



STATE OF NEW JERSEY

In the Matter of Karita Caldwell
Newark Public School District

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2016-2026
OAL DKT. NO. CSV 01976-16

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ISSUED: NOVEMBER 15, 2016 BW

The appeal of Karita Caldwell, Security Guard, Newark School District, removal effective December 18, 2015, on charges, was heard by Administrative Law Judge Kelly J. Kirk, who rendered her initial decision on July 25, 2016. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on November 10, 2016, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

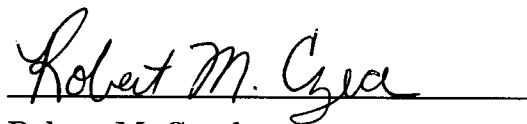
ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Karita Caldwell.

Re: Karita Caldwell

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
NOVEMBER 10, 2016

A handwritten signature in cursive script, reading "Robert M. Czech", is written over a horizontal line.

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 01976-16

AGENCY DKT. NO. 2016-2026

**IN THE MATTER OF KARITA L. CALDWELL,
NEWARK PUBLIC SCHOOL DISTRICT.**

Arnold Shep Cohen, Esq., for appellant Karita L. Caldwell (Oxfeld Cohen, attorneys)

Bernard Mercado, Esq., for respondent State-Operated School District of the City of Newark (Charlotte Hitchcock, General Counsel)

Record Closed: June 9, 2016

Decided: July 25, 2016

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

The Newark Public School District terminated security guard Karita Caldwell pursuant to N.J.A.C. 4A:2-2.3(a)(6) and (12)¹ for conduct unbecoming a public employee and other sufficient cause, as a result of an incident that occurred on February 9, 2015, involving Caldwell and a student.

¹ The Final Notice of Disciplinary Action reflects "N.J.A.C. 4A:2-2.3(a)(11) – OTHER SUFFICIENT CAUSE," but N.J.A.C. 4A:2-2.3(a)(12) is "other sufficient cause."

PROCEDURAL HISTORY

On or about October 23, 2015, the Newark Public School District served Karita Caldwell with a Preliminary Notice of Disciplinary Action (PNDA). (J-A.) A departmental hearing was held on November 3, 2015, and the charges of conduct unbecoming a public employee and other sufficient cause were sustained. (J-A.) On or about November 30, 2015, the Newark Public School District served Caldwell with a Final Notice of Disciplinary Action (FNDA), removing her effective December 18, 2015. (J-A.)

Caldwell appealed, and the Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 to the Office of Administrative Law (OAL), where it was filed on February 3, 2016. The hearing was held on May 2, 2016, and the record remained open for post-hearing submissions. The record closed on June 9, 2016.

EVIDENCE AND FINDINGS OF FACT

The Newark Public School District presented the testimony of Eric Ingold. Karita Caldwell testified on her own behalf.

Background

The following material facts are largely undisputed. Accordingly, I **FIND** them to be the **FACTS** of this case:

Karita Caldwell has been employed by the Newark Public School District (District) as a school security guard since January 2000. Caldwell worked from 8:00 a.m. until 4:00 p.m. at the Sussex Avenue School, which is an elementary school. Security guards are not armed. Caldwell had scheduled times to be at different locations within the school. Caldwell has no prior disciplinary history.

Eric Ingold is employed by the District as the executive director of safety. He was previously employed by the Newark Police Department for almost twenty years and retired as a lieutenant. Ingold oversees the day-to-day operations of the Office of Safety for all the schools.

On February 9, 2015, an incident occurred involving Caldwell and a student, I.A., ("the incident") which was recorded by a school video camera with no accompanying audio. Subsequent to the incident, Caldwell continued to work as a school security guard at Sussex Avenue School for the remainder of the 2014–2015 school year.

On June 16, 2015, Caldwell was evaluated by Principal Darleen Gearhart for the 2014–2015 school year, and her Employee Performance Evaluation Form reflects that her overall rating was satisfactory. (A-1.) Ingold does not perform evaluations of the security guards.

Caldwell continued to work as a school security guard at Sussex Avenue School for the 2015–2016 school year, until she was terminated on December 18, 2015.

