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STATE OF NEW JERSEY

In the Matter of Donna Brooks, Atlantic County, Department of Public Safety

CSC Docket No. 2013-2538
OAL Docket No. CSV 5081-13

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: NOV 19 2014 (WR)

The appeal of Donna Brooks, a Clerk 3, Atlantic County, Department of Public Safety, of her 15 day suspension, effective April 22, 2013, on charges, was heard by Administrative Law Judge W. Todd Miller (ALJ), who rendered his initial decision on September 8, 2014, modifying the 15 working day suspension to a 10 working day suspension. Exceptions were filed on behalf of the appellant, and cross exceptions were 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 November 6, 2014, did not adopt the ALJ's recommendation to modify the penalty to a 10 working day suspension. Rather, the Commission upheld the 15 working day suspension.

DISCUSSION

On January 14, 2013, the appointing authority presented the appellant with a Final Notice of Disciplinary Action (FNDA), which charged her with a violation of departmental policies, incompetence, inefficiency or failure to perform duties, conduct unbecoming a public employee, and misuse of public property. Specifically, the appointing authority asserted that the appellant used her work computer for an online chat for an excessive length of time and lied to a county investigator about her knowledge of certain personnel matters during an unrelated investigation. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In the initial decision, the ALJ set forth that on December 3, 2012, Lieutenant Steven Iuliucci received an email from Myra Eberwine in furtherance of a complaint Eberwine had made concerning, in part, disparate treatment regarding her work assignments. Attached to that email was a transcript of an online chat between Eberwine and the appellant in which Eberwine complained about work-related problems. The online chat occurred on August 2, 2012, a work day, from 8:06 a.m. to 11:27 a.m. The appellant, who was at work during the chat, and Eberwine, who was at home, communicated back and forth every two or three minutes. Thereafter, Iuliucci interviewed the appellant about personnel matters concerning Eberwine.

The ALJ set forth the testimony of the appellant, who did not dispute the length or substance of her online chat with Eberwine and admitted that lengthy online chats are not permitted. Rather, the appellant asserted that she was able to work diligently while having the chat, as she was able to complete all of her assignments that morning. The appellant also argued that she did not lie to Iuliucci. She testified that when Iuliucci questioned her about if she knew or was told about Eberwine's disparate treatment, she responded that she did not know the "official" reason for such treatment. The ALJ found the appellant's testimony credible and her answers to Iuliucci's questions "logical and responsive."

Based on the foregoing findings of fact and credibility determinations, the ALJ dismissed the charges relating to the allegations that the appellant lied to the County Investigator. Additionally, although the ALJ found that the appellant had violated the appointing authority's computer policy, it did not establish that the appellant had failed to perform her duties. In this regard, the ALJ concluded that "[w]hile an inference may be drawn that the extent of the online chat must have taken the appellant away from her duties, in the end there was no proof this occurred." The ALJ noted that the appellant had multiple minor disciplines of one to three days[1] and one major discipline consisting of a six-day suspension. Accordingly, the ALJ recommended modifying the 15 working day suspension to a 10 working day suspension.

In her exceptions, the appellant contends that the ALJ failed to take into account her testimony that the use of the work computers for personal reasons was widespread and commonplace in her work place for which nobody had ever been previously disciplined. The appellant also asserts that the ALJ should not have relied on her disciplinary record because previous charges were unrelated to those in the instant matter. Accordingly, the appellant argues that the 10 working day suspension imposed by the ALJ is "excessive and should be reduced to a penalty of not more than five working days or less."

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[1] Agency records indicate that the appellant has served six one-day suspensions and three three-day suspensions.

In its cross exceptions, the appointing authority argues that the ALJ's modification of the penalty should be upheld because there is no dispute that the appellant used her work computer for personal use while on paid County time, despite knowing that such use was prohibited. It states that such use of the computer was more than *de minimus* because the chat lasted for three and one-half hours. Finally, it argues that the penalty is "more than reasonable and fair" to the appellant in light of her disciplinary record.

Upon its *de novo* review of the record, the Commission agrees that the charges relating to the allegations of the appellant's untruthfulness during an investigation should be dismissed, but that the charges related to her online conversation including the charge that she failed to perform duties, should be upheld.

