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STATE OF NEW JERSEY

In the Matter of David Anthony,
Hudson County

CSC Docket No. 2015-1886
OAL Docket No. CSV 00435-15

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: SEP 0 2 2015 (JET)

The appeal of David Anthony, a Management Specialist with the Hudson County Sheriff's Office, of his removal effective November 26, 2014, on charges, was heard by Administrative Law Judge Joann Lasala Candido (ALJ), who rendered her initial decision on July 9, 2015. Exceptions were filed on behalf of the appellant and the appointing authority, and a reply to exceptions was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on August 19, 2015, accepted and adopted the Findings of Facts and Conclusions as contained in the ALJ's initial decision, but did not adopt the ALJ's recommendation to modify the removal to a 90 working day suspension. Rather, the Commission modified the removal to a 30 working day suspension.

DISCUSSION

The appointing authority removed the appellant on charges of insubordination, conduct unbecoming a public employee, and other sufficient cause. Specifically, the appointing authority asserted that the appellant made a derogatory and inappropriate comment toward S.B., an African-American co-worker and subordinate employee, while in the presence of another co-worker on November 28, 2012. Specifically, the appointing authority alleged that the appellant referred to

S.B. as "Buckwheat." Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case.

In her initial decision, the ALJ found that the appellant was serving in a supervisory capacity in the same unit with S.B., but was not S.B.'s immediate supervisor. It was not disputed that the appellant uttered the word "Buckwheat" toward S.B. in the workplace on November 28, 2012, and that more than one employee overheard the remark. Specifically, the ALJ found that the appellant referred to S.B.'s garb as "Buckwheat" during a conversation at work. The ALJ explained that the term "Buckwheat" references an African-American fictional character from many years ago, and it is now considered a racial slur. The appellant admitted in his testimony that he made the offensive remark, but that he did not intend to offend S.B. However, the appellant denied making the offensive statement during the appointing authority's initial investigation of the incident. The ALJ noted that the appellant completed diversity training and he received a copy of the employee handbook which prohibits the use of discriminatory language. In this regard, the ALJ indicated that the employee handbook prohibits any form of harassment based on race, creed, color, and national origin. As such, the ALJ found that the appellant was aware of the racial implications of the term "Buckwheat" when he uttered it. Moreover, the ALJ found that the appellant's reference to the term "Buckwheat" was particularly offensive to S.B. Therefore, the ALJ concluded that the evidence established that the appellant was guilty of the charges of conduct unbecoming a public employee and other sufficient cause, but did not constitute insubordination. Thus, since the appellant did not have any prior major disciplinary history and was otherwise an exemplary employee, the ALJ recommended modifying the removal and imposing a 90 working day suspension.

In his exceptions to the ALJ's decision, the appellant asserts that he did not refer to S.B. as "Buckwheat." Rather, he only referred to S.B.'s hat while using that term and he was only attempting to engage in light banter. The appellant contends that the remark was mischaracterized and it was not intended to be discriminatory. As such, the ALJ erroneously concluded that he was aware of the racial implications of the remark. In this regard, the appellant explains that, at the time of the incident, he had no idea that the term "Buckwheat" was a racial slur. Further, the appellant avers that the record does not support the finding that he received training to avoid using the term. The appellant asserts that the appointing authority's policies, as well as the training he received, did not primarily focus on discrimination issues. Rather, the policies are primarily focused on sexual harassment. The appellant states that the "diversity dictionary" he received from the appointing authority indicates 400 terms that are considered offensive in the workplace, however, the term "Buckwheat" was not one of them. In addition, the appellant contends that the appointing authority's witnesses were not credible. In this regard, the appellant explains that S.B. and the other witness to the remark, Alice Nestor, did not immediately object to the inappropriate remark. He also

alleges that Nestor's testimony is questionable since she had some prior history with S.B.. The appellant adds that the appointing authority's failure to call S.B. as a witness undermines the racial implication of the statement. As such, he maintains that the ALJ's finding that S.B. was offended by the remark is not supported by the evidence. Moreover, the appellant asserts that he answered truthfully during the appointing authority's investigation and he did not say, "Hey Buckwheat." In this regard, the appellant explains that the appointing authority never asked him if he stated, "You have a Buckwheat hat thing going on." He also states that the ALJ ignored the fact that he continued to perform his duties for an additional nine months after the incident and the testimony from his supervisor that he is an exemplary employee. The appellant adds that he was not separated from S.B. after the incident occurred, and while the term "Buckwheat" may be out of date, it is not a racist slur. As such, the appellant asserts that the remark is not sufficient to warrant his removal or a 90 working day suspension.

