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STATE OF NEW JERSEY

In the Matter of Michael Mylod

CSC Docket No. 2014-2772
OAL Docket No. CSV 6353-14

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

ISSUED: FEB 10 2017 (EG)

The appeal of Michael Mylod, a Senior Recreation Therapy Aide with Monmouth County, of his removal effective May 4, 2014, on charges, was heard by Administrative Law Judge John S. Kennedy (ALJ), who rendered his initial decision on December 8, 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 attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on January 18, 2017, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision and the ALJ's recommendation to uphold the appellant's removal.

DISCUSSION

The appellant was removed on charges of conduct unbecoming a public employee and other sufficient cause. Specifically, the appointing authority asserted that the appellant created a disruptive work environment when he used an improper, loud, boisterous, threatening, and demeaning tone toward a volunteer. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

The ALJ found that on November 19, 2013, the appellant got into a verbal dispute with a volunteer regarding the maintenance of a plant and that the appellant believed that the room the volunteer was in was off limits. The appellant

was not the volunteer's supervisor and did not hold any position of authority over the volunteer. Additionally, the dispute took place in the presence of at least three residents and was loud enough to be heard by at least two employees. Further, the appellant had received warnings and discipline about his loud tone, use of foul language, and for arguing with co-workers.

Mary Bogan, a Recreation Therapist, testified that it was her belief that the appellant's removal was motivated by a personal dislike of him by former administrator Allison Marshall. Specifically, she claimed that Marshall had a collage in her office that included a picture of the appellant with a hand-drawn penis near his face and that she would comment about the appellant's weight and the fact that she hated him. However, as no other witness could verify the existence of the collage or the doctored photo, the ALJ did not find her testimony credible. Rather, the ALJ found that the decision to discipline the appellant in this matter was made by the Department of Human Resources, not Marshall. In addition, the ALJ concluded that the appellant's conduct was such that it could adversely affect the morale or efficiency of a government unit or destroy public respect in the delivery of public services. Further, the ALJ found that the appellant also violated a number of department policies, including policies to treat co-workers with courtesy and respect at all times, and that boisterous and disruptive activity in the workplace is to be avoided. With regard to the penalty, the ALJ determined that the appellant's work history revealed that he suffered from severe behavioral problems which presented a risk to the well-being of the vulnerable residents. In this regard, the ALJ stated that the appellant had several prior disciplinary actions for using foul, inappropriate and threatening language towards co-workers, sometimes in the presence of other staff or residents. The ALJ determined that in light of the seriousness of the present matter, and the appellant's disciplinary history, that removal was the proper penalty.

In its exceptions, the appellant argues that there were two administrative hearings that exonerated him that were ignored by the ALJ. The first was a hearing by the New Jersey Board of Nursing, which found that his actions were not abusive towards residents. The second was a hearing by the Unemployment Appeal Tribunal, which found that the appellant was not discharged for misconduct connected with work. Additionally, the appellant argues that the testimony of Theresa Aziz, an Account Clerk, was not credible as it was heavily influenced by Marshall. The appellant also claims that the ALJ erred in disregarding the credible testimony of Lisa Skellinger, a Recreational Aide, Art McGillis, a Building Maintenance Worker, and Bogan. Further, the appellant contends that Marshall's dislike and hatred of him was the reason he received prior discipline.

In response, the appointing authority argues that the ALJ properly determined that Aziz was the most credible witness. Aziz was a new employee who reported the incident and had no bias against the appellant. It adds that the

witnesses presented by the appellant all admitted to being his friends and close workplace colleagues. In regard to the New Jersey Board of Nursing's decision, the appointing authority asserts that the appellant had not introduced such evidence prior to the closing of the record and the ALJ excluded this portion of his post-hearing submission. The ALJ also indicated that the Unemployment Appeal Tribunal decision was not entitled to any preclusive effect as it did not address whether the appellant had engaged in conduct worthy of discipline. Further, the appointing authority asserts that *Oliveri v. Y.M.F. Carpet, Inc.*, 186 *N.J.* 511 (2006) states that unemployment proceedings do not have any preclusive effects in future litigation. Moreover, the appointing authority indicates that the ALJ made a factual finding that no animus between the appellant and Marshall was demonstrated. Thus, it contends that the ALJ properly relied upon the appellant's poor disciplinary record in determining that removal was the proper penalty.