Regarding the charges relating to her online conversation, the ALJ found that the appellant used her work computer to chat for nearly three and one-half hours. Nevertheless, the ALJ dismissed the charges related to her failure to perform her duties because there was insufficient proof that she had failed to perform her duties. The Commission disagrees. In this regard, the Commission does not find the appellant's argument that she was multi-tasking to be convincing. She spent three and one-half hours on a personal conversation while she should have been performing work-related duties. Such conduct establishes, *per se*, that the appellant failed to perform at least some of her duties during that time, notwithstanding her claims of "multi-tasking." Finally, while the appellant contends that such activity is widespread and unpunished in her workplace, she offers no evidence to support her claim. More importantly, even if her contention were true, it would not excuse her improper behavior. Accordingly, the credible evidence in the record supports the charge of failure to perform her duties.

Regarding the penalty, the Commission's review is also *de novo*. In addition to considering the seriousness of the underlying incident, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Commission applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV)

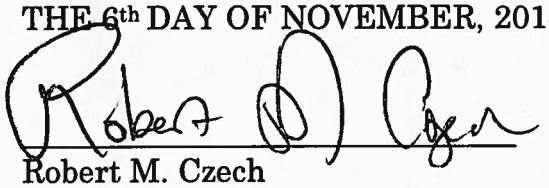
463. In assessing the penalty in relationship to the employee's conduct, it is important to emphasize that the nature of the offense must be balanced against mitigating circumstances, including any prior disciplinary history. In the present matter, the appellant, as noted above, had numerous minor disciplines and one major discipline consisting of a six-day suspension. While the appellant argues that these prior matters were unrelated to the current misconduct, the Commission can take all prior disciplinary actions into account when determining the proper penalty. Accordingly, based on the nature of the misconduct and the appellant's prior disciplinary history, the Commission concludes that a 15 working day suspension is the appropriate penalty.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant for 15 working days was justified. The Commission, therefore, affirms that action and dismisses the appeal of Donna Brooks.

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 6th DAY OF NOVEMBER, 2014



Robert M. Czech
Chairperson
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 5081-13
AGENCY DKT. NO. CSC 2013-2538

IN THE MATTER OF DONNA BROOKS, ATLANTIC COUNTY DEPARTMENT OF PUBLIC SAFETY.

Mark Featherman, Teamsters Local 331, appearing for Donna Brooks, appellant, pursuant to N.J.A.C. 1:15.4(a)(6)

Richard Andrien, Assistant County Counsel, for Atlantic County Department of Public Safety (James Ferguson, County Counsel, attorney)

Record Closed: August 11, 2014 Decided: September 8, 2014

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

Appellant, Donna Brooks, appeals her fifteen-day suspension as a Clerk with the Atlantic County Department of Public Safety (Atlantic County) effective April 22, 2013. The charges sustained against appellant were a violation of Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11 (Manual of Rules and Regulations); 01.11 (Obedience to Laws, Department Rule, Policy or Regulations); 12.01 (Sleeping, Loafing, Eating where Prohibited, Idle While on Duty); 12.17 (Lying to a Superior or Any Member of the Department

Regarding an Official Matter); and N.J.A.C. 4A:2-2.3(a)(1) Incompetence, Inefficiency or Failure to Perform Duties, (6) (Conduct Unbecoming a Public Employee); (7) (Misuse of Public Property). As set forth more particularly below, some of the charges are being **SUSTAINED** and some **DISMISSED** with the **PENALTY MODIFIED** from a fifteen-day suspension to a ten-day suspension.

PROCEDURAL HISTORY

Appellant was served with a Preliminary Notice of Disciplinary Action (PNDA) on January 14, 2013. Appellant requested a departmental hearing, which was held on February 7, 2013. A Final Notice of Disciplinary Action (FNDA) was served on appellant by certified or registered mail on March 21, 2013. Appellant requested a fair hearing on March 25, 2013.

The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. It was filed at the OAL on April 5, 2013. A prehearing conference was held on October 3, 2013, and the matter was scheduled for hearing on March 26, 2014. This date was adjourned at the request of Atlantic County due to competing trial calendar with the Federal District Court. The matter was rescheduled for August 11, 2014, wherein it proceeded to trial and the record closed.

