STATE OF NEW JERSEY

In the Matter of Marc-Elie Georges, Passaic County, Preakness Health Center

CSC DKT. NO. 2021-542
OAL DKT. NO. CSV 11251-20

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: APRIL 27, 2022

The appeal of Marc-Elie Georges, Assistant Supervisor of Nurses, Passaic County, Preakness Health Center, of his removal, effective October 23, 2020, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on March 11, 2022. No exceptions were filed.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting of April 27, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

Since the removal has been reversed, the appellant is entitled to be reinstated with mitigated back pay, benefits, and seniority pursuant to *N.J.A.C.* 4A:2-2.10. The appellant is also entitled to reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12.

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. Feb. 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay or counsel fees 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 action of the appointing authority in removing the appellant was not justified. The Commission therefore reverses that action and grants the appeal of Marc-Elie Georges. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of separation to the actual date of 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.[1] Proof of income earned, and an affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. The Commission further orders that counsel fees be awarded to the attorney for the appellant pursuant to *N.J.A.C.* 4A:2-2.12. An affidavit of services in support of reasonable counsel fees 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 and *N.J.A.C.* 4A:2-2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay or counsel fee dispute.

The parties must inform the Commission, in writing, if there is any dispute as to back pay or counsel fees 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 ON
THE 27TH DAY OF APRIL, 2022

Deirdré L. Webster Cobb

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Allison Chris Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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Attachment

[1] The initial decision indicates that the appellant waived back pay beginning on October 12, 2021, and spanning 119 calendar days (equal to 79 work days) thereafter. Accordingly, the back pay award shall also not include pay for that period.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 11251-20
AGENCY REF. NO. 2021-542

IN THE MATTER OF MARC-ELIE GEORGES, PASSAIC COUNTY, PREAKNESS HEALTHCARE CENTER.

Colin M. Page, Esq., for appellant Marc-Elie Georges (Colin M. Page & Associates, attorneys)

Matthew P. Jordan, Esq., and **Leslie S. Park**, Esq., for respondent Passaic County (Office of County Counsel, attorneys)

Record Closed: March 4, 2022 Decided: March 11, 2022

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

This matter involves the removal of appellant Marc-Elie Georges (appellant), an Assistant Nursing Supervisor, employed by respondent Passaic County at its Preakness Healthcare Center (Preakness or respondent), on disciplinary charges, effective October 23, 2020. The allegations are that appellant sent personal emails on a work-issued electronic device and also used said device to send unencrypted medical information in violation of N.J.A.C. 4C:2-2.3(a)(1) (incompetency, failure to perform duties), N.J.A.C. 4C:2-2.3(a)(6) (conduct unbecoming), and N.J.A.C. 4C:2-2.3(a)(12) (other sufficient

causes). The latter charge set forth that appellant violated resident's rights, HIPAA, and County Personnel Policy on Use of County property.

PROCEDURAL HISTORY

By Preliminary Notice of Disciplinary Action dated August 3, 2020, Preakness advised appellant of the above-referenced charges and also suspended him immediately without pay. A departmental level hearing was requested and held, although the date is not indicated. By Final Notice of Disciplinary Action dated October 26, 2020, these charges were sustained resulting in his removal effective October 23, 2020.

The appellant timely appealed this determination on November 4, 2020, and the matter was transmitted by the Civil Service Commission to the Office of Administrative Law (OAL), where it was filed on November 25, 2020, for hearing 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. It was assigned to me on December 21, 2020. A telephonic case management conference was held on February 9, 2021, at which time *in limine* motion practice was discussed with respect to some of respondent's proposed documents. A briefing schedule was established. On May 6, 2021, I issued a Letter-Order in which I declined to grant the *in limine* motion and advised counsel that there were material issues and a need for *voir dire* and cross-examination before I would adjudicate the admissibility or weight to be given to any forensic expert or proffered documents.