In response, the appointing authority maintains that removal is the appropriate penalty. Specifically, the appointing authority asserts that, as a supervisor, the appellant had a greater duty to refrain from referring to a subordinate employee as "Buckwheat." In this regard, the ALJ properly determined that supervisory employees are held to a higher standard of conduct than non-supervisory employees. Further, the appointing authority contends that the appellant attended mandatory training for unlawful harassment which he disregarded. The appointing authority adds that its employee handbook includes an anti-harassment policy, which prohibits, among other things, harassment on the basis of race. The policy also sets forth "managerial/supervisory" responsibilities and requires supervisors to enforce the policy. The appointing authority states that the term "Buckwheat" is a racial slur and was not an inadvertent use of poor language. In addition, the appointing authority asserts that the appellant was less than truthful with regard to his actions, as he initially denied that he used the term "Buckwheat."

In reply, the appellant states that it appears that the appointing authority is inventing claims that he engaged in deceitful conduct and falsely states that he attended training without providing any evidence of such.

Upon independent review of the entire record, including the exceptions and reply to exceptions filed by the parties, the Commission agrees with the ALJ's determination to uphold the charges of conduct unbecoming a public employee and other sufficient cause. However, the charge of insubordination has not been sustained. Further, while the Commission agrees with the ALJ's recommendation to modify the removal, for the reasons noted below, the Commission modifies the removal to a 30 working day suspension.

In the present matter, the Commission agrees with the ALJ that the evidence established that the appellant uttered a racial slur toward S.B., a subordinate co-worker, and the incident was compounded because the appellant is in a supervisory position. Further, the Commission agrees that the appellant's conduct violated the appointing authority's policy against harassment and discrimination in the workplace. Although the appellant may have been referring to an item of clothing, *i.e.,* a hat, it does not excuse him from such inappropriate behavior. The appellant is in a supervisory position and he is held to a higher standard of conduct. Moreover, the Commission is not convinced that the appellant was unaware that the term "Buckwheat" constitutes a racial slur. Such behavior disrupts the work environment and cannot be minimized.

However, in determining the proper 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 this case, the record indicates that the appellant's record does not contain any major disciplinary history. The appointing authority's arguments that the appellant's removal should be upheld are not persuasive. While discriminatory language in the workplace is never appropriate, especially for a supervisory employee, given the totality of the circumstances present in this matter, including the appellant's prior disciplinary history, the fact that he continued to serve for nine months after the incident occurred, and his apparent lack of intent, it is appropriate to impose a 30 working day suspension. The Commission emphasizes that it does not condone such behavior and further instances of such conduct would support a harsher penalty up to and including removal.

Since the removal has been modified, the appellant is entitled to mitigated back pay, benefits and seniority for the period following his 30 working day suspension to the date of actual reinstatement pursuant to *N.J.A.C.* 4A:2-2.10.

With respect to counsel fees, *N.J.A.C.* 4A:2-2.12 provides for the award of counsel fees only where an employee has prevailed on all or substantially all of the

primary issues in an appeal. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. *See Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A4489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In this case, the Commission sustained the charges of conduct unbecoming a public employee and other sufficient cause, and imposed a 30 working day suspension. Therefore, he is not entitled to counsel fees.

This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections,* Docket No. A-5581-01T2F (App. Div. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved. In the interim, as the court states in *Phillips, supra,* if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

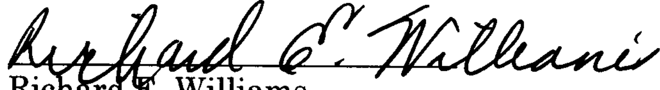
ORDER

The Civil Service Commission finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Commission modifies the removal to a 30 working day suspension. The Commission further orders that the appellant be granted back pay, benefits and seniority for the period following his 30 working day suspension until his reinstatement. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C.* 4A:2-2.10. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of this issue.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of the appellant's reinstatement. 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 should be pursued in the Superior of Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19th DAY OF AUGUST, 2015



Richard E. Williams
Member
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 00435-15

AGENCY DKT. NO. 2015-1886

IN THE MATTER OF DAVID ANTHONY, HUDSON COUNTY, SHERIFF DEPARTMENT.