Video

The video starts at approximately 11:00 a.m., and reflects the security area. (J-B.) The bottom center of the video frame shows the security desk ("the desk"). The top left shows the three adjacent single doors opposite the desk, hereinafter individually identified as the left, middle and right doors. The top right shows a short flight of stairs leading down toward another area. On the left-side wall, near the doors, is a display case. Along the right-side wall is a single chair ("the chair"), approximately halfway between the desk and the top right side of the wall, where there is a trash can and then a hallway. The following is my general observation of the relevant contents of the video from 11:00 a.m. until 11:35 a.m.:

At approximately 11:00 a.m., I.A. is seen just in front of the desk facing Principal Gearhart, who is standing just to the right of the desk. A security guard is seated at the desk. I.A.'s backpack is on the desk. I.A. appears to be arguing with Principal

Gearhart. I.A. moves toward the desk and reaches his hand toward the backpack strap, but Principal Gearhart puts her arm out and moves him back from the desk. Students are filing across the area, from the upper right to lower left of the frame, directed by another adult. The security guard gets up from the desk and goes around the left side of the desk toward I.A. Principal Gearhart and the security guard are directing I.A. to the chair, but I.A. is not complying. The two move toward I.A. and he backs up toward the chair. I.A. does not sit, and the security guard continues to try to get him to sit in the chair, at times motioning to him or using her hand or arm to move him. At approximately 11:00:20 a.m., Principal Gearhart returns to the desk, picks up I.A.'s backpack, and walks off camera to the left of the desk. I.A. still does not sit in the chair, and he and the security guard continue to argue. At approximately 11:00:44 a.m., while the two are still arguing, the security guard returns to the desk and sits down. At approximately 11:01 a.m., I.A. is wandering around the security area and walks to the left of the desk, but is stopped by the security guard. At approximately 11:01:42 a.m., while the security guard is partially off screen to the left of the desk, I.A. wanders down a short flight of stairs to an area still visible from the desk. At approximately 11:02:44 a.m., a group of children and adults file across the screen from the lower left to the upper right. At approximately 11:03:16, the security guard gets up from the desk and walks off screen to the left. At approximately 11:04:30 a.m., Principal Gearhart returns to the chair with I.A.'s backpack (and also with a jacket). Principal Gearhart motions to and begins speaking from there to I.A., who was still in the downstairs area. At approximately 11:04:40, Principal Gearhart walks to the downstairs area and appears to be directing I.A. to the chair, as adults and much younger children file across the security area. At approximately 11:05:30 a.m., I.A. returns to the desk area and interacts with the security guard, who is standing by the chair as Principal Gearhart leaves. At approximately 11:05:40 a.m., I.A. sits down in the chair along the right-side wall while the security guard stands near him.

Caldwell first appears on the video at approximately 11:05:48 a.m., at which time I.A. is seated in the chair. At approximately 11:06 a.m., Caldwell and the security guard walk off camera to the left of the desk. Caldwell returns to the desk at approximately 11:06:17 a.m. Thereafter, adults and children file past the desk. The other security guard briefly returns to the left side of the desk, where Caldwell is seated, drinking from

a bottle and reading. I.A. is still seated. At approximately 11:08 a.m., I.A. turns around in his chair and touches a bulletin board behind him. At almost 11:09 a.m., Caldwell gets up from the desk, opens the far right door to allow an adult inside, and returns to the desk. I.A. again touches the bulletin board. At approximately 11:10 a.m., an adult stops at the desk and is talking. Shortly thereafter it appears that I.A. may be talking to Caldwell or the adult from the chair. The adult walks over to I.A. briefly and then exits at the top right of the screen. At approximately 11:11 a.m., I.A. stands up, walks around by the chair and then walks across the security area to the left and off camera. Caldwell remains at the desk reading. I.A. returns at approximately 11:12 a.m. and sits back down in the chair.