Upon its *de novo* review of the record, the Commission agrees with the ALJ regarding the charges and his decision to uphold the appellant's removal. In his exceptions, the appellant questions the ALJ's credibility determinations. Specifically, the appellant claims that the ALJ erred in disregarding the testimony of Skellinger, McGillis, and Bogan. In addition, he contends that Aziz's testimony should not have been found credible. 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 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 the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless, upon its review of the entire record, the Commission finds that there is sufficient evidence in the record to support the ALJ's credibility determinations. The ALJ explicitly indicated that he found Bogan's testimony as to Marshall's personal dislike of the appellant not credible because her allegation regarding the collage could not be corroborated by other witnesses and the determination to discipline the appellant was not made by Marshall. Further, while the ALJ did not address Aziz's credibility directly, it was clear from his findings of facts that the ALJ found her credible. With regard to the rest of Bogan's testimony and the testimony of Skellinger, McGillis, and the appellant, the ALJ's initial decision does not discount their testimony. Bogan's and Skellinger's testimony both indicated that the appellant was loud and McGillis testified that he was not present for the

entire incident and did not know what happened prior to his arrival. Furthermore, while the appellant claimed he was not yelling, he acknowledged that he was speaking loud enough that Bogan could hear him from the hall and asked him to keep his voice down. Therefore, the Commission has no reason to credit the appellant's contentions that the testimony of these witnesses was discounted. Further, the appellant's contention that his prior discipline was due to animus by Marshall is unpersuasive. In this regard, the Commission notes that the time to argue animus by Marshall for the prior disciplinary actions was when those actions were actively being determined. Moreover, the appellant has not provided any credible or persuasive evidence that Marshall disciplined him in this matter because she disliked him.

Further, while the appellant asserts that the ALJ did not give due deference to the decisions by the New Jersey Board of Nursing and by the Unemployment Appeal Tribunal, the New Jersey Board of Nursing's decision was introduced after the record closed and as such was stricken from his post-hearing submissions. Regardless, the New Jersey Board of Nursing determination appears to dismiss an abuse charge against the appellant but the appointing authority's disciplinary action was based on his creating a loud and disruptive work environment while interacting with a volunteer. Moreover, unemployment proceedings do not have any preclusive effects in future litigation and, in this matter, does not evidence that the appellant was not properly disciplined.

In determining the proper penalty, the Commission's review is *de novo,* and the Commission, in addition to its consideration of the seriousness of the underlying incident, utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Further, 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 principle 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 the instant matter, the appellant's disciplinary history shows four minor disciplinary actions from 2001 to 2010, and one major disciplinary action, a 40-day suspension, in 2012. Additionally, several of these prior disciplinary actions were for misconduct similar to the appellant's behavior in the current matter. Accordingly, given the appellant's improper conduct in this matter, in conjunction with his disciplinary history, removal is clearly the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was appropriate. Therefore, the Commission affirms that action and dismisses the appeal of Michael Mylod.

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 18TH DAY OF JANUARY, 2017

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P.O. Box 312
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 6353-14
AGENCY DKT. NO. 2014-2772

IN THE MATTER OF MICHAEL MYLOD, MONMOUTH COUNTY DEPARTMENT OF HEALTH CARE FACILITIES.

Philip G. Mylod, Esq., for appellant Michael Mylod

Steven Kleinman, Special County Counsel, for respondent Monmouth County Department of Health Care Facilities (Andrea I. Bazer, County Counsel, attorney)

Record Closed: October 28, 2016 Decided: December 8, 2016

BEFORE **JOHN S. KENNEDY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Certified Nurse's Aide (CNA), Michael Mylod (appellant) appeals the action by the Monmouth County Department of Health Care Facilities, Geraldine L. Thompson Care Center (GLTCC) terminating his employment on grounds of conduct unbecoming and other sufficient cause.

Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) on February 5, 2014. A departmental hearing was held on March 10, 2014, after which appellant was advised by a Final Notice of Disciplinary Action, (FNDA) dated May 7, 2014, that he had been terminated effective May 7, 2014. Appellant appealed the termination to the Civil Service Commission (CSC) and the Office of Administrative Law (OAL), as required under N.J.S.A. 40A:14-202(d). The matter was heard over the course of three days, April 23, 2015, July 28, 2015, and April 21, 2016. The parties filed written summations on July 13, 2016. Respondent objected to appellant's post-hearing submission asserting that it attempted to introduce materials not in the record. Appellant objected to the motion on July 27, 2016, and respondent replied on August 26, 2016. Oral argument was heard on September 15, 2016. On October 28, 2016, this tribunal issued an Order striking from the record certain references found in appellant's post-hearing submission and the record closed.