FACTUAL SUMMARY

On December 6, 2012, Atlantic County initiated an investigation into inappropriate conduct of appellant. Atlantic County determined that appellant was using her work computer for an excessive online chat with another county employee, Officer Myra Eberwine (Eberwine) and lied to a county investigator about her knowledge of certain personnel matters – which were part of an unrelated investigation.

The appellant is assigned to the classification unit as a clerk within the Atlantic County Department of Public Safety. A classification clerk is required to process new inmate commitments for the Atlantic County Jail. This involves looking at the inmate's

criminal history, scoring their level of risk, entering the risk factor data into the computer and determining the appropriate placement in the prison housing units. A classification clerk is also assigned other special tasks.

Commitments are received all throughout the day and night. The morning is particularly busy because overnight commitments need to be processed and the prisoners need to be placed in the appropriate housing unit. Atlantic County processes approximately 1,000 inmate commitments a year.

The investigation of appellant was assigned to Lieutenant Steven Iuliucci (Luliucci). Iuliucci explained that he had received an email from Eberwine on December 3, 2012. Eberwine had already been complaining of disparate treatment regarding specific work assignments. Eberwine attached to her email a lengthy online chat that she had with appellant on August 2, 2012, in support of her ongoing allegations of disparate treatment.

The August 2, 2012, online chat between Eberwine and appellant begins at 8:06 a.m. and continues through 11:27 a.m. (C-3). The online conversation is continuous with appellant and Eberwine each initiating or responding every two or three minutes. Appellant was at work and used her work computer for the online chat. Eberwine was apparently at home (J-4).

The August 2, 2012, online chat between appellant and Eberwine involved work related grievances. Eberwine complained to appellant that she was not being properly rotated in and out of classifications unit, like other officers. Eberwine claimed that she had more seniority, which was not being recognized. She also complained that one of the officers was harassing her and creating hostile environment (C-3).

On November 20, 2012, Iuliucci interviewed appellant. This interview pre-dates the current investigation but the answers provided by appellant are alleged to be inconsistent or untruthful with the online chat received by Iuliucci from Eberwine on December 3, 2012. On November 20, 2012, appellant was questioned about work related complaints made by Eberwine. "When asked, Donna stated that she has no

knowledge or was she told why Eberwine was removed from classifications" (C-2). Atlantic County contends this statement is false or untruthful when compared to the online chat. Atlantic County contends that the content of the online chat between appellant and Eberwine (C-3) reflects that appellant had knowledge as of November 20, 2012, why Eberwine was removed from classification. Even if appellant was not untruthful, Atlantic County argues that Brooks was not as forthcoming as she should have been for an investigation of this nature.

Appellant does not dispute the length and substance of her online chat with Eberwine on August 2, 2012. Appellant's argues that she work diligently while having the chat. Online chats are easy to perform. It is much like having a conversation in the office. There is an exchange of information back and forth through a computer. Appellant contends that she completed all her morning assignments. There were no proofs that she failed to perform her assigned duties diligently and proficiently on August 2, 2012.

Appellant also contends that she did not lie to Iuliucci on November 20, 2012. Appellant recalls being sent to the trailer office outside the facility. She was advised that management was investigating a harassment complaint by Eberwine against Lieutenant Kelly and Sergeant Robinson. Eberwine had been removed from the classifications unit and was very upset. Appellant did not know why management removed Eberwine from the classification unit. No one from management officially advised appellant the basis for the personnel change involving Eberwine. Indeed, there were rumors but no official announcements from management. Consequently, when Iuliucci asked appellant if she had any "knowledge" or had been "told why" Eberwine was removed from classifications; she honestly did not know the official reason for the personnel change. While appellant had discussions with Eberwine about the personnel move; those discussions involved Eberwines's thoughts, feelings or opinions. Iuliucci did not ask appellant if she had direct conversations with Eberwine about why she (Eberwine) believed she was removed. Indeed, appellant was not asked to divulge the content of her conversations with Eberwine. She interpreted Iuliucci's question as asking if she knew why "management" moved Eberwine. Consequently, her responses to Iuliucci on November 20, 2012, were not inaccurate or untruthful.

FINDINGS OF FACT AND CREDIBILITY

1. On August 2, 2012, appellant was employed with Atlantic County – assigned as a clerk with the classification unit in the jail.

