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STATE OF NEW JERSEY

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

In the Matter of Elmore Gaines, City
of Newark

CSC Docket No. 2015-449

Request for Reconsideration

ISSUED: FEB 9 2015

(SLD)

Elmore Gaines, a Code Enforcement Officer, Department of Neighborhood and Recreational Services, City of Newark, petitions the Civil Service Commission (Commission) for reconsideration of the attached final decision rendered on July 30, 2014, which upheld his removal, effective September 3, 2013.

By way of background, the appointing authority presented the petitioner with a Final Notice of Disciplinary Action (FNDA) which removed him on charges of conduct unbecoming a public employee, misuse of public property and other sufficient cause. Specifically, the appointing authority asserted that on March 26, 2013, the petitioner sent an e-mail entitled "unfair treatment" to the Assistant Corporation Counsel, and copied a number of other individuals in which he personally attacked the Assistant Corporation Counsel's professional integrity.

Upon the petitioner's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. After a hearing, the Administrative Law Judge (ALJ) determined that the appointing authority had met its burden of proof with regard to the charges. Specifically, the ALJ found that the petitioner's e-mail accusing the Assistant Corporation Counsel of trying to influence an ALJ with both her dress and body crossed the line of what could be acceptable standards of decency and constituted conduct that was unbecoming a public employee. Moreover, the ALJ noted that it was clear that the petitioner intended to harass, intimidate or at a minimum embarrass the Assistant Corporation Counsel by forwarding the e-mail to 40 or 50 City officials. Therefore, the ALJ found that the petitioner's actions also violated the e-mail policy. The ALJ indicated that the

petitioner's disciplinary record evidenced numerous warnings and suspensions, with the last three suspensions for 60 days, 90 days and 120 days. Accordingly, the ALJ found that based on the precepts of progressive discipline, and the petitioner's actions in the instant matter, removal was appropriate.

In his exceptions to the initial decision, the petitioner argued that the ALJ was not impartial and treated him unfairly. The petitioner also asserted that he had never been trained on any e-mail policy and he disputed that he sent an e-mail. Rather, he maintained that he sent a "text" from his phone while he was not at work. The petitioner also disputed that he attacked the Assistant Corporation Counsel. Rather, he maintained that she was not dressed in proper business attire since she wore tight miniskirts, showed cleavage and "stumbled" around on stiletto heels on three separate days, even though it was winter and she was pregnant. The petitioner also claimed that the Assistant Corporation Counsel acted inappropriately by smiling and grinning at the ALJ and continuously pulling her skirt, which was "way over her buttocks" every time she approached a witness, thereby embarrassing and disturbing the petitioner and his witness. The petitioner also claimed that the ALJ erred in not giving him the opportunity to face his accuser, in the ALJ's recitation of the petitioner's witnesses' testimony, and that the disciplinary record that was used was inaccurate. Upon its *de novo* review of the record, the Commission adopted the ALJ's recommendation to uphold the petitioner's removal.

In the petitioner's request for reconsideration, he argues that the Commission erred in adopting the ALJ's decision. Specifically, he argues that the Commission did not make a fair and independent evaluation of the record since he does not believe the Commission read his exceptions. Specifically, the petitioner reiterates that he did not write an e-mail since he made it from his phone in the evening after work hours and he was not allowed to work during the prior hearing. The petitioner also reiterates that the ALJ's recitation of his disciplinary history was incorrect. Furthermore, the petitioner maintains the Commission, which has no minority members, is clearly not an equal employment opportunity commission at all, and has relegated a veteran to the "homeless line."

Despite an opportunity to do so, no arguments were submitted by the appointing authority.

CONCLUSION

N.J.A.C. 4A:2-1.6(b) sets forth the standards by which a prior decision may be reconsidered. This rule provides that a party must show that a clear material error has occurred or present new evidence or additional information not presented at the original proceeding which would change the outcome of the case and the reasons that such evidence was not presented at the original proceeding. *N.J.A.C.*

4A:2-1.2(c) sets forth the factors for consideration in evaluating petitions for a stay or interim relief.