FACTUAL DISCUSSION

Gwendolyn Thomas was the Assistant Nursing Home administrator for Monmouth County. There were two county run nursing homes in Monmouth County at the time of appellant's removal. Subsequent to appellant's removal, both county-run facilities were sold to private entities, which continue to be operated under different names. She has known the appellant since she started working for the county ten years ago. He worked at GTLCC as a Senior Recreation Therapy Aide. GLTCC served a vulnerable population of the elderly and infirm, many of whom were confined to wheelchairs, and/or suffered from chronic psychiatric diagnoses, as well as dementia and Alzheimer's disease. Appellant's job as a Senior Recreation Therapy Aide required him to conduct recreational programs and activities with GLTCC residents, and also to accompany them on trips. He also was certified as a nurse's aide but he held no supervisory or management authority. Appellant would report to a chief recreation therapist, first Allison Marshall (before her promotion to Administrator) and then Dorothea ("Dory") Lewis. The chief recreation therapist also serves as the volunteer coordinator for the facility, and in that capacity would resolve any concerns or disputes that a volunteer had with an employee, or vice versa.

The nursing home industry "is the second most regulated industry behind nuclear energy." GLTCC is regulated on both the federal and state levels, and receives oversight from the New Jersey Department of Health and the Office of the Ombudsman for the Institutionalized Elderly. If any violations are found, it can result in monetary and other penalties to the County, as well as the finding of a "deficiency."

On November 19, 2013, there was an incident between one of GLTCC's regular volunteers, L.S., a widowed senior citizen who had been married to a GLTCC resident, and appellant. Earlier in the day, L.S. had informed her supervisor, Ms. Lewis that a fern in the recreation area was shedding leaves and making a mess. Ms. Lewis went to look for herself, and agreed that the plant needed to be removed. Because Ms. Lewis thought that a staff member might be interested in taking the plant home, instead of throwing it out, she directed L.S. to put the plant in a small room the staff used in the back of the recreation area. This room is a "locker room," and is not used for storing medical records, although there are two dry erase boards for recreation staff to communicate amongst themselves regarding the needs of particular residents. In order to keep that information private, the door to this room is normally kept closed so that guests and family members cannot see what is written on the dry erase boards from the recreation area. Volunteers are able to access the room if needed because they have been trained in patient confidentiality.

Apparently, appellant saw L.S. in the small room in the back of the recreation area, and confronted her because he felt she was somewhere where she should not have been. He also was upset because L.S. was not listening to his wishes about the plant and he felt that she was responsible for its poor condition.

Ms. Thomas was advised about the incident after the fact. She met with Ms. Marshall and appellant and asked him to write a statement. (R-7.) Appellant recognized that his voice got loud and later apologized to L.S. after he discovered she had permission to move the plant. This confrontation occurred in the recreation area in the presence of at least three residents. As a result respondent filed a resident abuse report with the Department of Health and the Ombudsman. The Office of the Ombudsman conducted an investigation and determined that there was sufficient

information to verify staff to resident verbal/mental abuse to two residents. (R-9 and R-10.) The county disciplined appellant based in part upon this incident and in part because of his prior disciplinary history. The decision to discipline appellant came from the County Human Resources Department after the investigation had been completed.

Dorothea Lewis was the Chief Recreation Therapist at the time of the November 19, 2013, incident. She testified that she was appellant's supervisor and also supervised the volunteers. Issues between employees and volunteers are supposed to be reported to her for handling. She was first advised of the altercation between appellant and L.S. on the date of the incident by Theresa Aziz, an employee in the business office that had witnessed the incident and advised Lewis that she heard appellant yelling from her office across the hall. Ms. Aziz was upset because residents were in the recreation area at the time on the incident. Earlier in the day, L.S. had informed Ms. Lewis that a fern in the recreation area was shedding leaves and making a mess. Ms. Lewis went to look for herself, and agreed that the plant needed to be removed. Because Ms. Lewis thought that a staff member might be interested in taking the plant home, instead of throwing it out, she directed L.S. to put the plant in a small room the staff used in the back of the recreation area. She advised appellant after the incident that there was a zero tolerance for yelling in the facility. Ms. Lewis would have expected appellant to complain to her about a volunteers actions and not get into an altercation in the presence of residents.