Adults and students periodically walk through the security area. At approximately 11:14 a.m., Caldwell gets up from the desk and opens the right door for an adult and child, who then walk to the desk. I.A. remains seated. At approximately 11:15 a.m., I.A. gets up and walks across the security area to the left of the desk and off camera. I.A. returns at approximately 11:16 a.m., wanders around the security area a bit, and then walks to the left and out of camera view again. At approximately 11:17 a.m., I.A. returns to the chair area. I.A. picks up his jacket and backpack. He places the backpack on the chair, opens it, puts his jacket in the backpack and zips it back up. Adults and a group of young children file across the security area. I.A. remains standing next to the chair going through his backpack. At approximately 11:18:29 a.m., I.A. picks up his backpack and puts it on. Some students and adults are near the left side of the desk and more students are lining up at the top right of the screen to cross the area. Shortly thereafter, an adult is talking to I.A. At approximately 11:19 a.m., the adult walks away and I.A. walks ahead of the students and out of the camera view to the left. A large group of young children temporarily line up across the security area. At approximately 11:19:55 a.m., Caldwell gets up from the desk and moves out of view to the left while the students are still lined up across the security area. At almost 11:20 a.m., I.A. returns to the security area and walks past the other students to the doors. I.A. lingers around the right door and looks out the right door several times. At approximately 11:20:30 a.m., I.A. walks away from the doors and off camera to the left again as the remaining students leave the security area. At approximately 11:21:03 a.m., I.A. returns to the security area and walks toward the doors as Caldwell returns to the desk. I.A. pauses

by the doors and looks out the middle door and then again walks off camera to the left. Caldwell is seated at the desk. At approximately 11:21:33 a.m., I.A. again walks back to the doors. He looks out the right door and again walks off camera. At approximately 11:21:58 a.m., Caldwell gets up from the desk and walks off camera to the left. At approximately 11:22:03 a.m., I.A. walks to the desk and deliberately knocks Caldwell's book and juice bottle off the desk. At approximately 11:22:17 a.m., I.A. walks off camera. At approximately 11:22:35 a.m., some children cross the security area. At approximately 11:22:47 a.m., I.A. returns to the desk, this time behind the desk, but then walks off camera again as more students file across the security area.

At approximately 11:23:10 a.m., I.A. returns to the security area and takes off his backpack near the chair. At approximately 11:23:22 a.m., Caldwell returns to the desk, then immediately walks to the doors and looks out the left door as I.A. starts walking toward the desk. Caldwell walks from the doors, cuts in front of another student walking by, and reaches her hand out for I.A.'s face. I.A. turns and she grabs him above his right shoulder, near his temple or ear. At this time, there are four other children present, one in very close proximity to Caldwell and I.A. Caldwell then pushes I.A. toward the back of the security area (visually behind and to the right of the desk), off camera, while several other students watch, including additional students who enter the security area. At approximately 11:23:42 a.m., the other security guard is seen behind the desk, and she then walks off camera to the left as Caldwell walks to the right of the desk, picks up the book that I.A. had knocked on the floor and tosses the book on the desk at approximately 11:23:48 a.m. Caldwell then picks up I.A.'s backpack and throws it across the security area, not far behind another student walking past, and while at least five students are in view. The backpack hits the left wall just below the display case, and then rolls in front of the left door. Students are still watching at approximately 11:23:56 a.m., and Caldwell is behind the left side of the desk. Caldwell walks from the left, around the front of the desk diagonally to the trash can, and throws paper, which misses the trash can and lands on the floor as she turns back toward the desk. As Caldwell returns to the left side of the desk, she appears to be yelling and pointing toward the rear left of the security area, which is not visible on camera. At approximately 11:24:07 a.m., Caldwell walks out of camera view. Caldwell quickly returns and appears to be directing another student out of the security area. Caldwell

again walks out of view to the rear left side, as another student crossing the security area turns around and is watching. At approximately 11:24:27 a.m., Caldwell returns to the desk and picks items up off the desk. Caldwell then appears to be speaking to another security guard. At approximately 11:25 a.m., the other security guard walks to the trash can and picks up the paper Caldwell left on the floor and throws it in the trash can.

At approximately 11:35 a.m., Principal Gearhart returns to the security area, speaks briefly with Caldwell, picks up I.A.'s backpack from the floor in front of the left door and walks back out of camera view.

Testimony

Karita Caldwell

Caldwell described the security area and explained that there is a wall directly behind the desk, and to the right is a set of double doors. To the left of the desk there are doors and a small walkway to the main office, where Principal Gearhart's office is located.

I.A. was sitting in the security area before Caldwell arrived. Caldwell believed him to be in fifth grade and approximately eleven or twelve years old. She did not know why I.A. was in the security area. Normally, if someone places a student there, Caldwell would be notified, but she had not been notified on this occasion.

