to have violated six sections of N.J.A.C. Civil Service Title 4A:2-2 which Township contends warrants her removal from employment. The New Jersey administrative code outlines the rules applicable to civil service employment. N.J.A.C. 4A, et seq. Chapter 2 of Title 4A addresses the issue of appeals, discipline, and separation of civil service employees. N.J.A.C. 4A:2, et seq. Major discipline is considered removal from employment, disciplinary demotion, and imposition of a suspension or fine for more than five working days. N.J.A.C. 4A:2-2.2(a). This is the regulation which permits major discipline to be imposed.

Each charge against appellant is addressed below.

1. N.J.A.C. 4A:2-2.5(a)1

The first regulation charged to Sampson, N.J.A.C. 4A:2-2.2.5(a)1, alleging appellant is unfit for duty. Under this code section:

1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

As appellant has admitted to violation of Township policies, the requirements of this section have been met. It is necessary to remove appellant immediately to maintain an effective direction of public services due to the repercussions of her actions in disregard of Township policies.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.5(a)(1) stating appellant is unfit for duty.

2. N.J.A.C. 4A:2-2.3(a)(1), Incompetency, inefficiency or failure to perform duties

Sampson is charged with "Incompetency, inefficiency or failure to perform duties" as codified at N.J.A.C. 4A:2-2.3(a)(1). 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).

Here, Sampson's years of service demonstrated her competence to do the work required. Her conduct, however, demonstrated her unwillingness to comply with Township policies which were known to her.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(1) for failure to perform duties.

3. N.J.A.C. 4A:2-2.3(a)(3), Inability to perform duties

Sampson is charged with "Inability to perform duties" as codified at N.J.A.C. 4A:2-2.3(a)(3). From the testimony and submissions and from the inability to act in compliance with Township policies it is plain that appellant is unable to perform her duties in accordance with Township rules and regulations.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(3) for inability to perform duties.

4. N.J.A.C. 4A:2-2.3(a)(6), Conduct unbecoming a public employee

Sampson charged with engaging in “conduct unbecoming a public employee” as codified at N.J.A.C. 4A:2-2.3(a)(6). 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. King v. County of Mercer, CSV 2768-02, Initial Decision (February 24, 2003), adopted, Merit Sys. Bd. (April 9, 2003), <http://njlaw.rutgers.edu/collections/oal/>. In Jones v. Essex County, CSV 3552-98, Initial Decision (May 16, 2001), adopted, Merit Sys. Bd. (June 26, 2001), <http://njlaw.rutgers.edu/collections/oal/>, it was observed that conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. In Karins v. City of Atlantic City, 152 N.J. 532 (1998), an off-duty firefighter directed a racial epithet at an on-duty police officer during a traffic stop. In Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992), the court stated that a finding of misconduct 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.”

Sampson admittedly engaged in an affair with a coworker and, while a supervisor, a worker under her supervision and control. She engaged in the affair for at least a three-year period in clear violation of the Township’s dating policy. She did not report the “dating” of a coworker to an appropriate supervisor. She admits the affair and states that violation of this policy is of a minor nature.

Sampson states that she did not want to notify her superiors of this activity “because I was having an affair.” The exact nature of appellant’s reticence to inform her superiors of this activity was not borne out. Nor was her frame of mind at the time of the action. But neither relieves her of her responsibility to comply with Township policies, including compliance with the Township dating policy. Sampson may have blatantly disregarded this policy believing it to be of minor consequence, but the consequences are plain to me. In the event they are not, they are a willful disregard to an employer’s

policy which, as a result of this disregard, has opened the employer to litigation which, in all probability, would not have occurred had appellant not abrogated her responsibility for compliance with the dating policy.

Such action by Sampson would have the effect of eroding the public's respect for public employees, as well as to erode the public's confidence, knowing that Sampson engaged in an affair using Township time and in Township facilities. Residents would rightfully be concerned about the competency and adequacy of the administration of their government.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(6), for conduct unbecoming.

5. N.J.A.C. 4A:2-2.3(a)(7), Neglect of duty

Sampson has been charged with "Neglect of duty" as codified at N.J.A.C. 4A:2-2.3(a)(7). "Neglect of duty" has been interpreted to mean that an employee "neglected to perform an act required by his or her job title or was negligent in its discharge." In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009), adopted, Civil Service Commission (March 27, 2009), njlaw.rutgers.edu/collections/oal/. The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "the legal standard of reasonable conduct in the light of the apparent risk." Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

As an EMT, Sampson performs a vital service in the community and her behavior and professionalism is subject to public scrutiny. Engaging in behavior that may be compromising while on duty is not what the Township expects of an employee. Her duty

required that her actions not put the Township, a potential patient or a fellow employee in jeopardy.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(7), for neglect of duty.

6. N.J.A.C. 4A:2-2.3(a)(8), Misuse of public property

Sampson has been charged with "Misuse of public property" as codified at N.J.A.C. 4A:2-2.3(a)(8). Appellant's answers on Hemby's statement that sexual activity occurred on Township property was, paraphrasing, "It could have". As the affair spanned a period of years and appellant made an equivocal statement to this assertion I find, that due to the totality of the circumstances and documentation provided that appellant did violate this standard.

For the foregoing reasons, I **CONCLUDE** that the respondent has met its burden as it relates to charge N.J.A.C. 4A:2-2.3(a)(8), for misuse of public property.

7. Violation of Township dating policy

Appellant admitted to violation of this policy, therefore I **CONCULUDE** that respondent has met its burden as it relates to this violation.

PENALTY

An appeal to the Civil Service Commission requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties, it is not.