L.S. gave her own statement on November 21, 2013, which was written down by Ms. Marshall. (R-6.) L.S. explained that a fern she had donated for the recreation area was shedding badly, and at Ms. Lewis's instructions, she put it in the closet. She then stated, "[n]ext thing I know, Michael comes charging out of the room, all 300 pounds of him," and told her that she had no respect for the residents and did not care for them. Id.

Theresa Aziz worked as an account clerk, handling the personal needs accounts of residents. At the time of the incident, Ms. Aziz had only been working at GLTCC for a few weeks, and testified at that point she had not had any substantial prior interaction, either positive or negative, with appellant. Ms. Aziz was assigned an office near the

recreation area, close enough that she could hear it if the television was too loud. Just before the incident occurred, she left her office to go to the front desk, and along the way stopped by the recreation area to speak with resident, N.W., with whom she was friendly. While she was talking with N.W., "all hell broke loose, for lack of a better term." Appellant was storming back and forth in the recreation area, red in the face, while screaming at L.S. Ms. Aziz could not recall exactly what appellant was saying, but confirmed that his voice was "extremely loud" and that "it was "scary." She further observed that during the incident, N.W.'s eyes were bulging and her mouth had dropped open, and that L.S. was visibly upset and shaking. The incident took long enough that she "just wanted to get the residents out of there." Eventually, someone else told appellant to calm down, to which he responded by yelling "get out; it's none of your business." Ms. Aziz assisted N.W. out of the recreation area, who by that time was in tears.

After appellant quieted down, Ms. Aziz spoke with L.S., who was "crying and very upset," and then gave her a hug. Ms. Aziz believed she was obligated to report the incident, and because her immediate supervisor and Ms. Marshall were not there, she spoke with Ms. Lewis and social worker Pat Revlak. Ms. Lewis and Ms. Revlak contemporaneously documented their conversations with Ms. Aziz. (R-3 and R-4.) In her testimony, Ms. Aziz reaffirmed the accuracy of everything contained in her statement and affirmed that she was not pressured by anyone when she prepared it. She further reiterated on cross-examination that appellant's behavior reminded her of "a child having a temper tantrum, like a really, really bad temper tantrum."

Lisa Skellinger is a fellow recreational aide and works closely with appellant. Earlier on the day in question, Ms. Skellinger and appellant where instructed by their supervisor, Ms. Lewis, to keep the locker room door closed, because there is a bulletin board in there were important information is written. She and appellant agreed and went to lunch duty. Upon their return, they found that L.S. was in the locker room and the door was wide open in violation of Ms. Lewis's policy. One of the plants that appellant had been taking care of all the time was dumped in the garbage. Appellant said, "who dumped my plant in the garbage? Why is there dirt all over? You shouldn't be in here." Ms. Skellinger then saw Art McGillis, the janitor, and asked him to clean up

the dirt. Ms. Skellinger had worked at GLTCC for over thirty years and has known appellant since he began his employ in 1997 as a CNA. She was appellant's supervisor until 2001 when Ms. Marshall took over. At the time of the incident, she and appellant were partners and she is lost without him. When asked if appellant was "yelling" at L.S., Ms. Skellinger replied "No". She stated appellant's voice could have been loud but she "didn't think it was loud."

Even though Ms. Skellinger was present during the incident, neither Ms. Marshall nor anyone else asked for her statement. Nonetheless, she wrote a statement of events because she believes appellant was being treated unfairly. (A-2.) In her statement, she indicated voices got loud and that L.S. was yelling at appellant. Ms. Skellinger also testified, as did all witnesses, that appellant is friendly and caring towards all residents. She acknowledged on cross-examination that she has known Michael for thirty-one years and he sometimes can be loud. This is a physical characteristic and has nothing to do with behavior.

Art McGillis is a building maintenance employee and witnessed the Incident on November 19, 2013. Mr. McGillis testified that appellant "told the lady 'we told you several times to stay out that room.'" He was not nasty, just telling her using his normal voice. His testimony was consistent with his statement, dated November 25, 2015. (A-1.) On cross-examination, Mr. McGillis stated that he was not present for the entire incident and does not know what happened prior to his arrival into the room.