While Caldwell sat at the desk, I.A. got up and went to the door, and was opening and closing the door. By "opening and closing the door" she meant that I.A. pushed on the "silver thing," which was the bar across the door. Caldwell explained that if you push on the bar, the door can be opened from the outside. According to Caldwell, I.A. had opened and closed the doors a couple of times. Caldwell asked I.A. to stop, but I.A. continued to do it. No student should be at the doors. Caldwell radioed another security guard, who was out on the playground, and Caldwell left to get Principal Gearhart, who does not have a radio. Principal Gearhart was not in her office, so

Caldwell returned to her desk and waited for the other security guard, and Principal Gearhart, who had been notified to report to the security area by another individual.

The other security guard arrived after Caldwell touched I.A.'s head. Caldwell testified that she touched I.A.'s head, and clarified that she said "touch" because of the placement of her hand, and that her fingers were on his head. I.A. did not want Caldwell to touch him, and he leaned his head to the side; Caldwell did not push I.A.'s head to the side. Before Caldwell touched him, I.A. called her all kinds of vulgar names, including "bitch," and said what she could do with his private part. Caldwell testified that she touched him because she was telling him that what he was doing may eventually get him hurt out in the street. Caldwell was not angry, but she was upset because those words were being used in front of other students, "and we [are] supposed to be like the leader of the school." After Caldwell touched I.A.'s head, the other security guard arrived and was behind the desk. Caldwell was trying to lead I.A. to the other security guard.

At the time that Caldwell and the other security guard were trying to escort I.A. to Principal Gearhart's office, Principal Gearhart was just coming up the steps. Principal Gearhart assisted the other security guard in escorting I.A. I.A. did not want to go, and gave a little struggle and was pulling away from the other security guard. The other security guard was trying to pull him physically toward Principal Gearhart's office. Principal Gearhart then took I.A.'s arm and took him to her office.

Although the physical response occurred shortly after the bottle and book had been knocked off her desk, Caldwell denied that was the reason for the physical response. Rather, the response was because I.A. was calling Caldwell names and there was total disrespect being carried on in the front foyer of the building. Caldwell acknowledged that physical contact is not justified simply because a student is calling her names. She did make contact with his head, in the temple area. She did not consider it a strike because she did not slap or punch him. Her actions may not have been appropriate, but she stated, "we have relationships with the students in the building and some you can talk to and some you can't." When asked if it was inappropriate to make contact with I.A.'s head in the manner in which she did, her

response was, "I don't think I did anything to harm him, no." She also testified that there are times when a student must be physically restrained.

I.A.'s backpack was located on the floor to the right of the desk. Caldwell walked around the desk as I.A. was being escorted the other way. Caldwell's purpose in tossing the backpack was so that I.A. did not fall over the backpack when he was being escorted to Principal Gearhart's office. Caldwell did not later retrieve the backpack, because there are three doors there, but generally she opens the right door, and the backpack was by the left door. If the backpack had been in the way, she would have moved it. When asked if throwing the backpack across the room in the vicinity of other students was highly inappropriate, she testified, "No, I don't think that was inappropriate. I was preventing the safety of somebody falling and hurting themselves." They were standing near the backpack. She did not throw the backpack in anger; she did not want anyone to trip over it. She could not pick it up during the altercation and while trying to get I.A. to the desk, and she could not throw it behind the desk because there are doors there. Caldwell believed the display case was Plexiglas.

Caldwell acknowledged that she is responsible for the safety and security of students and is held to a higher standard than other staff members. She also acknowledged that it is inappropriate for a security guard to hit a student without provocation and a security guard should be disciplined for such conduct. I.A. did not need to be restrained, but because of what happened he had to go to Principal Gearhart's office. I.A. was not a danger and was not close to the doors at the time she made contact with him, but he was already name-calling.

Caldwell immediately completed an incident report, and she did not intentionally leave out the physical contact with I.A. or that the backpack was tossed.

Eric Ingold

Eric Ingold testified that the primary duties of a school security guard are to ensure the overall safety of the staff and students, and to maintain building and property security. At times, security guards are permitted to make physical contact with

students, for reasons that include breaking up a fight, preventing an assault or attack, or subduing a student. However, the contact must be passive, rather than aggressive, and cannot be a form of punishment or occur after the fact. Security guards are permitted to strike a student, but only when necessary to prevent further injury. Corporal punishment is not permitted.

Ingold testified that the physical contact between Caldwell and I.A. reflected in the video was not proper and was a violation of policy and procedures because the physical contact was aggressive, and was not to prevent other physical contact or physical injury to another individual or Caldwell. I.A. did not pose a danger of physical threat to students and he was not destroying school property. It is not appropriate for a security guard to strike a student or make contact with a student without provocation.

