

was modified by the Commission, charges were sustained. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

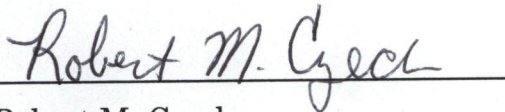
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 30 working day suspension to a 15 working day suspension. The Commission further orders that appellant be granted 15 days of back pay, benefits, and seniority. Per *N.J.A.C. 4A:2-2.10*, the amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by the appellant during this period. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

Counsel fees are denied pursuant to *N.J.A.C. 4A:2-2.12*.

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
FEBRUARY 8, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Assistant Director
Division of Appeals and Regulatory Affairs
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P. O. Box 312
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13816-15
AGENCY DKT. NO. 2015-3327

SABURA ALEXANDER,

Petitioner,

v.

**HUDSON COUNTY DEPARTMENT
OF FAMILY SERVICES,**

Respondent.

Seth Gollin, Esq., for Petitioner (Staff Attorney, AFSCME Council 52, attorneys)

Daniel W. Sexton, Esq., Assistant County Counsel for Respondent (Donato J. Battista, County Counsel, attorneys)

Record Closed: May 17, 2016

Decided: December 29, 2016

BEFORE **LELAND S. MCGEE, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondent, Hudson County Department of Family Services (Respondent or County), brings a major disciplinary action against the petitioner, Sabura Alexander (Petitioner or Alexander), HSS IV Supervisor, effective May 8, 2015. Respondent alleges that Petitioner's conduct was unbecoming a public employee; that she was

insubordinate; that she neglected her duty; and other sufficient cause exists. Respondent alleges that on May 8, 2015, Petitioner violated a "cease and desist" directive from her director. Specifically, she "took the opportunity . . . to confront, harass, annoy and vex employee Jackie Angione" by chanting, and then chanting and dancing, slogans/statements directed towards Ms. Angione.

On May 8, 2015, Respondent issued a Preliminary Notice of Disciplinary Action against Petitioner. On May 19 an administrative hearing was held and on June 10, 2015, Respondent issued a Final Notice of Disciplinary Action upholding the charges. On September 3, 2015, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on March 31, and April 7, 2016. On May 17, 2016, the record closed.

FACTUAL DISCUSSION

The pertinent facts of this case are not in dispute and as such, I **FIND** the following to be the **FACTS** of this case:

1. On or about March 11, 2015 Petitioner and co-worker, Jackie Angione (Angione) had a dispute regarding certain procedures to be implemented within their office. Both parties testified that they "had no problems" with each other prior to this time and that they "always got along."
2. On or about March 11, 2015, Petitioner sent an email to Angelica M. Harrison, Director of Respondent's Division of Welfare (Harrison). In the email correspondence, among other things, Petitioner complained about co-worker Jackie Angione, alluding to her "unprofessionalism" conduct. (R-1.)
3. On or about April 24, 2015, Harrison responded to the complaint by way of a memorandum to Petitioner. This memorandum also served as a "Cease and

Desist Order” for Petitioner to cease “having contact with Ms. Angione and she with [Petitioner].” (R-2.)

4. The memorandum also made reference to Harrison’s “understanding” that Petitioner has shouted at some of her co-workers, and suggested that she “look into controlling [her] anger so that we do not continue these issues in the workplace.” (ibid.)
5. The attendance time sheets for Petitioner and other employees was located in or adjacent to Angione’s office and Petitioner was required to walk passed her to sign in. During the period from April 24, 2015, to May 8, 2015, Petitioner waited for Angione to be away from her desk in order to sign in.
6. Sometime during the end of 2014 and early 2015, Angione informed some employees of her intent to retire during 2015.
7. On May 8, 2015, while enter her place of employment, Petitioner walked passed Angione’s office and was singing or chanting, “countdown.” On her return trip passed Angione’s office, Petitioner gleefully continued.
8. On May 8, 2015, Angione wrote a memorandum to R. Knapp, Deputy Director, wherein she complained that Petitioner’s conduct was harassing and violated the Cease and Desist Order. (R-3.)
9. On May 8, 2015, co-worker Kathy Cunningham was present when Petitioner passed Angione’s office. She hand-wrote a note to “To Whom it May Concern” wherein she memorialized her observation that Petitioner was “singing and dancing countdown” as she passed Angione’s office. (R-4.) The implication was that Petitioner was referring to the fact that Angione would be retiring soon.
10. Petitioner acknowledges that she was singing “countdown”; however May 8, 2015, was the Friday of Mother’s Day weekend and her reference was to her anticipation of the weekend. There were other co-workers present at the time of the incident. There is no evidence that Petitioner specifically stated or