Under cover of August 13, 2021, appellant's attorney sought to be relieved as counsel, to which respondent consented. I entered a Consent Order to that effect on August 17, 2021. The hearing dates of October 20 and 21, 2021, remained on my calendar. On October 12, 2021, appellant requested an adjournment of those dates in order to retain new counsel, and waived back pay for the period of the delay. Appellant retained new counsel in December 2021, necessitating some additional delay and a status conference in early 2022. The plenary hearing was scheduled to take place by

virtual Zoom on February 8 and 11, 2022.[1] Ultimately, the second date was not needed because, as set forth below, an additional witness's proffered testimony was stipulated to by the parties. The post-hearing briefs were received at the OAL on March 4, 2022, and the record closed on that date.

FACTUAL DISCUSSION

Based upon due 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**:

Appellant[2] was an Assistant Nursing Supervisor at Preakness from March 2017 until his suspension without pay effective on August 4, 2020. By way of background, appellant was born in Haiti and did his initial post-secondary schooling in that country, studying economics. He emigrated to the United States before he completed his fourth year there and had to start over, choosing to proceed in a nursing career. After being employed in another facility, he was encouraged to apply to Preakness by Daniel Nasulme, who was then the Assistant Director of Nursing and someone appellant knew. Appellant began employment with Preakness on or about April 7, 2014. When a supervisory position was posted, appellant applied and was promoted. As an Assistant Nursing Supervisor, appellant was responsible for assuring proper patient care, interacting with family members, and setting up staffing assignments. He explained that he believed himself to be very detail oriented and highly responsible in his work ethic. In fact, he emphasized that he always went above and beyond, trying hard to overcome any perception that his immigrant background inadequately prepared him for his job.

Appellant described how Covid impacted the facility, the patients, and the overall environment at Preakness. There was a lot of fear amongst both staff and residents; residents were lonely without family visitations; and the facility was also short-staffed

[1] Appellant waived any rights to back pay for the period between October 12, 2021, and the rescheduled hearing dates, which equates to 119 calendar days or 79 workdays.
[2] While appellant did not testify first, I find the narrative flows better if I set out his testimony at the beginning. The County still bears the burden of proof and burden of persuasion.

because of Covid exposures. Georges stated that he was exposed twice in those first months of the pandemic. Because of the severe limitations in place at the healthcare facility, appellant understood that Preakness had acquired some iPads so that staff could facilitate virtual visits between residents and family members, or telemedicine appointments between residents and outside medical personnel. Appellant testified that they were not provided to every employee but used communally within each department. He received no instruction on how to use the iPad. His first and only time using a device occurred on July 30, 2020, when he was asked by the Assistant Director of Nursing Nasulme to convene a virtual consultation with a third-party hospice provider to whom a Preakness resident (R.S.) would be transferred for end-of-life care. Georges had been caring for the patient and had the greatest familiarity with his medical situation and his family members.

Appellant explained that he had no experience with iPads and not only was not particularly proficient in technology in general, but had never been a user of Apple products specifically. He understood that there were two video applications on the device, including Facetime. Appellant was able to reach out in the late afternoon to Marie Pierre, the hospice nurse who was the contact for the transfer and care of R.S., but she advised that she was working from home, and he could visually confirm that she was in her backyard. Appellant explained that R.S. had a new medical issue with open and unhealed wounds or bedsores. Pierre asked him to send photos and any new physician orders. Appellant explained at the hearing that he would normally have faxed over such information, but the hospice nurse did not have access to fax at her home and requested that he email the information to her. During this videoconference, appellant's phone was "buzzing" constantly and he felt pressured to get to his other responsibilities so he advised Pierre that he would complete the requested document share as soon as he could.