Ingold noted that students were traveling in the hallway, and Caldwell inappropriately threw a backpack in the vicinity of the students. The backpack came relatively close to striking another student, and landed where it was blocking the door. Security guards are not permitted to throw students' backpacks and such conduct is against the image that the school wants to portray. It was not appropriate for the backpack to be blocking the door, and also not appropriate for the incident to occur in front of other students, as that goes against the culture, climate and image that security guards must maintain with the students.

By State law, the Violence, Vandalism and Substance Abuse (VV-SA) Incident Report Form must be completed in the event of certain types of incidents occurring on school grounds. Caldwell completed the VV-SA Incident Report Form (incident report), and she wrote "verbal assault" and "student was restrained." Ingold testified that there is no such thing as a "verbal assault," and a verbal assault or use of profanity is not grounds to use physical force. The security guard's job is to impartially absorb that language and maintain professionalism. Additionally, Ingold did not observe on the video that I.A. was opening doors just prior to the incident. According to Ingold, Caldwell's description of the incident in her reports was inaccurate because she omitted the physical contact, which was a strike to the head, and she omitted throwing the

backpack. Ingold deemed Caldwell's conduct an unnecessary use of force, and an "assault." Caldwell's conduct was disruptive to the school environment.

The February 9, 2015, incident was brought to Ingold's attention within a few days after it occurred. If there are allegations of assault in the schools, the State's Department of Child Protection and Permanency (DCPP) investigates. Any District investigation is not initiated until the completion of the DCPP investigation, so as not to compromise the State's investigation. There was a DCPP investigation into this incident, but Ingold was not aware of when the DCPP investigation concluded or of the outcome of the DCPP investigation.

Ingold personally reviewed the incident report from Caldwell and the video, but he did not conduct further investigation because it pertained to school personnel, which falls under the purview of Labor Relations. Ingold never interviewed Caldwell, the student or the school principal. With respect to discipline, Labor Relations conducts the investigation, though Ingold may have some input. Ingold verbally recommended in a conversation with Labor Relations that Caldwell be terminated.

Factual Discussion

A credibility determination requires an overall evaluation of the testimony in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546, 555 (1954). It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961). "The 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).

Ingold's testimony was consistent, credible and corroborated by other evidence. However, he had no independent knowledge of the incident, having only reviewed the video and Caldwell's incident report. Conversely, Caldwell's testimony and her incident report were not entirely consistent with the video. Caldwell's incident report, which was, in part, redacted, states:

[I.A.] using profanity at me and the staff. Student was placed in the foyer. . . . I never said anything to this student until he kept opening the front door. I asked him to stop and he continued to do the same thing. I went to notify the principal (Gearhart) what he was doing. I had a book and juice on my desk. When I came back I noticed he threw both items all over the desk and I asked him why did he touch my stuff. Both guards myself and Ms. Jones tried to get him from the front foyer area. Ms. Gearhart seen the struggle and intervened. The parent is being notified about his behavior.

[I.A.] called me all kinds of bitches and how I was fat. He has a very stocky build he was restrained by Principal and another guard.

[J-D.]

Review of the video reflects that I.A. several times went to the doors and looked out the windows, but it does not reflect that any door was opened, as no light can be seen in the door frame. However, it cannot be determined from the video whether I.A. at any point pressed the bar to allow access from the outside. There is no dispute that I.A. purposefully knocked Caldwell's book and juice bottle off the desk.

Caldwell did not attempt to physically intervene at any time that I.A. was near the doors. Rather, Caldwell physically grabbed I.A. immediately after she discovered that her personal belongings had been knocked off her desk. Specifically, Caldwell was walking back from the door and I.A. was walking toward the desk, when Caldwell reached out toward I.A.'s face. I.A. turned and she grabbed him near his right ear or temple area and pushed him to the back of the security area. I.A. was not near the doors, was not walking toward the doors, and did not pose any risk to the safety or security of the building or its occupants.

