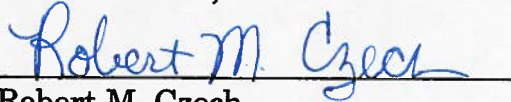


ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Yolanda Curtis.

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of issuance of this decision. In the absence of such notice, the Commission will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter shall be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION
FEBRUARY 4, 2015



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
Written Record Appeals Unit
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 1289-14
AGENCY DKT. NO. 2014-1806

**IN THE MATTER OF YOLANDA
CURTIS, DEPARTMENT OF
CHILDREN & FAMILIES (GLOUSTER
WEST LOCAL OFFICE).**

Raymond Montgomery, Staff Representative, AFSCME Council One, for
appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Douglas Banks, Employee Relations Coordinator, for respondent pursuant to
N.J.A.C. 1:1-5.4(a)(2)

Record Closed: November 21, 2014

Decided: December 24, 2014

BEFORE SARAH G. CROWLEY, ALJ:

STATEMENT OF THE CASE

Appellant, Yolanda Curtis, Assistant Family Service Worker II, Department of Children and Families (DCF), appeals an eight day suspension for a violation of the New Jersey policy prohibiting discrimination in the workplace (State Anti-Discrimination Policy), conduct unbecoming a public employee and neglect of duty. DCF contends

that Ms. Curtis made inappropriate remarks to a client and her daughter during scheduled visitations, in violation of the state anti-discrimination policy. Ms. Curtis denies having made any such inappropriate statements.

PROCEDURAL HISTORY

On August 22, 2013, the respondent issued a Preliminary Notice of Disciplinary Action. Following a hearing, respondent issued a Final Notice of Disciplinary Action on January 16, 2014, sustaining the charges and imposing an eight day suspension. The appellant requested a hearing and the matter was filed at the Office of Administrative Law (OAL), on January 31, 2014, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on October 31, 2014. The parties submitted post-hearing submissions on November 21, 2014, and the record closed on that date.

FINDINGS OF FACT

The following facts are not in dispute:

Appellant is an Assistant Family Service Worker for DCF. She has worked in that capacity for seven years. Her primary responsibilities are to transport and supervise visitation between children and their non-custodial parents. She has no prior disciplinary infractions. Ms. Curtis was assigned to supervise visitation between A.M. and her daughter. It is alleged that sometime between September 2012 and December 2012, Ms. Curtis made inappropriate comments to the client about her African American daughter not knowing who Martin Luther King was, and telling A.M., that she was "raising her daughter white." Ms. Curtis is African American and the mother, A.M. is Caucasian. It is also alleged that Ms. Curtis commented about the mother's sexual orientation. Ms. Curtis denies having made any inappropriate comments to A.M.

TESTIMONY

For respondent:

Amanda Hammond is employed by DCF as a Supervising Family Services Specialist and she is Ms. Curtis' supervisor. She testified that Ms. Curtis' primary responsibilities were to provide transportation and to supervise visitation between children and their non-custodial parents. Ms. Hammond testified that it would be inappropriate for a worker to interject their personal opinions to the clients and that they are trained regarding appropriate and professional behavior.

Ms. Hammond testified that A.M., the mother of S.M., was receiving supervised visitation as a result of mental health and substance abuse issues, as well as prior domestic violence concerns. Ms. Hammond described A.M.'s case in her report as "very challenging." (R-6.) The child was now nine years old and in foster care. Ms. Hammond's report states that she was "quite skeptical of whether Ms. Curtis could have said the things to A.M." Ms. Hammond did not immediately refer the matter to the Office of EEO/AA for review because she questioned A.M.'s credibility with regard to her allegations against Ms. Curtis. However, that she removed Ms. Curtis from A.M.'s case upon notification of the complaint. She had received no other complaints against Ms. Curtis, except one allegation that she had ended visitation early. Ms. Hammond identified the Policy Against Discrimination (R-1), as well as a list of training that Ms. Curtis had attended. (R-3.)

Paul Pintella is an investigator for the Affirmative Action Office of DCF. He testified that the incident was reported in December 2012, and his investigation did not commence until February 2013. Mr. Pintella testified that his responsibilities were to gather statements, interview witnesses, and make a recommendation to the director regarding whether a violation of the policy against discrimination had occurred. Mr. Pintella testified that he received a referral from Gloucester East of the Division of Child Protection and Permanency on January 3, 2013. The allegation related to comments

made to a client between September 2012 and December 2012. He testified that he interviewed a total of six people, including the complainant and the respondent in this matter.

