



STATE OF NEW JERSEY

In the Matter of Keisha Lewis
 City of Orange Township, Police
 Department

**FINAL ADMINISTRATIVE ACTION
 OF THE
 CIVIL SERVICE COMMISSION**

CSC DKT. NO. 2017-3367
 OAL DKT. NO. CSV 05933-17

⋮
⋮
⋮
⋮
⋮
⋮
⋮
⋮
⋮

ISSUED: APRIL 20, 2018 BW

The appeal of Keisha Lewis, Police Officer, City of Orange Township, Police Department, removal effective March 29, 2017, on charges, was heard by Administrative Law Judge Joann LaSala Candido, who rendered her initial decision on March 14, 2018. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of April 18, 2018, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in removing the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Keisha Lewis.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 18TH DAY OF APRIL, 2018



Deirdre L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05933-17

AGENCY DKT. NO. 2017-3367

**IN THE MATTER OF KEISHA LEWIS, CITY OF
ORANGE TOWNSHIP POLICE DEPARTMENT.**

Keisha Lewis, petitioner, appearing pro se

Dan Smith, Esq., appearing on behalf of respondent, City of Orange Township

Record Closed: March 2, 2018

Decided: March 14, 2018

BEFORE JOANN LASALA CANDIDO, ALAJ:

STATEMENT OF THE CASE

Petitioner, Keisha Lewis, appeals her removal as a recruit with the City of Orange Township (respondent or City). The City contends that petitioner lacks respect of authority, defying the way the agency performs.

PROCEDURAL HISTORY

On March 29, 2017, petitioner was served with a Preliminary Notice of Disciplinary Action charging her with incompetency, inefficiency or failure to perform duties in violation of N.J.A.C. 4A:2-2.3.

On March 29, 2017, petitioner was served a Final Notice of Disciplinary Action sustaining the charges based upon the following incidents:

- 2/28/17 Ordered to write a report due to appearance
- 2/28/17 Could not name the President of the United States
- 3/01/17 Ordered to write a report showing a lack of interest in the job as a police officer
- 3/01/17 Addressed a sergeant as "bro"
- 3/02/17 Wore earrings in Recruit uniform knowing she was not permitted to do so
- 3/22/17 Made threatening gestures to a detective behind the detective's back

Petitioner filed a request for a hearing and the matter was then forwarded to the Office of Administrative Law (OAL), where it was filed on May 1, 2017, as a contested case. The matter was assigned to ALJ Richard McGill before being assigned to me on January 18, 2018, due to an illness. Hearings took place on January 18, 2018, and March 2, 2018, on which date the record closed.

ISSUES

Did the respondent carry its burden of proving the charges referenced above by a preponderance of the credible evidence? If so, what disciplinary action, if any, is appropriate?

TESTIMONY

Keisha Lewis

On January 13, 2017, Keisha Lewis started the Essex County Police Academy. She suffered an injury at the Academy February 2, 2017, an ACL sprain and a locked knee. She was dismissed from the Academy on February 23, 2017. She was sent back to Orange Police Academy on February 28, 2017. There was an issue with her hair and she was instructed to go into the bathroom and wet down her hair. She did so and was told to write a report why her hair was the way it was. She completed the report. On February 28, 2017, petitioner was unable to name the President of the

United States and referred to him as the 'orange guy.' She was asked to write a seven-page report on Donald Trump and a five-page report on respect.

On March 1, 2017, she was ordered by the Director to write a report on her interest as an officer. She did not finish to the last line and it was ripped up. She was ordered to re-write it. Petitioner contends that all recruits were required to write about their interest as a police officer. She was also ordered to write a two-page essay on how to properly write a report.

On March 1, 2017, she referred to a sergeant as "bro" and was ordered to write a report that she completed.

On March 2, 2017, she was ordered to write a report and two-page essay after inappropriately wearing earrings to a promotional ceremony.

On March 8, 2017,¹ she was accused of making a threatening gesture behind a detective's back during a class, which she denies.

Petitioner testified that she would never disrespect a superior and she had passed up many towns to be an officer in Orange.

Sergeant Michael Tingolie

Sergeant Tingolie testified on behalf of respondent. Sergeant Tingolie supervised petitioner at the Orange Police Department. On March 1, 2017, there was a pursuit from Newark towards Orange being broadcast on the police radio and petitioner stated to him "that's my call bro." Recruits must address officers by their rank. Petitioner wrote a satisfactory essay. This conduct is not fitting for a police officer. On March 2, 2017, petitioner was wearing earrings while in the police academy uniform, which is impermissible. Until a recruit completes the academy they must wear that uniform and comply with academy policy and rules. He instructed her to remove the

¹ The Final Notice of Disciplinary Action incorrectly reflects March 22, 2017, rather than March 8, 2017.

earrings and write a report, which she did. He was also present when petitioner referred to the President as the orange guy when the Director asked her to name him. That is a lack of respect.