Although Caldwell referred to her contact with I.A. as a “touch,” it was not merely a touch. Throughout the video, both Principal Gearhart and the other security guard had “touched” I.A. in an effort to guide him toward where he was supposed to be sitting or prevent him from leaving or taking his backpack. The manner in which Caldwell aggressively approached and grabbed I.A. was in stark contrast to the manner in which Principal Gearhart and the other security guard had made physical contact with I.A. Additionally, review of the video reflects that I.A. was already out of the way of the backpack when Caldwell hurled it without regard for students in the area. Further, even if there was a risk of I.A., Principal Gearhart, or a security guard tripping over the backpack, it could easily have been picked up and simply placed on top of the desk.

At various times the video reflects that I.A. is speaking. However, there was no audio with the video, so it is not possible to determine whether I.A. utilized profanity or made other derogatory remarks. Caldwell's incident report reflects that I.A. called her “all kinds of bitches” and “fat,” and she testified that he called her all kinds of vulgar names, including “bitch,” and said what she could do with his private part. Given I.A.'s behavior throughout the video, and that his mouth could often be seen moving, it would not be surprising if he had called Caldwell names or used profanity, or was otherwise insolent. However, at the time that Caldwell grabbed I.A., he was not behaving aggressively, and he was not a physical threat to any person or property. Further, although Caldwell's description of I.A. as having a “very stocky build” is accurate, there was no reason to have “restrained” I.A., and that there was a “struggle” is not plausible, as I.A. was much smaller in stature than Caldwell, and there was another security guard present almost immediately after Caldwell moved I.A. toward the back of the security area.

Having had an opportunity to consider the evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following additional **FACTS** in this case:

Upon discovering that I.A. had knocked her book and juice bottle off the desk and onto the floor, Caldwell aggressively reached for I.A.'s face, and when he turned to avoid the contact, she grabbed I.A. above his shoulder, near his temple or ear. At that

time, I.A. was not near the doors or walking toward the doors, and he did not pose any risk to the safety or security of the school or its occupants. As I.A. was being escorted to Principal Gearhart's office, Caldwell picked up his backpack, which had been on the floor next to the desk, and hurled it across the security area, while other students were present in the security area.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 11A:1-1 through 12-6, the "Civil Service Act," established the Civil Service Commission in the Department of Labor and Workforce Development in the Executive Branch of the New Jersey State government. N.J.S.A. 11A:2-1. The Commission establishes the general causes that constitute grounds for disciplinary action, and the kinds of disciplinary action that may be taken by appointing authorities against permanent career service employees. N.J.S.A. 11A:2-20. N.J.S.A. 11A:2-6 vests the Commission with the power, after a hearing, to render the final administrative decision on appeals concerning removal, suspension or fine, disciplinary demotion, and termination at the end of the working test period, of permanent career service employees.

N.J.A.C. 4A:2-2.2(a) provides that major discipline includes removal, disciplinary demotion, and suspension or fine for more than five working days at any one time. An employee may be subject to discipline for reasons enumerated in N.J.A.C. 4A:2-2.3(a), including conduct unbecoming a public employee. N.J.A.C. 4A:2-2.3(a)(6). In appeals concerning such major disciplinary actions, the burden of proof is on the appointing authority to establish the truth of the charges by a preponderance of the believable evidence. N.J.A.C. 4A:2-1.4; N.J.S.A. 11A:2-21; Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Caldwell is charged with conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)(6) and other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)(12). The burden of proof is on the Newark Public School District to prove the charges by a preponderance of the credible evidence.

N.J.A.C. 4A:2-2.3(a)(6) does not define conduct unbecoming. However, the Appellate Division has held that conduct unbecoming a public employee is “any conduct . . . which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). In Emmons, which involved a police officer charged with conduct unbecoming, the Appellate Division also held that conduct unbecoming is “any conduct which adversely affects the morale or efficiency of the bureau.” Ibid. What constitutes conduct unbecoming a public employee is primarily a question of law. Karins v. Atl. City, 152 N.J. 532, 553 (1998).

As the title suggests, as a school security guard Caldwell is responsible for the security of the students, staff and school. Yet, she made aggressive physical contact with I.A. because he had knocked her book and juice off the desk. Certainly, I.A. deserved to be disciplined for his conduct. However, Caldwell failed to exercise good judgment and her behavior was unprofessional, aggressive, and inappropriate, which is especially troubling in view of her position as a school security guard. Rather than notify Principal Gearhart or other school personnel of his conduct, who could then have appropriately disciplined I.A., Caldwell became enraged, made aggressive physical contact with I.A., and hurled I.A.’s backpack across the room while other students were present, all of which is documented by video. Caldwell was not preventing any physical threat to another person or property, and I concur with Ingold that Caldwell’s conduct was an improper and unnecessary use of force. Certainly, such behavior by a school security guard would tend to destroy the public’s respect and confidence in the safety and security of the Newark Public School District. Accordingly, I **CONCLUDE** that Caldwell engaged in conduct unbecoming a public employee.