The instant request for reconsideration is based on the assertion that the Commission made an error by upholding the petitioner's removal. However, a review of the record in the instant matter reveals that reconsideration is not justified. Initially, although the petitioner challenges the impartiality of the Commission and claims that it did not read his exceptions, he presents no evidence in support. The record reveals that copies of the petitioner's exceptions, as well as the ALJ's initial decision were reviewed by the Commission. Moreover, 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 also, *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. 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 sufficient 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). Therefore, while the petitioner disputes the ALJ's finding that he had utilized the appointing authority's e-mail system, he has presented no evidence which establishes that the ALJ's credibility findings were arbitrary, capricious, unreasonable or not based on the evidence in the record. Additionally, a review of the petitioner's exceptions and the ALJ's decision indicate that regardless of whether or not the petitioner utilized the appointing authority's e-mail system, the comments which he reiterates in his exceptions were inappropriate and in and of themselves support the charge of conduct unbecoming a public employee.

Additionally, although the petitioner claims that the disciplinary record before the Commission was incorrect, other than his mere allegations, he has presented no evidence in support. With regard to the penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the 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. Moreover, 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

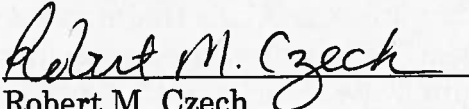
disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the theory of progressive discipline is not "a fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007); *In re Herrmann*, 192 N.J. 19 (2007). Moreover, the record evidences that the petitioner's most recent suspension, prior to his removal, was a six-month suspension. *See In the Matter of Elmore Gaines* (CSC, decided September 3, 2014) (Petitioner's request for reconsideration of the six-month suspension was denied). Therefore, based on the foregoing, the petitioner has failed to establish that reconsideration is justified in this matter.

ORDER

Therefore, it is ordered that this request for reconsideration be denied.

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 4TH DAY OF FEBRUARY, 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
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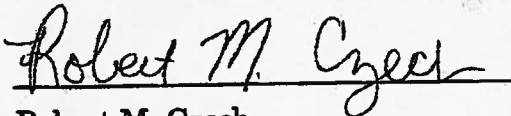
Attachment

c: Elmore Gaines
Michael Greene
Kenneth Connolly
Joseph Gambino

Re: Elmore Gaines

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
JULY 30, 2014



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 14166-13
AGENCY DKT. NO. 2014-844

**IN THE MATTER OF ELMORE GAINES,
CITY OF NEWARK, NEIGHBORHOOD &
RECREATIONAL DEPARTMENT**

Elmore Gaines, pro se

**Allison Brown-Jones, Assistant Corporation Counsel, for respondent City of
Newark, Neighborhood & Recreational Department (Michael Oppici,
Corporation Counsel, attorney)**

Record Closed: February 4, 2014

Decided: May 12, 2014

BEFORE JEFFREY A. GERSON, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about July 9, 2013 a Preliminary Notice of Disciplinary Action was filed against Elmore Gaines, a Code Enforcement Officer of the City of Newark, Neighborhood Services.

There were three charges filed against Gaines, the first being conduct unbecoming a public employee.

The basis of the complaint stems from an E-mail authored by Gaines and transmitted using the City of Newark electronic system directed to a Municipal attorney who, at the time, was conducting a hearing with Gaines at the Office of Administrative Law. This transmission was directed toward the Municipal attorney, but copied to in excess of forty other Municipal officials including the Mayor, the entire Municipal counsel and several other agency heads.

A Final Notice of Disciplinary Action dated August 29, 2013, sustained all three charges against Gaines and removed him from his position effective September 3, 2013. On or about September 19, 2013, Gaines appealed his termination and the matter was forwarded to the Office of Administrative Law on or about October 1, 2013. A hearing was conducted on February 4, 2014 and concluded on that day.

TESTIMONY

No witnesses testified on behalf of the City because their factual circumstances were stipulated to by Gaines.

Marked in evidence as J-1 was the E-mail authored by Gaines and circulated to the named recipients. Gaines admitted authorship of the E-mail and that he had transmitted it using the City of Newark Electronic System.