David Beckett, Esq., for appellant, David Anthony (Law Office of David Beckett)

Sean Dias, Esq. for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: June 12, 2015 Decided: July 9, 2015

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals his removal by the Hudson County Sheriff Department (respondent). By Preliminary Notice of Disciplinary Action dated April 14, 2014, respondent charged appellant with insubordination, conduct unbecoming a public employee, and other sufficient cause, alleging that appellant on November 28, 2012, made a derogatory and inappropriate comment to a co-worker Serita Broady referring to her as "Buckwheat," a long-ago television character of African American decent. This was uttered in the presence of Alice Nestor, a co-worker. Respondent further charged him with attempting to influence co-worker Nestor's recollection of the incident and for his lack in judgment of Broady's bereavement leave claim. After a departmental hearing

on September 12, 2014, respondent issued its Final Notice of Disciplinary Action, dated December 1, 2014, sustaining only the charge of uttering the derogatory statement to a subordinate employee. On this sustained charge, respondent removed appellant. He received his pay until June 5, 2014, based upon a salary of $80,000 per year.

Appellant filed an appeal with the Civil Service Commission and the matter was transmitted to the Office of Administrative Law, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. This matter came to the undersigned on January 12, 2015, for disposition and a hearing was scheduled for and conducted on May 8, 2015. The record closed on June 12, 2015, upon receipt of written summations.

ISSUE

The issue is whether respondent has proven the charges of insubordination, conduct unbecoming a public employee, and other sufficient cause by a preponderance of the credible evidence and, if any of the charges are sustained, the disciplinary action warranted under the circumstances.

TESTIMONY

A summary of the evidence offered in support of, and in opposition to, the charges against appellant follow. The factual discussion is not intended to be a verbatim report of the testimony of all the witnesses. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented. In short, appellant significantly disputes the facts that give rise to the charges against him.

Francine Shelton

Undersheriff Francine Shelton testified on behalf of respondent. She oversees all four civilian employee units, 911 unit, weights and measures, security guards, and business sales departments. Appellant was the supervisor/office manager of the business sales department. Alice Nestor was chief clerk in the same department. Serita Broady was an employee in that department. All employees are required to attend harassment and discrimination training. Appellant received this training on July 11, 2011. (R-5.) In addition, appellant received training on May 10, 2011, in the understanding and managing of today's diverse workplace. (R-6.) Shelton was not present at those trainings.

Alice Nestor was Serita Broady's immediate supervisor. Appellant supervised Nestor. On November 29, 2012, Broady wrote a letter to Shelton complaining of an incident between her and appellant on November 28, 2012. (R-3 (for identification purposes).) Shelton was not in the area where the comment was made, and consequently had no personal knowledge of what was said. Shelton testified that appellant's work performance was outstanding. She was not aware of any other complaints about him.

Alice Nestor

Chief Clerk Alice Nestor testified on behalf of respondent. She has been employed with the Sheriff's Office for twenty-five years. Appellant was her supervisor.

Nestor testified that, on November 28, 2012, at approximately 4:00 p.m., while she was in the office, she heard appellant state to Broady as she was putting on her coat in a coat room "Hey, Serita, you look like Buckwheat." Broady, who is African American, was about four feet away from appellant when he made the utterance. Nestor, who called out sick the day after the incident for a planned surgery, did not return to work for three weeks. At the time of incident, she had not filed a complaint or advised anyone of the incident because she assumed that Broady would file it. She stated that Broady did not complain at the time of the utterance.

Nestor submitted an unfinished written statement as well as a handwritten statement to the undersheriff about the incident and was questioned by investigators six months later. However, this was now after the death of her son on January 8, 2013. Accordingly, she felt this incident had become secondary to her and that it was insensitive to question her at that time.

Richard Sires

Richard Sires testified on behalf of appellant. He is currently employed by respondent as a principal personnel technician. Shelton is his direct supervisor. He and Shelton were both involved in the investigation of appellant. Nestor, who was asked to submit a handwritten statement about the incident, submitted it in typewritten form. When asked why it was typewritten, Nestor responded that Broady had typed the document for her. Nestor stated that Broady "was getting in her face" and she felt intimidated by her. Nestor also stated that her computer was not working properly.