2. On August 2, 2012, appellant had lengthy online chat with Officer Eberwine from 8:06 a.m. to 11:27 a.m. (C-3).

3. The online conversation involved continuous typed and read communications every two-three minutes on a work computer (C-3).

4. Appellant was trained and received a copy of the county's applicable workplace and computer policies (J-2 and J-3).

5. On November 20, 2012, appellant was interviewed by Iuliucci about a disputed between Eberwine and other employees or officers (an unrelated investigation).

6. Appellant was questioned by Iuliucci about if she (appellant) knew or was told why Eberwine was moved out of the classification unit.

7. Appellant responded that she did not know "officially" why Eberwine was moved out of the classification unit.

I found appellant to be credible. She admitted that she had a lengthy online chat with Eberwine on August 2, 2012. Appellant thought she could perform all her duties and while conversing by computer. Appellant admitted that lengthy online chats were not permitted (C-6). Appellant also admitted that she was in violation of the county's computer policy. Her primary contention was the she did not lie to anyone during the investigation of the Eberwine matter.

I also found appellant's explanation of her answers provided to Iuliucci's on November 20, 2012, about the Eberwine's job reassignment, logical and responsive to the Iliucci's questions. Appellant was asked if she knew or had knowledge why Eberwine was reassigned from the classification unit. She answered the question narrowly, but truthfully. She did not know why management removed Eberwine from

this title. Appellant's August 2, 2012, online chat with Eberwine suggests that she knew much more about why Eberwine was removed from this title and did not impart with this information when question by Iuliucci. But whatever Eberwine thought or believed, was her opinion and not fact. The way in which Iuliucci posed the question to appellant – did not lead me to believe it was clear and direct, resulting in the narrow reply provided by appellant. Iuliucci did not ask appellant to tell him why Eberwine believed or thought she was removed from this title. Consequently, appellant did not lie or provide false or misleading information to Iuliucci on November 20, 2012.

CONCLUSIONS

The burden of persuasion rests with the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, which is the standard in proceedings before an administrative agency. Atkinson v. Parsekian, 37 N.J. 143 (1962). An appeal requires the Office of Administrative Law to conduct a de novo hearing and to determine the appellant's guilt or innocence, as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987); Cliff v. Morris County Bd. of Social Serv., 197 N.J. Super. 307 (App. Div. 1984).

I **CONCLUDE** that respondent meet it is burden of proof in regard to the charges appellant violating Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11 (Manual of Rules and Regulations); 01.11 (Obedience to Laws, Department Rule, Policy or Regulations) must be **SUSTAINED**. The county policy strictly limits the use of computers and internet to official business (J-2:22 & 26). Violation of this policy or misuse of the county's computer is subject to discipline (J-2:26). Appellant was provided with a copy of the county's computer use policy (J-2). Appellant clearly violated the county's policies by using a work computer for an online chat for over three hours. I am mindful that de minimus use of a work computer may occur and not result in disciplinary charges – at management's discretion. But the facts herein do not comport with a de minimus use.

The charges involving 12.01 (Sleeping, Loafing, Eating where Prohibited, Idle While on Duty); 12.17 (Lying to a Superior or Any Member of the Department Regarding an Official Matter); and N.J.A.C. 4A:2-2.3(a)(1) Incompetence, Inefficiency or Failure to Perform Duties, (6) (Conduct Unbecoming a Public Employee); (7) (Misuse of Public Property) are **DISMISSED** for insufficient proof. There were no proofs that appellant failed to perform her duties or complete her assigned tasks, was loafing or idle, notwithstanding the length of her online chat. While an inference may be drawn that the extent of the online chat must have taken appellant away from her duties, in the end there was no proof this occurred. And appellant explained that online chat, while continuous, only involved a few key strokes on the computer each time. Many staff members can complete multiple tasks (multi-tasking) at the same time. Finally, based upon the findings of fact and credibility determinations, I **CONCLUDED** that appellant was not untruthful when questioned by Iuliucci. Therefore, the conduct unbecoming a public employee charge must be **DISMISSED**.