referenced the fact that Angione was retiring or that Petitioner looked at, or in the direction of Angione as she passed the office.

Credibility Determinations

In assessing a witness's credibility, an Administrative Law Judge must consider his/her 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). A fact finder may reject a witness's testimony "when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521-22 (1950); see Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958) (rejecting testimony "inconsistent with other testimony or with common experience" or "overborne by other testimony."); D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). An ALJ may consider the "interest, motive, bias, or prejudice of a witness" but "where such choice is reasonably made, it is conclusive on appeal." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952); Renan Realty Corp. v. State, Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958.) Greater weight of credible evidence in the case – preponderance – depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." Perrone, *supra*, 5 N.J. at 522.

Here, the only conflicting testimony was as to whether Petitioner directing her gleeful exhibition at Angione. Conflicting and irreconcilable testimony requires credibility determinations, based on the totality of the evidence, prior to making findings as to the disputed facts. In re Final Agency Decision of Bd. of Exam'rs of Elec. Contractors, 356 N.J. Super. 42 (App. Div. 2002). Although there were several employees present during the incident, Petitioner was unable to offer any witnesses. She state that she did not

believe that any of the other people present “tell the truth” about what happened. It is clear that, although both Angione and Petitioner stated that they had no problems with each other, there was a rift between the two of them. I do not find Petitioner’s was credible when she stated that the “celebration” was not directed at Angione. I **FIND** the testimony of Respondent’s witnesses to be more credible than that of Petitioner. Respondent’s evidence is more consistent in the manner in which it collectively “hangs together.” Petitioner’s testimony “contains inherent contradictions which alone or in connection with other circumstances in evidence excite suspicion” as to its veracity. Perrone, supra, 5 N.J. at 521-22. For the foregoing reasons, I **FIND** that Petitioner did engaged in the conduct set forth in the Specifications of the Preliminary Notice of Disciplinary Action and the Final Notice of Disciplinary Action, with the intent to at least annoy Angione if not harass her.

ANALYSIS AND CONCLUSIONS OF LAW

Applicable Standard

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. An employee who commits a wrongful act related to his or her duties or who gives other just cause may be subject to major discipline. N.J.S.A. 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). In a civil service disciplinary case, the employer bears the burden of sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 11A:2-6(a)(2), -21; N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-2.1, “burden of proof”; N.J.A.C. 4A:2-1.4. That burden is to establish by a preponderance of the competent, relevant, and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982).

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, which after a de novo hearing makes an independent determination as to both guilt and the “propriety of the penalty imposed below.” W. New York v. Bock, 38

N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a “fair preponderance of the believable evidence.” N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

Conduct Unbecoming a Public Employee

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, “unbecoming conduct” is broadly defined as “any conduct which adversely affects the morale or efficiency of the [governmental unit] [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.” Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citations omitted); In re Nicosia, A-5285-04T5 (App. Div. May 17, 2007), <<http://njlaw.rutgers.edu/collections/courts/>>. The conduct 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.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Petitioner admits to engaging in the described “celebration”; however, denies that it was directed at Angione. The undersigned is not persuaded that her conduct was not directed at Angione. Further, she (and Angione) were governed by a Cease and Desist Order and I **CONCLUDE** that Petitioner violated that Order which was a “violation of the implicit standard of good behavior.” Therefore I **CONCLUDE** that Petitioner engaged in conduct unbecoming a public employee.

Insubordination and Neglect of Duty

Black’s Law Dictionary 802 (7th Ed. 1999) defines insubordination as a “willful disregard of an employer’s instructions” or an “act of disobedience to proper authority.” Webster’s II New College Dictionary (1995) defines insubordination as “not submissive to authority: disobedient.” Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

“Insubordination” is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.