To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.

Thus, progressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. [citations omitted]

In re Herrmann, 192 N.J. 19, 33-4 (2007).

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws “are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme.” State Operated School District v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). “The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the 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, 465.

The theory of progressive discipline is not a fixed rule to be followed without question. In re Carter, 191 N.J. 474, 484 (2007). “[S]ome disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record.” Id. The question for the fact finder is whether the disciplinary action is so disproportionate to the offense, considering all circumstances, to shock one’s sense of fairness. Id. Removal has been upheld where the acts charged, with or without prior disciplinary history, have warranted imposition of the sanction. Id. Hence, an employee may be removed, without regard to progressive discipline, if their conduct was egregious. Id.

The Township seeks affirmation of its removal of Sampson from employment. Removal is a form of major discipline as outlined in N.J.A.C. 4A:2-2.2. Major discipline that may be imposed ranges from a suspension or fine of more than five working days through removal from employment. Likewise, the Township disciplinary guidelines provide for a range of discipline for violation of its policies, which encompasses minor discipline through major discipline. Specifically, Sampson was found to have violated the township's dating policy and other violations pursuant to N.J.A.C. 4A:2-2.3(a) including being unfit for duty; incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; neglect of duty and misuse of public property. (R-1.) Sampson has been found to be in violation of all charged offenses. The disciplinary guidelines provide for a range of discipline to be imposed up to and including removal.

Under a progressive discipline analysis, Sampson's prior disciplinary history must be considered, and she has no prior disciplinary history, which is a substantial mitigating factor to consider for progressive discipline.

However, appellants willful disregard of Township policies, and the negative effects deriving therefrom and the cascading effect of appellants action (or lack of action in disregard of the dictates of the dating policy) support the imposition termination. The concept of progressive discipline may be disregarded in certain circumstances. This is one of those circumstances. After having considered all of the proofs offered in this matter and the impact upon Upper Township in consequence of the appellant herein, and after having given due deference to the impact of and the role to be considered by and relative to progressive discipline, I **CONCLUDE** that appellant's violations are significant to warrant a penalty of removal. Therefore, I **CONCLUDE** that the imposition of removal is an appropriate penalty for these violations.

Therefore, I **CONCLUDE** that the original penalty of removal be **SUSTAINED**.

ORDER

It is **ORDERED** that the charges and specifications made against the appellant set forth in the Final Notice of Disciplinary Action, dated July 29, 2022, are **SUSTAINED**.

It is also **ORDERED** that the penalty of removal against appellant is **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.



November 13, 2023
DATE

CARL V. BUCK III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

CVB/tat

APPENDIX

WITNESSES

For appellant:

Michelle Sampson

For respondent:

Rhonda Sharp

EXHIBITS

Joint:

- J-1 March 29, 2021, Township Preliminary Notice of Disciplinary Action
- J-2 Preliminary Notice of Disciplinary Action January 12, 2021
- J-3 Intent to terminate the appellant's position effective April 21, 2021
- J-4 Second Preliminary Notice June 16, 2022
- J-5 Sampson acknowledging Hemby complaint
- J-6 Disciplinary hearing
- J-7 Appeal of termination
- J-8 Township employee dating policy
- J-9 February 3, 2021, Sampson recorded statement
- J-10 Preliminary Notice on work history
- J-11 Appellant record of disciplinary action

Appellant:

- P-2. Certifications of Michele Sampson
- P-3. PNDA of Marc Hemby
- P-4. FNDA of Marc Hemby

Respondent

- R-1 Preliminary Notice of Disciplinary Action, dated March 29, 2021
- R-2 Complaint of Mikhaila Hemby, dated January 12, 2021, and Complaint of John "Marc" Hemby, dated January 17, 2021
- R-3 Investigation Notes of Rhonda Sharp from January 19, 2021, investigation interview of Marc Hemby
- R-4 Audio of Marc Hemby Interview on January 19, 2021
- R-5 Investigation Notes of Rhonda Sharp from February 1, 2021, investigation interview of Marc Hemby
- R-6 Audio of Marc Hemby Interview on February 1, 2021
- R-7 Text Messages between Michelle Sampson and Marc Hemby, provided by Marc Hemby
- R-8 Photos provided by Marc Hemby
- R-9 Memorandum provided by Marc Hemby regarding Text Messages and Pictures, signed by Marc Hemby on February 1, 2021
- R-10 Investigation Notes of Rhonda Sharp from February 3, 2021, investigation interview of Michelle Sampson
- R-11 Audio of Michelle Sampson Interview on February 3, 2021
- R-12 Township of Upper's Employee Dating Policy
- R-13 Text Messages between Michelle Sampson and Marc Hemby, provided by Michelle Sampson
- R-14 Ring Doorbell Video of Marc Hemby on June 28, 2020

- R-15 Job History of Michelle Sampson (also designated as P-1)
- R-16 New Jersey Civil Service Job Specifications for Chief Emergency Medical Technician and Senior Emergency Medical Technician
- R-17 Complaint in Mikhaila Hemby v. Upper Township, et al, filed on December 29, 2020
- R-18 Settlement Agreement and General Release for Mikhaila Hemby v. Upper Township, et al., with exhibits
- R-19 Oath of Office for Michelle Sampson, dated December 10, 2019
- R-20 Second Amended Torts Claim Notice, dated February 9, 2021
- R-21 Hearing Officer Decision of Brian P. Trelease, Esq. in the Disciplinary Matter of Senior EMT Michelle Sampson
- R-22 Final Notice of Disciplinary Action, dated July 29, 2022