The penalty imposed by the Newark Public School District was removal. The Civil Service Commission may increase or decrease the penalty imposed by the appointing authority, though removal cannot be substituted for a lesser penalty. N.J.S.A. 11A:2-19. When determining the appropriate penalty, the Commission must utilize the evaluation process set forth in West New York v. Bock, 38 N.J. 500 (1962), and consider the employee’s reasonably recent history of promotions, commendations and the like, as well as formally adjudicated disciplinary actions and instances of

misconduct informally adjudicated. However, in an instance where an employee commits an act sufficiently egregious, removal may be appropriate notwithstanding the lack of a prior history of infractions. See, e.g., In re Herrmann, 192 N.J. 19 (2007). According to the Supreme Court, progressive discipline is a worthy principle, but it is not subject to universal application when determining a disciplined employee's quantum of discipline. Id. at 36.

Although progressive discipline is a recognized and accepted principle that has currency in the [Civil Service Commission's] sensitive task of meting out an appropriate penalty to classified employees in the public sector, that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. 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. See, e.g., Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), certif. denied, 135 N.J. 469 (1994).

[Id. at 33–34.]

The theory of progressive discipline is not a fixed and immutable rule to be followed without question, as some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007). The Supreme Court has noted that “the question for the courts is ‘whether such punishment is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.’” Ibid. (quoting In re Polk, 90 N.J. 550, 578 (1982)). The Supreme Court also noted that the Appellate Division has likewise acknowledged and adhered to this principle, where the acts charged, regardless of prior discipline, warranted the imposition of the sanction. Carter, supra, 191 N.J. at 485.

Caldwell argues that the videotape demonstrates that her actions were not inappropriate, that she did not repeatedly strike the student in the face/head area, push him in a corner or wrongfully toss his book bag across the hallway, and that she should not have been severely disciplined. However, having reviewed the video several times, there is no doubt that Caldwell lost self-control, made aggressive physical contact with I.A.'s head, and hurled his backpack across the room without regard for other students walking through that area.

Additionally, Caldwell argues that she has been employed by Newark Public School District since January 2000, had no prior disciplinary record, and continued to work at the school from the date of the incident on February 9, 2015, to December 18, 2015, when she was terminated. However, that she received an overall satisfactory² evaluation in June 2015, and the District continued to allow Caldwell to work in the same position for an additional ten months is not considered a mitigating factor, and is troubling in view of her conduct. Additionally, that there were no further incidents within that ten-month period does not negate the seriousness of the February 9, 2015, incident. Caldwell's conduct was unprofessional, unreasonable, and unwarranted under the circumstances, and renders her a liability as a school security guard. In view of the totality of the facts and circumstances of this case, including the aggressive physical contact and hurling the backpack, I **CONCLUDE** that Caldwell's conduct rendered her unsuitable for continuation in her position as a school security guard and was sufficiently egregious to warrant removal in the absence of any major disciplinary history.

ORDER

I **ORDER** that the charges of conduct unbecoming a public employee and other sufficient cause are **SUSTAINED** and that respondent's removal of Caldwell from her employment as a school security guard is hereby **AFFIRMED**.


I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

² It is observed that the evaluation reflects that Caldwell "needs [improvement]" in "Demonstrates Good Conduct and Judgment" and that a growth area is "judgment under pressure."

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, P.O. 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.

7/25/16
DATE


KELLY J. KIRK, ALJ

Date Received at Agency:

7/25/16

Date Mailed to Parties:

7/25/16

dlc

APPENDIX

WITNESSES

For Appellant:

Karita Caldwell

For Respondent:

Eric Ingold

EXHIBITS IN EVIDENCE

Joint

- J-A Final Notice of Disciplinary Action, dated December 30, 2015
- J-B Surveillance video, dated February 9, 2015
- J-C Surveillance images
- J-D Incident Report, dated February 9, 2015

For Appellant:

- A-1 Employee Performance Evaluation Form, dated June 16, 2015
- A-2 (Not in Evidence)

For Respondent:

None