[Ricci v. Corp. Express of the E., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. Insubordination is always a serious matter, especially in a paramilitary context. “Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department.” Rivell v. Civil Serv. Comm’n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

I **CONCLUDE** that Petitioner engaged in conduct unbecoming a public employee because she engaged in conduct that violated a directive from her supervisor. I **CONCLUDE** that her conduct constituted insubordination.

Neglect of duty is one of the grounds for disciplinary action in a civil service matter under N.J.A.C. 4A:2-2.3(7). Although not defined by the regulation, it generally means that a person is not performing his or her job. The person may have failed to perform an act that the job requires or may have been negligent in the discharge of a duty. The duty may arise by specific statute or from the very nature of the job itself.

I **CONCLUDE** that there is no evidence that Petitioner failed to perform her job duties. I therefore **CONCLUDE** the charge of neglect of duty should not be sustained.

Appropriateness of Penalty

It is well-established that the employee’s past record and any mitigating circumstances may be reviewed in assessing a penalty. See Bock, supra, 38 N.J. 500.

The severity of the infractions must also be balanced against “whether removal or something less is appropriate under the circumstances.” In re Figueroa, CSV 3819-01, Initial Decision (October 10, 2003), <http://njlaw.rutgers.edu/collections/oal/>; see Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980). Progressive discipline may be “bypassed when an employee engages in severe misconduct,” especially where the offense involves “public safety” and risks “harm to persons or property.” In re Herman, 192 N.J. 19, 33-34 (2007). In assessing penalties, “[t]he overriding concern” is the “public good.” George v. N. Princeton Developmental Ctr., 49 N.J.A.R.2d (CSV) 463, 465.

“[W]here the underlying conduct is of an egregious nature,” an individual may be removed regardless of disciplinary history. In re Glenn, CSV 5051-03, Initial Decision (May 23, 2005), <http://njlaw.rutgers.edu/collections/oal/>; see Henry, *supra*, 81 N.J. at 571. Counseling, warnings, meetings, etc., do not constitute discipline under merit system rules. See N.J.A.C. 4A:2-2.2 and N.J.A.C. 4A:2-3.1. Here, as the charges resulted from offenses occurring from August to September of 2010, “it was incumbent upon [respondent] to follow the concept of progressive discipline” and advise petitioner that “failure to change [her] behavior could result in termination from employment.” Glenn, *supra*, CSV 5051-03.

Petitioner’s underlying conduct was not egregious. The undersigned is persuaded that there was some mutual distain between Angione and Petitioner. Further, Angione was scheduled to retire and may have already done so. As such, the circumstance giving rise to the conflict would be eliminated. Further, Respondent’s witness Director Harrison, Division of Welfare, indicated that she believed that the documentary evidence submitted was incorrect. Those documents indicate no prior disciplinary action against Petitioner. (R-5.) For the foregoing reasons I **CONCLUDE** that the penalty of thirty-days’ suspension was not appropriate. I **CONCLUDE** that a penalty of five days for the charge of conduct unbecoming and ten days for the charge of insubordination is appropriate.

ORDER


It is **ORDERED** that petitioner, Sabura Alexander, be given a fifteen-day suspension.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, 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.

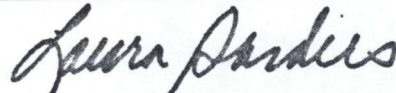
December 29, 2016
DATE


LELAND S. MCGEE, ALJ

Date Received at Agency:

December 29, 2016

Date Mailed to Parties: December 30, 2016
lr


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

LIST OF WITNESSES

For Petitioner:

Sabura Alexander

For Respondent:

Angelica Harrison

Jacqueline Angione

Kathy Cunningham

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

None

For Respondent:

- R-1 Email from Petitioner dated March 11, 2015
- R-2 Memorandum from Angelica M. Harrison dated April 24, 2015
- R-3 Memorandum from Jackie Angione dated May 9, 2015
- R-4 Handwritten letter from Kathy Cunningham dated May 8, 2015
- R-5 Employee Profile for Petitioner