The initial complaint was received by Emmons Thompson, a Family Services Specialist at the Gloucester West office. Mr. Thompson received a call from A.M. who related to him that Yolanda Curtis made some inappropriate comments to her. Mr. Pintella prepared a statement based upon his conversation with Mr. Thompson, which Mr. Thompson signed. The representative for the appellant objected to the admission of this report and the hearsay statements of Mr. Thompson, who was not offered as a witness. Moreover, the report of Mr. Thompson had redacted every name contained in the report. The objection to the admission of the report from Mr. Thompson was sustained.

Mr. Pintella testified that he interviewed the complainant A.M. and he testified at length about the interview with the complainant and the allegations about the statements made by Ms. Curtis. He identified a statement which he had prepared based on his conversation with A.M. The statement contained numerous redactions and was not signed. Mr. Pintella's later testimony revealed that the "interview" was by telephone only, and there was no recording of the conversation. Mr. Pintella testified that he typed up the statement himself, but it was never signed by the complainant. The appellant's representative objected to the entry of the statement into evidence, as it was hearsay, was unsigned, redacted and the proponent was not going to testify. The objection was sustained.

Mr. Pintella's final interview was with Ms. Curtis who denied any of the allegations. She was asked to sign a statement which Mr. Pintella prepared after their interview. She made several changes to the statement and signed it. (R-8.) Mr. Pintella identified and reviewed the Policy Against Discrimination and the "zero tolerance" policy. (R-1.) Mr. Pintella concluded that a violation of the policy had occurred.

For appellant:

Yolanda Curtis testified that she is employed as an Assistant Family Service Specialist II for DCF. Her responsibilities include supervising visitations between children and their non-custodial parents. She testified that she was the specialist assigned to the case of A.M. and supervised the weekly one hour visitation with her daughter, age nine, who was in foster care. She testified that she had one hour of visitation a week with her daughter who was nine years old at the time. Ms. Curtis testified that the mother would come late and sometimes cancel scheduled visitations. She stated that this may be why she may have complained about visitation being cut short.

Ms. Curtis testified that was aware that A.M. was a lesbian and lived with her partner. However, she testified that she had no concerns or problems with this and never commented on this to A.M. Ms. Curtis testified that she is a lesbian herself and would not make a negative comment about this. Ms. Curtis testified that she never told A.M. she was raising her child white. She also stated that the child is in fact in foster care with an African American family. Ms. Curtis stated that she did have a conversation with A.M.'s daughter one day about Martin Luther King. The daughter told her she had to write a paper and told Ms. Curtis she did not know who Martin Luther King was. Ms. Curtis told her about Martin Luther King. However, she testified that she never said anything to A.M. about the subject.

FINDINGS OF FACT

In view of the contradictory testimony presented by appellant and the respondent witnesses, the resolution of the charges against Ms. Curtis requires that I make a credibility determination with regard to the critical facts. The choice of accepting or rejecting the witnesses' testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be

believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experiences and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. Super. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718,749 (1963). A fact finder is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, 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. Super. 514. 521-22 (1950). See D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997).

Having had an opportunity to carefully observe the demeanor of the witnesses, it is my view that Ms. Curtis was truthful and credible. Her testimony was consistent with the written statements and the other facts presented at the hearing. I found Ms. Hammond's testimony to be truthful and credible. Ms. Hammond testified that she questioned the credibility of A.M. or that Ms. Curtis would have made such statements. The State's only other witness, Paul Pintella, had no firsthand knowledge of any of the events.

Accordingly, I FIND:

1. Ms. Curtis was a Family Services Specialist for the Department of Child and Families and was assigned to supervise visitation between A.M. and her daughter, during the period of September 2012 and December 2012. Visitation is for one hour a week.
2. A.M. was a client of DCF as a result of being homeless, having mental health and substance abuse issues.

3. On or about December 27, 2012, Emmons Thompson of the Division received a complaint from A.M. about inappropriate comments that Ms. Curtis made.
4. Based on these allegations, the state issued a Preliminary and Final Notice of Discipline charging a violation of the New Jersey State Policy Prohibited Discrimination in the Workplace on the basis of race and sexual orientation; Conduct Unbecoming of a Public Employee; Neglect of Duty; Discrimination That Affects Equal Employment Opportunity; and Other Sufficient Cause – Violation of Policy or Administrative Decision.
5. The State provided no credible testimony to support these allegations. The hearsay testimony of Mr. Pintella of a telephone conversation with A.M. and a conversation with Mr. Thompson was not corroborated by any credible testimony or evidence.
6. Ms. Curtis' testimony that she did not make any inappropriate statements was sincere and credible and I find that she did not make any inappropriate statements to A.M.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service employees' rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. Super. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment,

supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant. An appeal to the Civil Service Commission requires the OAL to conduct a de novo hearing to determine the employee's guilt or innocence, as well as the appropriate penalty if the charges are sustained. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The appointing authority has the burden of proof and must establish by a fair preponderance of the credible evidence that the employee was guilty of the charges. Atkinson v. Parsekian, 37 N.J. Super. 143 (1962); In re Polk Licence Revocation, 90 N.J. Super. 550 (1980). Evidence is found to preponderate if it establishes that the tendered hypothesis, in all human likelihood, is true. See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, Dwyer v. Ford Motor Co., 36 N.J. Super. 487 (1962).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant seeking an eight day suspension. Specifically, the appellant has been charged with the following offenses:

1. Conduct Unbecoming a Public Employee (N.J.A.C. 4A:2-2.3(a)(c)6);
2. Neglect of Duty (N.J.A.C. 4A:2-2.3(a)(7));
3. Discrimination That Affects Equal Employment Opportunity (as defined by N.J.A.C. 4A:7-1.1, Including Sexual Harassment);
4. Other Sufficient Cause - Violation of Policy or Administrative Decision (N.J.A.C. 4:2-2.3(a)12).

The majority of the evidence presented by the appointing authority in this matter was hearsay. Hearsay evidence is evidence of statements made out of court which is offered in court to prove the truth of the matter(s) asserted therein. Generally, such evidence is not admissible in proceedings held in the Judicial Branch. However, the

New Jersey Rules of Evidence incorporate numerous exceptions to this general rule excluding hearsay. In administrative hearings the rule governing the admissibility of hearsay evidence is different. Hearsay may be admitted in evidence subject to limitations on its use as a means of establishing ultimate findings of fact. The rule is codified at N.J.A.C. 1:1-15.5.

(a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

[N.J.A.C. 1:1-15.5.]

N.J.A.C. 1:1-15.5(b) recites what is commonly referred to as the residuum rule, which was best described in Justice Francis' foundational opinion for the New Jersey Supreme Court in Weston v. State, 60 N.J. 36, 50-51 (1972):

It is common practice for administrative agencies to receive hearsay evidence at their hearings . . . As Judge Learned Hand said for the Court of Appeals for the Second Circuit in NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (1938), mere rumor would not support a board finding, "but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." And see, Goldsmith v. Kingsford, 92 N.H. 442, 32 A.2d 810 (1943) . . . However, in our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added

probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.

Even where hearsay would normally be accepted in evidence under N.J.A.C. 1:1-15.5, a judge may exclude the evidence where the probative value of the admission of the evidence is substantially outweighed by the prejudice that admission may cause or by the undue consumption of time that admission of such evidence may require. N.J.A.C. 1:1-15.1(c).

In this matter, the State has provided only hearsay evidence in support of the charges against the appellant. The State did not produce the complainant or the case worker who spoke to the complainant. One of the state's own witnesses questioned the credibility of the complaining witness and whether the appellant would say such a thing. The other witness presented by DCF spoke briefly with the complainant on the telephone. There was not a residuum of legally reliable or competent evidence to support the hearsay statements of the complainant, and thus, the allegations against the appellant cannot be sustained.

Based upon the testimony and findings, I **CONCLUDE** that the respondent has not satisfied its burden of providing that the appellant engaged in conduct which constituted a violation of the policy against discrimination, neglect of duty, conduct unbecoming or other sufficient cause. Applying the law to the facts, I **CONCLUDE** that the respondent has failed to prove any of the foregoing charges by a preponderance of the credible evidence. Accordingly, I **CONCLUDE** that the discipline and the penalty have not been sustained and must be **REVERSED**.

ORDER

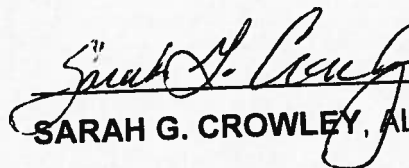
I **ORDER** that the action of the appointing authority in imposing an eight day suspension is **REVERSED**.

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.

December 24, 2014
DATE


SARAH G. CROWLEY, ALJ

Date Received at Agency:

December 24, 2014

Date Mailed to Parties:

December 29, 2014

SGC/cb

APPENDIX

WITNESSES

For appellant:

Yolanda Curtis

For respondent:

Amanda Hammond

Paul Pintella

EXHIBITS

Joint:

- J-1 Preliminary Notice of Disciplinary Action
- J-2 Final Notice of Disciplinary Action

For appellant:

None

For respondent:

- R-1 Anti-Discrimination Policy
- R-2 Findings Letter, dated July 15, 2013
- R-3 Training Transcript
- R-4 thru 5 Not in evidence
- R-6 Statement of Amanda Hammond
- R-7 Not in evidence
- R-8 Statement of Yolanda Curtis