Sergeant Tingolie submitted a report outlining a summary of all information pertaining to Lewis while she was at the Essex County Police Academy. (R-1.)

Sergeant Jean-Paul Barbosa

Sergeant Barbosa testified on behalf of respondent. He is employed by the Orange Police Department in Internal Affairs. Barbosa investigated the reports dated March 23 and 24, 2017, as well as the PNDA and the report authored by Detective Kovach dated March 9, 2017. (R-2 thru R-5.) He confirmed that a poem was to be recited by all recruits and she was not able to recite from memory. Because petitioner was considered an at-will employee during a working test period she can be terminated for any reason.

Detective April Kovach

Detective Kovach testified on behalf of respondent. She has been employed by respondent for the past seventeen years. Kovach testified that every day there was an issue with petitioner. On petitioner's first day back from the academy she had to be spoken to about her hair. Kovach confirmed the incident when petitioner referred to the President as the orange guy. Kovach was embarrassed because she oversaw petitioner. This was petitioner's second chance to get it together since she failed the police academy.

Kovach also confirmed through eye-witnesses that petitioner made a threatening gesture behind her back when she walked behind her. Petitioner was given three chances to recite the poem "See it Through" from memory but she was unable to do so. She filed a report dated March 9, 2017. Petitioner wore earrings to a promotional ceremony while in recruit uniform. This is impermissible. Petitioner was asked to write a two-page essay on why it was inappropriate to wear earrings but she did not complete

the assignment. Petitioner did refer to the President as the orange guy but there were further questions that were not addressed at this hearing. (R-5.)

Police Officer Lamar Payne

Officer Payne is employed by the Orange Police Department. Payne was in the group of recycled recruits with petitioner. He witnessed petitioner make a gesture behind Kovach's back when petitioner walked behind her. Payne described the table in the room and how petitioner would walk behind Kovach after her leaving the podium and on the way back to her seat. (R-8.)

Recruits who are still considered trainees when not completing the academy were made aware of how to wear their hair and that no jewelry or make-up is permissible. He was present when petitioner was seen wearing earrings and he heard petitioner refer to the President as orange.

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness' testimony. It requires an overall assessment of the witness' 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 (9th Cir. 1963). Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself, in that it must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Perrone, 5 N.J. 514, 522 (1950). A fact finder is free to weigh the evidence and to reject the testimony of a witness 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. Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as inherently incredible, and may also reject testimony when it is inconsistent with other testimony or with common experience or overborne by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). The choice of

rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable choice. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981).

I **FIND** the testimony offered by respondent's witnesses to be compelling and credible. All witnesses offered consistent versions leading up to the termination of petitioner. Each of the witnesses' testimony was wholly consistent with their written reports and nearly contemporaneous with the incidents. Petitioner's testimony, on the other hand, was in direct contradiction to the credible testimony offered by respondent's witnesses and was not deemed credible.

FINDINGS OF FACT

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

1. Petitioner failed out of the Essex County Police Academy on February 23, 2017, for obtaining more than the allowable nineteen physical training zeros.
2. Petitioner, as well as three other recruits, were permitted to return to the Township of Orange Police Department after failing the Police Academy. Two of the recruits were recommended to be recycled back into the Academy. All recruits were still considered trainees and must comply with rules and policies of the Academy.
3. The first day petitioner returned to the Police Department on February 28, 2017, Lieutenant Brown ordered her to write a report why her hair was in disarray and her appearance inappropriate.
4. Petitioner was unable to name the President of the United States when asked on February 28, 2017, and she referred to him as the "orange guy."
5. On February 28, 2017, Director T. Warren ordered petitioner to write a report on the President of the United States. She, as well as the other recruits, were asked to write a five-page report on respect.

6. On March 1, 2017, petitioner was unable to recite a poem from memory assigned in January 2017. Sergeant Cassidy ordered petitioner to write a report on interest or lack thereof of becoming a police officer.
7. On March 1, 2017, petitioner referred to a ranked officer as "bro."
8. On March 2, 2017, petitioner wore earrings to a promotional ceremony while in uniform in violation of policy and procedure.
9. On or about March 7, 2017, while attending a lecture by Detective Kovach, petitioner made a threatening gesture when passing behind her.
10. Petitioner was removed from the police department effective March 29, 2017.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Civil service employees' rights and duties are governed by the Civil Service Act and regulations promulgated pursuant thereto. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1. The Act is an important inducement to attract qualified people to public service and is to be liberally applied toward merit appointment and tenure protection. Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). However, consistent with public policy and civil service law, a public entity should not be burdened with an employee who fails to perform his or her duties satisfactorily or who engages in misconduct related to his duties. N.J.S.A. 11A:1-2(a). Such a civil service employee may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a).

In appeals concerning major disciplinary actions brought against classified employees, the burden of proof is on the appointing authority. N.J.A.C. 4A:2-1.4(a). The standard of proof in administrative proceedings is a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 275 (1958). The preponderance may also be described as the greater weight of credible evidence in a case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Testimony, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself.

Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). An appeal to the Merit System Board 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 Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

The other obligation of an appointing authority is to discipline an employee for misconduct to discourage a recurrence of such misconduct or, where appropriate, to remove an employee from public service because of the individual severity of the misconduct or because of the cumulative effect of multiple acts of misconduct. Disciplinary action may take the form of removal, suspension, fine, or disciplinary demotion. N.J.S.A. 11A:2-6a (1), (2), and (3); N.J.A.C. 4A:2-2 and -3. Probationary review and discipline are not mutually exclusive of one another. Certainly, a probationary employee may be disciplined during the working test period. N.J.S.A. 11A:4-15(c); N.J.A.C. 4A:4-5.4(b). Indeed, petitioner was disciplined during her working test period. Infractions occurring during a working test period logically can be factors to consider in making an ultimate determination of whether a probationer's overall performance is unsatisfactory at the conclusion of the working test period. However, the probationary review process cannot permissibly substitute for the disciplinary process. The agency recognizes the difference between the disciplinary and probationary review processes by placing them in separate subsections of N.J.A.C. 4A:4-5.4.

Regarding Civil Service Rule N.J.A.C. 4A:2-2.3(a)(3), petitioner did exhibit an inability to perform her duties. There is no definition in the New Jersey Administrative Code for inability to perform duties. However, case law has determined a charge of inability to perform duties is appropriate where the employee is incapable of carrying his or her own weight. Klusaritz v. Cape May County, CSV2690-98, Initial Decision (May 13, 2002), adopted, Merit Sys. Bd. (October 25, 2002), <http://njlaw.rutgers.edu/collections/oal/final/csv2690-98.pdf> (where appellant failed to complete assignments accurately, failed to follow prescribed formats and submitted inaccurate work); Richard Stockton College v. Parks, CSV 4279-03, Initial Decision (January 31, 2005), adopted, Merit Sys. Bd. (April 3, 2005),

<http://njlaw.rutgers.edu/collections/oal/final/csv4279-03.pdf> (where respondent failed to prioritize and complete tasks in a timely manner).

The standard for proving a violation of N.J.A.C. 4A:2-2.3(a)(1), incompetence, inefficiency or failure to perform duties, is set forth in Glenn v. Twp. of Irvington, CSV 5051-03, Initial Decision (February 25, 2005), adopted, MSB (May 23, 2005), <<http://njlaw.rutgers.edu/collections/oal/search.shtml>>, that is, considering the nature and frequency of the conduct. Charges of incompetence, inefficiency or failure to perform duties are sustained predominantly in instances where there is either continual poor performance by an employee or the employee is responsible for an incident resulting in serious repercussions to the employer. When describing the officer's misconduct, the ALJ in Glenn noted:

[T]he persistence, pervasiveness and repetition of the misconduct of ignoring orders of his superiors, of neglecting to complete assignments, keep appointments or follow protocols and of failing to successfully perform the duties of the job . . . and the repeated disregard of training, directives, orders, admonishments, requests and warnings . . . can only draw one to a conclusion that the behavior was calculated and intentional A manifest rejection of the expectations of an appointing authority as occurred here is the epitome of a combination of . . . neglect of duty and inefficiency.

[Glenn, CSV 5051-03, Initial Decision.]

In the instant matter, applying the standard of Glenn and looking at the nature and frequency of the conduct of the petitioner, it is apparent that there has been a consistent failure in performing her assigned duties beginning on the first day of petitioner's return from the Academy. She has had to write and re-write reports specific to her for being insubordinate, unable to name the President, and being in violation of the recruit uniform—clearly defying the rules and regulations of both the Academy and Police Department. I therefore **CONCLUDE** that petitioner is unable to perform her duties and that the charge of inability to perform duties, incompetency and inefficiency should be sustained.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's removal be **AFFIRMED**.

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.

March 14, 2018
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

March 14, 2018

Date Mailed to Parties:
ljb

MAR 15 2018

Lucia Barberis
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESS LIST

For Petitioner:

Keisha Lewis

For Respondent:

Sergeant Michael Tingolie

Sergeant Jean-Paul Barbosa

Detective April Kovach

EXHIBIT LIST

For Petitioner:

P-1 Notice of Unemployment Determination

P-2 Newark Public Schools Letter of Recommendation dated January 29, 2018

P-3 Progress Report Lee Orthopedics

For Respondent:

R-1 Report of Recruit Keisha Lewis dated February 24, 2017, authored by Sergeant Tingolie

R-2 Report of Recruit Keisha Lewis dated March 23, 2017, authored by Sergeant Tingolie

R-3 Report of all recruits dated March 24, 2017, authored by Sergeant Tingolie

R-4 Preliminary Notice of Disciplinary Action dated March 29, 2017

R-5 Report of Detective April Kovach dated March 9, 2017

R-6 Writing assignment of President Donald Trump authored by petitioner

R-8 Drawing of conference room