After the City rested its case, Gaines called Wanda Stevenson, a union representative to testify on his behalf. Stevenson confirmed receiving the E-mail in question and indicated that she was aware of the policy precluding employees from using City of Newark computers for personal use and/or for the purpose of intimidating or harassing others.

Gaines testified on his own behalf and reaffirmed the fact that he had authored the E-mail in evidence and had used a City of Newark computer to originate and circulate it.

Gaines indicated that he was frustrated by the Municipal attorney's conduct at his prior hearing indicating that he thought that she was "using her body to influence the judge".

DISCUSSION

Gaines transmitted the E-mail using the City of Newark Electronic E-mail System and personally attacked the City of Newark's Assistant Corporation Counsel. The E-mail read in relevant part:

"I take exception that you sent my witnesses away without asking me or telling me or the judge, I wonder whose idea this was. I take exception to you dress code, a five month pregnant woman in a tight short mini skirt was this a misguided attempt to pervade the judge because of your weak case".

Gaines, by accusing the Newark Assistant Corporation Counsel of trying to influence the judge with both her dress and her body undoubtedly crossed the line of what could be acceptable standards of decency and engaged in conduct that was unbecoming a public employee.

Offensive E-mails, in violation of an internal E-mail policy, have been found to constitute conduct unbecoming. See In Re Shauyn Copeland, OAL DKT. NO. CSV 05036-04 Initial Decision (Aug. 4, 2005). Although Gaines' E-mail does not rise to the offense of distribution of pornographic imagery as found in Copeland, its depiction of the municipal attorney and the clear inference that the attorney was attempting to inappropriately influence the judge is quite simply conduct unbecoming. If Gaines had sent his E-mail only to the Corporation Counsel handling his case at the time, it might well have been argued that out of his frustration he did something quite offensive and rude. But, the fact that Gaines forwarded the E-mail to so many City officials, no other conclusion can be reached other than the fact that he intended to either harass, intimidate, or at the very least embarrass Corporation Counsel. Unnecessarily besmirching Corporation Counsel and circulating it to between forty and fifty officials of the City is both a violation of policy and clearly conduct unbecoming.

SANCTION

A review of J-3 in evidence, Gaines' disciplinary history, reveals a rather deplorable record. It reflects numerable warnings and several suspensions, the last three of which appeared to be sixty, ninety, and one hundred twenty day suspensions. Standing alone, the charges in this disciplinary action would probably not warrant a termination, but, the progressive nature of Gaines disciplinary record and his prior entry into many settlement agreements should have put him on notice that any further disciplinary infractions could very well result in his termination. He had been disciplined in the past for conduct unbecoming, including an act that discredited another officer in the Department, in that case although not using E-mails, but offensive brochures. Thus, not only is Gaines' record rather extensive, his offense in this case is not dissimilar to offenses to which he was suspended in previous cases. In fact, a review of Gaines' record indicates that the City of Newark had been quite patient with him over a course of many years and their patience was repaid by a venomous attack against a Corporation Counsel. This conduct warrants termination.

ORDER

It is **ORDERED** that Elmore Gaines is terminated from his position of Code Enforcement Officer for the City of Newark, Neighborhood Recreational Services as of September 3, 2013.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 12, 2014



DATE

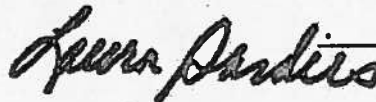
JEFFREY A. GERSON, ALJ

Date Received at Agency:

5/12/14

Date Mailed to Parties:

sej



5/13/14

**DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE**

APPENDIX

WITNESSES

For Petitioner

Wanda Stevensen

Elmore Gaines

For Respondent

None

EXHIBITS

For Petitioner

None

For Respondent

None

Joint:

- J-1 Printout of Email from Elmore Gaines dated 4/1/13
- J-2 City of Newark E-Mail Policy dated 6/27/00 (6 pgs.)
- J-3 Employment History printout for Elmore Gaines (2 pgs)
- J-4 Certification of Elvin Padilla Re: Elmore Gaines Employment History Printout
- J-5 Printout of Disciplinary Action
- J-6 Initial Decision dated May 6, 2011