David Anthony

David Anthony testified on his own behalf. He has been a management specialist for respondent since May 2011.

He stated that at the end of the day on November 28, 2012, staff was getting ready to leave and he engaged in "chit chat" with Broady while she was exiting the coat closet and was putting on her coat. She asked Anthony what he thought of her outfit, and he responded, in part, that she had that "Buckwheat hat look going on" but he did not intend to upset Broady. Neither Broady nor anyone else in the area voiced any concern about his comment.

He admitted that he failed to mention his reference to "Buckwheat" during the investigation conducted by respondent of the incident. Accordingly, when asked during the investigation if he had ever said "hey Buckwheat" to Broady, he denied it. He further

stated that in retrospect, he should not have used the word "Buckwheat" to describe Broady's hat.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I make the following **FINDINGS of FACT**. Appellant is a management specialist for respondent since May 2011. He supervised the business sales department. As part of his employment, appellant received harassment and discrimination as well as training and understanding and managing diverse workplace training. He is not Broady's immediate supervisor.

I **FIND** that there is no dispute that a racial slur was uttered by appellant on November 28, 2012, in the workplace. I further **FIND** that appellant was aware that the term "Buckwheat" referred to an African American child on a television show many years ago. Although no complaint was initially made, the term was offensive to Broady. Appellant admitted that he used the term, but that he did not intend to offend Broady and, in retrospect, admitted that he should not have uttered it. There is no dispute that more than one person heard the slur. Appellant has had no major prior disciplinary actions and was viewed as an exemplary employee.

Because appellant admitted to uttering the term "Buckwheat," I will not address credibility. I **FIND** that he was aware of its racial implication and I further **FIND** that it was offensive to a worker-subordinate.

LEGAL ANALYSIS AND CONCLUSIONS

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a public employee's rights and duties. The Act is designed to attract qualified personnel to public service and is liberally construed toward attainment of merit appointments and broad tenure protection. Essex Council No. 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. 1972);

Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, a civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be removed or subject to major discipline. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de novo hearing before an administrative law judge are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, to be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). The County bears the burden of proving the charges against Laban by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Appellant has been charged with insubordination, which is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; and disrespect or use of insulting or abusive language to supervisor. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority." Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation. Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster's II New College Dictionary (1995) "insubordination" refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002).

Appellant argued that he did not willfully disobey or disregard an order or instruction of his superior (who, in this case, was Undersheriff Shelton), nor was there a claim that he was disrespectful or that he refused to perform any action that was required of him. To the contrary, Shelton testified that appellant was an outstanding employee and was not aware of any prior disciplines. Because there has been no proof

that appellant was non-compliant with a superior or disobeyed an order of a superior, I **CONCLUDE** respondent has not demonstrated by the preponderance of the legally competent, credible evidence that appellant committed acts of insubordination on November 28, 2012.

An employee may be subject to discipline for conduct unbecoming a public employee. Conduct unbecoming a public employee constitutes grounds for major discipline under N.J.A.C. 4A:2-2.3(6). Although the term is undefined under the Administrative Code, the charge has been interpreted to include any conduct that adversely affects the morale or efficiency of the bureau or "which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." In re Emmons, 63 N.J. Super. 136 (App. Div. 1960). The employee need not violate the criminal code or a written rule or policy of the employer.

Here, appellant referred to "Buckwheat," a television character of African American decent when commenting on the garb worn by Broady. This was offensive, particularly to an employee also of African American decent, and was clearly against public policy. The Employee Handbook dated May 1, 2003, specifically states that the "County prohibits any form of harassment based on race, creed, color, national origin . . . ." (R-4.) Appellant, as a co-worker and particularly as a supervisor, inappropriately racially offended a worker under his supervision, conduct that is clearly unacceptable. I therefore **CONCLUDE** that respondent has met its burden of proof on the charge of conduct unbecoming.

Appellant has been charged with violating N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Other sufficient cause is generally defined in the charges against appellant as all other offenses caused and derived as a result of all other charges against him. Other sufficient cause is an offense for conduct that violates the implicit standards of good behavior which devolve upon one who stands in the public eye as an upholder of that which is morally and legally correct. Therefore, I also **CONCLUDE** that the respondent has met its burden of proof on this charge.