Mary Bogan had been employed at GLTCC as a Recreation Therapist until her transfer in March 2016. She previously held the position of Senior Recreation Therapist but was demoted by Allison Marshall after a disciplinary action. Ms. Bogan testified that on November 19, 2013, the television was loud and that as she walked by the recreation area, she heard some raised voices, those voices being both appellant and L.S. Ms. Bogan's testimony as to the events of November 19, 2013, is consistent with her statement to Ms. Marshall. (A-4.) She was not present in the room but stuck her head in the room and asked them to keep their voices down.

Ms. Bogan feels that appellant was removed from his position because Ms. Marshall did not like him. Ms. Marshall made a collage of appellant, which she kept in her office. One of the pictures in the collage was appellant in a pink bunny outfit during Easter. (A-3.) While A-3 is the original photo, the one in the collage included a hand drawn penis near appellant's face. No other employees could verify the existence of the collage or the doctored photo of appellant. Ms. Bogan contends that Ms. Marshall would comment about appellant's weight and would comment that she hates him.

On cross-examination, Ms. Bogan admitted to having been demoted for disciplinary reasons in 2014. (R-38.) She also admitted sending appellant a text message around the time of the incident telling him not to fall into their trap. "Divide and Concur." (R-39.)

Michael Mylod, appellant, began his employment at GLTCC in May 1997. He gave a statement on the incident on November 22, 2013, (R-7) in which he admits having a disagreement with L.S. on how to take care of a plant. He later apologized to L.S. for the misunderstanding when he learned that she had permission to move the plant into the locker room. He was upset that L.S. did not listen to him regarding the plants. Ms. Lewis told him to keep his voice down and no other discipline occurred until Ms. Marshall got involved. She disciplined him for everything and once told him he was lucky to have a job. Ms. Marshall never told him that she hated him and he was unaware of the collage that Ms. Bogan described.

Appellant maintains that he was not yelling at L.S., however, he later admitted regretting not speaking with her privately about the incident, instead of confronting her directly. He also agrees that he was speaking loud enough that Ms. Bogan could hear them from the hall and came in to ask them to keep their voices down.

Allison Marshall, the former administrator at GLTCC testified on behalf of the respondent as a rebuttal witness. She has been living in South Carolina for the past two years and agreed to testify in this hearing via video conferencing. She never told anyone that she hated appellant as she did not hate him or want him fired. She

remembers the photo of appellant in the bunny costume and recalls that appellant loved making the residents smile. She did not have a collage of appellant and did not draw a penis on any picture of him. She treated appellant the same way she treated all of the employees at GLTCC. She made a recommendation as to appellant's discipline but she did not have the final say as to what that discipline would be. That determination is made by the County Human Resources Department. Progressive discipline played a role in the decision to remove appellant. He had been given a fair and final warning letter in 2011 regarding his loud "booming" tones, use of foul language and arguing with a co-worker. (R-11.)

In order to resolve the inconsistencies in the witness testimony, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963).

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).

Having considered the testimonial and documentary evidence offered by the parties, I **FIND** that the testimony offered by the Ms. Bogan regarding the motivation behind appellant's discipline is not credible. She insists that Ms. Marshall had a personal dislike of appellant and he was disciplined as a result. Her testimony regarding the collage and Ms. Marshall hating appellant is not corroborated by any other witness, including appellant. Further, the testimony of Ms. Thomas and Ms. Marshall confirms that the County's Department of Human Resources reviewed the allegations and made the final determination to seek removal. This is supported by the FNDA (R-1) and the PNDA (R-2) which was issued by the County Hearing Coordinator, Scott Climer. Therefore, I **FIND** as **FACT** that the appellant's discipline resulting from the November 19, 2013, incident was not motivated by a personal dislike of appellant by Ms. Marshall or anyone at GLTCC.