PENALTY

In West New York v. Bock, 38 N.J. 500, 523 (1962), the New Jersey Supreme Court stated that a public employee's prior disciplinary record may be referred to in assessing the reasonableness of a penalty for a current offense. However, exceptions to the application of "progressive discipline" have been made where certain acts are "so egregious in nature and/or so detrimental to the public welfare that immediate termination is warranted, notwithstanding a good disciplinary history." Curtiss v. East Jersey State Prison, CSV 12007-96, Initial Decision (Dec. 17, 1997), aff'd., Merit System Bd. (Jan. 27, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>; see also Nelsen v. East Jersey State Prison, 97 N.J.A.R.2d (CSV) 347, 350 (where charged offense is an act "which, in view of the duties and obligations of the position, substantially disadvantages the public, good cause exists for removal [even if a first offense]"); Reinhardt v. East Jersey State Prison, 97 N.J.A.R.2d (CSV) 166, 169, where the ALJ discussed this exception by stating:

> [N]o rigid disciplinary guidelines for assessing penalties exist. A system of progressive discipline has evolved . . . to serve the goals of providing public employee's job security

> and protecting them from arbitrary employment decisions. Nevertheless, at times immediate removal may be appropriate and need not be preceded by less severe penalties. See Golaine v. Cardinale, 142 N.J. Super. 385, 395-6 (Law Div. 1976). Of course, an employee's conduct must be egregious before the policy of progressive discipline is circumvented.

Appellant's disciplinary history involves a myriad of reprimands for absenteeism and lateness. She has been suspended from one to three days several times for minor disciplinary events. Appellant has one major six-day suspension for a violation of the standards of conduct and obedience to laws related to her misuse of criminal history information – for personal use.

Appellant has been employed with the county for seventeen years. She offered two nominations as the employee of the month from 2012 as mitigation (A-1; A-2). Appellant is otherwise considered a good employee.

According to Lieutenant David Kelsey, the Atlantic County allocated five days of the suspension to appellant's lying or lack of truthfulness and ten days to her policy violations and loafing charges.

Based upon appellant's disciplinary history, along with factoring in the charges that have been sustained and dismissed, a **MODIFIED PENALTY** of a ten-day suspension is imposed. Over three hours of unauthorized and improper computer use is more than de minimus policy violation and is deserving of a ten-day suspension after considering the conduct at hand along with the disciplinary history and commendations.

ORDER

Based upon the foregoing, I **ORDER** that the charges of 12.01 (Sleeping, Loafing, Eating where Prohibited, Idle While on Duty); 12.17 (Lying to a Superior or Any Member of the Department Regarding an Official Matter); and N.J.A.C. 4A:2-2:3(a)(1) Incompetence, Inefficiency or Failure to Perform Duties, (6) (Conduct Unbecoming a Public Employee); (7) (Misuse of Public Property) are **DISMISSED** for insufficient proof.

It is further **ORDERED** that the charges for violating the Atlantic County Department of Public Safety, Division of Adult Detention, Policy and Procedure Manual, 1.3.11 (Manual of Rules and Regulations); 01.11 (Obedience to Laws, Department Rule, Policy or Regulations) be **SUSTAINED.**

It is further **ORDERED** that the fifteen-day suspension be modified to a ten-day suspension and that appellant be awarded back pay, pension credit and all other emoluments for five-days resulting from the modified penalty reduction.

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, 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.

9/8/14
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 9/8/14

Date Mailed to Parties: 9/10/14

/jb/lam

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Appellant:

Donna Brooks

For Respondent:

Lieutenant Steven Iuliucci
Lieutenant Michael Kelly
Lieutenant David Kelsey

EXHIBITS

Joint:

J-1 Preliminary and Final Notices of Disciplinary Action
J-2 Computer Use Policy
J-3 Atlantic County, Department of Public Safety - Policy and Procedure
J-4 Appellant's Time Card – August 2, 2012

For Appellant:

A-1 August 8, 2012, Commendation – Employee of the Month
A-2 December 4, 2012, Commendation – Employee of the Month

For Respondent:

C-1 Intentionally Omitted
C-2 Investigation Report – November 20, 2012

C-3 Online Chat E-mailed from Myra Eberwine to Steve Iuliucci
C-4 Intentionally Omitted
C-5 Intentionally Omitted
C-6 Investigation Report – December 6, 2012
C-7 Intentionally Omitted
C-8 Definition of ESGR
C-9 Appellant's Disciplinary History