As to the penalty of removal sought by respondent, I **CONCLUDE** that such penalty is too harsh. Appellant's work performance, other than for this singular transgression, was considered by those who knew him as exemplary, thus requiring progressive discipline for removal. Progressive discipline is a system that has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is an evaluation of the nature, number and proximity of prior disciplinary infractions, and in turn, the imposition of progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential. Bock, supra, 38 N.J. at 522-24.

As was stated here, appellant's record is absent any prior formal disciplines. When dealing with the question of penalty in a de novo review of a disciplinary action against a civil service employee, the Civil Service Commission is required to reevaluate the proofs and penalty on appeal based on the charges presented. N.J.S.A. 11A:2-19; Henry v. Rahway State Prison, 81 N.J. 571 (1980); Bock, supra, 38 N.J. 500. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Bock, supra, 38 N.J. at 522-24. Major discipline may include removal, disciplinary demotion, suspension or fine no greater than six months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4.

Even though appellant did not have any prior disciplines and was considered an exemplary worker, his insensitive utterance of "Buckwheat" to a co-worker must never be tolerated—particularly in a workplace setting where he was given sensitivity training—and where he not only has acknowledged receipt of the policy against harassment, but has attended training sessions about its requirements. The Employee Handbook clearly prohibits such conduct, although, for some unexplained reason, it does not direct termination when an employee is guilty of discriminatory conduct. Although respondent correctly asserted that its policy addresses this discriminatory conduct, the policy itself does not automatically require a penalty of termination.

Respondent contends that because appellant was a supervisor, he had a greater responsibility to refrain from using the derogatory comment. In Griffith v. Bayside State Prison, CSV 4178-02, Initial Decision (February 11, 2004), modified, Merit System Board (April 13, 2004), <http://njlaw.rutgers.edu/collections/oal/search.html>, a supervisor referred to an African American subordinate as "boy" in the presence of other staff. She, as the appellant here, urged that the comments were not intended to be insulting or derogatory. The atmosphere at the time the comment was made was lighthearted and jovial. The Merit System Board reduced the penalty to a five-day suspension, but noted that the use of inappropriate language by a supervisor is unacceptable, even if the resulting affront was unintentional. The Griffith decision held that the imposition of minor discipline "should serve as a warning to the appellant that future infractions may result in a more serious penalty, up to and including removal."

Appellant's conduct clearly violated the policy against harassment and as a supervisor is held to a higher standard. However, for the reasons stated above, I cannot conclude that his conduct warrants removal, but rather a penalty of a ninety-day suspension.

ORDER

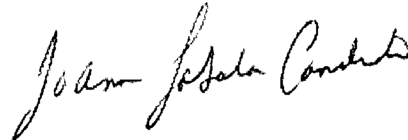
Based upon the foregoing, it is **ORDERED** that appellant be and is hereby suspended for a period of ninety (90) days on the sustained charges of conduct unbecoming a public employee and other sufficient cause. And it is further **ORDERED** that the charge of insubordination be and is hereby **DISMISSED**.

The suspension will commence as of November 26, 2014, the date of his removal. Upon serving the suspension, he shall be reinstated to the same position of management specialist with back pay, benefits and seniority retroactive to the date of his reinstatement. The amount of back pay shall be mitigated in accordance with the guidelines set forth in N.J.A.C. 4A:2-2.10(d)(3).

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, 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.



July 9, 2015

DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

APPENDIX

WITNESSES

For Appellant:

Richard Sires

David Anthony

For Respondent:

Francine Shelton

Alice Nestor

EXHIBITS

For Appellant:

A-1 Civilian Payroll Attendance Record

A-2 Preliminary Notice of Disciplinary Action

A-3 Letter dated February 18, 2011

A-4 Letter dated September 15, 2011

A-5 2013 Budget Presentation

A-6 Diversity dated April 2010

A-7 Pre-employment

A-8 Paycheck dated April 24, 2015

For Respondent:

R-1 Preliminary Notice of Disciplinary Action

R-2 Final Notice of Disciplinary Action dated December 1, 2014

R-4 Employee Handbook

R-5 Unlawful Harassment sign-in sheet

R-6 Understanding and managing today's diverse workplace dated May 10, 2011