Based upon due consideration of the testimonial and documentary evidence presented at the hearing and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following additional **FACTS**:

On November 19, 2013, appellant got into a verbal dispute with a volunteer at the GLTCC regarding the proper maintenance of a plant and the volunteer's presence in a room that appellant believed was to be off limits to the volunteer. GLTCC served a vulnerable population of the elderly and infirm, many of whom were confined to wheelchairs, and/or suffered from chronic psychiatric diagnoses, as well as dementia and Alzheimer's disease. Appellant was not the volunteer's supervisor and did not hold a position of authority over the volunteer such that he permitted to discipline or correct the volunteer's actions. The dispute, which took place in front of at least three residents, was loud enough to be heard by at least two employees, Ms. Aziz and Ms. Bogan, in other parts of the building. Appellant had been previously warned and disciplined about his behavior, and specifically about his loud "booming" tones, use of foul language and arguing with a co-worker. After completing an investigation, and considering the potential disciplinary options available, GLTCC management recommended removal as the appropriate penalty. In large part, this decision was based upon appellant's prior disciplinary history. The County's Human Resources Department concurred with GLTCC management, and following a departmental disciplinary hearing, his removal was upheld on May 7, 2014. As a result of the incident, respondent filed a resident abuse report with the Department of Health and the Ombudsman. The Office of the Ombudsman conducted an investigation and determined that there was sufficient information to verify staff to resident verbal/mental abuse to two residents. (R-9 and R-10.)

LEGAL ANALYSIS AND CONCLUSIONS

Appellant's rights and duties are governed by laws including the Civil Service Act and accompanying regulations. A civil service employee who commits a wrongful act related to his or her employment may be subject to discipline, and that discipline,

depending upon the incident complained of, may include a suspension or removal. N.J.S.A. 11A:1-2, 11A:2-6, 11A:2-20; N.J.A.C. 4A2-2.

The Appointing Authority shoulders the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

Appellant was charged with "Conduct unbecoming a public employee," N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an elastic phrase that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)).

I **CONCLUDE** that appellant's behavior did rise to a level of conduct unbecoming a public employee. The basis for the charge of conduct unbecoming was appellant's conduct during the November 19, 2013, incident with a GLTCC volunteer. As a result of appellant's conduct, the Office of the Ombudsman conducted an investigation and determined that there was sufficient information to verify staff to resident verbal/mental abuse to two residents. His conduct was such that it could adversely affect the morale

or efficiency of a governmental unit or destroy public respect in the delivery of governmental services.

Appellant has also been charged with violating N.J.A.C. 4A:2-2.3(a)(12), "Other sufficient cause." Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Specifically, appellant has been charged with violating Monmouth County Policies 522 regarding workplace violence, 701 regarding employee conduct, 703 regarding sexual and other unlawful harassment, 722 regarding workplace etiquette, County policy prohibiting workplace discrimination and harassment, N.J.A.C. 8:39-4.1 and Medicare/Medicaid requirements regarding resident rights. I **CONCLUDE** that appellant violated a number of these policies, specifically, appellant violated Policy 522 which requires employees to treat coworkers with courtesy and respect at all times. Policy 701 was violated in that it prohibits boisterous or disruptive activity in the workplace. Policy 722 directs employees to avoid public accusations and criticisms of other employees and directs employees to address such issues privately. N.J.A.C. 8:39-4.1 and Medicare/Medicaid requirements regarding resident rights state that residents shall be entitled to be free from physical and mental abuse. I **CONCLUDE** that the appointing authority has met its burden of proof that appellant committed an act in violation the aforementioned policies.

PENALTY

In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983). However, where the charged dereliction is an act which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal. See Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976), aff'd, 163 N.J.

Super. 453 (App. Div. 1978); In re Herrmann, 192 N.J. 19 (2007). The question to be resolved is whether the discipline imposed in this case is appropriate.

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), citing Rawlings v. Police Dep't of Jersey City, 133 N.J. 182, 197–98 (1993) (upholding dismissal of police officer who refused drug screening as "fairly proportionate" to offense); see also In re Herrmann, 192 N.J. 19, 33 (2007) (DYFS worker who snapped lighter in front of five-year-old):

> . . . 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).

A review of appellant's work history reveals that he suffers from severe behavioral problems, presenting an obvious and inherent risk to the well-being of the vulnerable residents of the GLTCC. The November 19, 2013, incident, standing alone, was a serious matter – to the point it triggered a mandatory report to the New Jersey Department of Health for an investigation. Appellant's disciplinary history confirms that this incident is reflective of a pattern of behavior. Appellant received numerous warnings, counselings, reprimands and other disciplinary actions for time and attendance violations but there were several prior instances where he was disciplined for using foul, inappropriate and threatening language towards co-workers, sometimes in the presence of other staff members or residents. Such prior conduct, in and of itself, could have resulted in removal. See, e.g., Benitez v. Passaic Cnty, 2000 WL 286782, OAL Dkt. No. CSV 7157-98 (February 29, 2000) (Care center worker removed from employment in substantial part because he used foul language towards another

employee in a setting where it could be overheard by other employees, patients and members of the public). Appellant was aware his job was on the line if lost control of his behavior again. In July 2011, appellant was called into a meeting, which was intended to "serve as [Appellant's] fair and final warning." See R-11. As then-GLTCC Administrator Diana Czerepuszko reminded him in a written memorandum, "[i]t is expected that you show an immediate, sharp, marked improvement in your conduct otherwise, there will be further, serious discipline." Id. Even after receiving his "fair and final warning," appellant's behavior did not improve, and the County was forced to issue disciplinary charges against him only a few months later, in March 2012. The county did not seek appellant's removal at that time, and decided to give him another chance, and only sought a forty-five day suspension. The suspension was later reduced to forty days via a settlement agreement, which he willingly executed after receiving guidance of legal counsel. As part of that agreement, appellant admitted to numerous instances of inappropriate conduct. (R-17.) This panoply of misconduct also included sick leave abuse (notably, despite nearly fifteen years of service with the County, at the end of 2011 he had only one-half hour left in his sick leave bank), repeated failure to report to work as scheduled, repeated failure to follow County call-in procedures, improperly entering the GLTCC kitchen area on numerous occasions, repeatedly bringing his dog into the facility without authorization, and initiating a confrontation with a speech therapist who was evaluating a resident, repeatedly insulting her. After having considered all of the proofs offered in this matter, and the impact upon the institution regarding the behavior by appellant herein and in light of the seriousness of the offense and in light of the concept of progressive discipline, and the employee's prior record, I **CONCLUDE** that the removal of the appellant is appropriate.

ORDER

Accordingly, I **ORDER** that the action of the appointing authority is **AFFIRMED**, as set forth above.

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.

12/8/16
DATE

JOHN S. KENNEDY, ALJ

Date Received at Agency: December 8, 2016

Date Mailed to Parties: December 8, 2016.

/lam

WITNESSES

For Appellant:

Lisa Skellinger
Art McGillis
Mary Bogan
Michael Mylod, appellant

For Respondent:

Gwendolyn Thomas
Dorothea Lewis
Theresa Aziz
Allison Marshall

EXHIBITS

For Appellant:

A-1 Art McGillis Statement, dated 11/25/13
A-2 Lisa Skellinger Statement, dated 12/5/13
A-3 Easter Photo
A-4 Mary Bogan Statement, dated 11/22/13 starting at 7:54 am
A-4a Mary Bogan Statement, dated 11/22/13 starting at 11:35 am
A-5 Not Admitted Into Evidence per 10/28/16 Order
A-6 Not Admitted Into Evidence
A-7 Correspondence from Karyn Schuchardt, dated 7/15/15
A-8 Not Admitted Into Evidence per 10/28/16 Order

For Respondent:

R-1 Final Notice of Disciplinary Action, dated 5/7/14
R-2 Preliminary Notice of Disciplinary Action, dated 2/5/14

R-3 Statement of Pat Revlak, dated 11/19/13

R-4a Statement of Dorothea Lewis, dated 11/19/13

R-4b Statement of Dorothea Lewis, dated 11/21/13

R-5 Interview of resident N.W., dated 11/21/13

R-6 Statement of L.S., dated 11/21/13

R-7 Statement of appellant, dated 11/22/13

R-8 Statement of Theresa Aziz, dated 11/22/13

R-9 Correspondence from Office of Ombudsman regarding resident V.B., dated 3/4/14

R-10 Correspondence from Office of Ombudsman regarding resident V.B., dated 3/4/14

R-11 Performance Notice issued to appellant, dated 7/27/11

R-12 Monmouth County Policies 522, 701, 703 and 722

R-13 Monmouth County Policy Prohibiting Workplace Discrimination and Harassment

R-14 Appellant's acknowledgement of County Policies

R-15 N.J.A.C. 8:39-4.1 Resident's Rights

R-16 42 C.F.R. 483.1 Resident Behavior and Facility Practices

R-17 to R-37 Appellant's Personnel Record

R-38 Final Notice of Disciplinary Action served upon Mary Bogan, dated April 9, 2014

R-39 Text Message from Mary Bogan to appellant