Once he had some time, appellant played with the iPad for a while but could not figure out how to transfer files from his government email account. This would have been early evening and there were no technical assistants available for him to ask. Apparently, the iPads had never been configured for work email accounts. Appellant decided the most efficient manner would be to take photos of the records with the iPad; then, he opened a browser window, navigated to www.hotmail.com, logged into his personal email

account, and sent the files to the hospice nurse at the work email she provided. He believed that he closed that browser window and returned to the home view on the device. Later, she advised that the email had not been received. He was able to confirm this by going back to the browser window and Hotmail email where he could see that the message had been marked "undeliverable." She confirmed that her company had been having some email issues, so she gave her personal email to him to use. There was some degree of urgency according to appellant because of medical concerns for managing R.S.'s pain. As appellant thought this through, it occurred to him that his first attempt to send the records would mean that he could access them and the failed email from his cell phone. Accordingly, he used his cell phone to forward the information to her in this manner. Appellant also stated that he had never configured the iPad's mail application with his personal account, but rather had used an internet browser and then his cell phone.

Appellant was also questioned at the hearing about his relationship with a staff nurse, Joanna Danilowicz, because an electronic communication with her became one of the grounds for this disciplinary matter. He confirmed that they had a personal relationship and were dating. They did not regularly work the same shift, although occasionally with the Covid staffing issues, it could happen that he would be her supervisor. With an abundance of caution, he advised upper management at Preakness earlier that spring that they were dating. This information was forwarded to the County Administrator who advised Preakness that the relationship did not violate any personnel policies. Appellant also insisted that the photo of an empty hallway and the accompanying text containing a sexual innuendo he sent to her was from his personal cell phone, was of a personal nature, and was actually just a joke or sexual banter common in their private communications. Contrary to the Executive Director's assumption that the private text and photo meant that they had actually had sex in an empty hallway in the Preakness facility during his working hours on that day, in fact, Danilowicz was out of state on vacation at the time of the text. Appellant knew that she would have received the text in the spirit in which it was sent. Moreover, the text and photos predated appellant's access to the iPad.

As stated, appellant would have presented the testimony of Danilowicz, the nurse to whom he emailed on July 29, 2020, but respondent's counsel agreed to stipulate to what she would have stated. The parties agree to stipulate that Joanna Danilowicz, if called, would testify to the following:

1. Prior to July 29, 2020, Ms. Danilowicz and Mr. Georges had developed a close, personal relationship.

2. This relationship was disclosed to Preakness leadership in or around February of 2020.

3. In 2020, Ms. Danilowicz and Mr. Georges normally worked different shifts. Ms. Danilowicz normally worked the 7:00 a.m. to 3:00 p.m. shift and Mr. Georges worked the 3:00 p.m. to 11:00 p.m. shift.

4. When Marc-Elie Georges sent the July 29, 2020, e-mail at issue in this case, Ms. Danilowicz was out of the state on vacation.

5. At the time that he sent the e-mail, Mr. Georges knew that Ms. Danilowicz was out of the state on vacation.

6. Ms. Danilowicz understood the content of the July 29, 2020, e-mail at issue to be a joke and did not consider it an invitation to have sex in the hallway at Preakness with Mr. Georges.

7. Due to their relationship, Mr. Georges was in a position to know whether she would find the contents of his July 29, 2020, e-mail to be unwelcome or offensive.

8. Ms. Danilowicz did not find the contents of Mr. Georges' e-mail to be unwelcome or offensive.

9. No one from Preakness ever asked Ms. Danilowicz whether she believed the e-mail at issue was unwelcome or offensive or whether she understood it to be a joke.

10. Ms. Danilowicz and Mr. Georges have never had sexual intercourse, or other any type of sexual contact, while on Preakness premises.

Preakness presented the testimony of Cristi V. Mahabir, Ibelise Grullon, Linda Van Der Veen, Micah Hassinger, and Lucinda Corrado.

Cristi Mahabir testified only to the general Human Resources (HR) policies. She had not been employed at Preakness during the relevant period, having joined as the

Deputy HR Director in April 2021, becoming the Interim HR Director in October 2021. She has approximately seven years of HR job experience since graduating college in 2014, none of which experience was in the healthcare industry until Preakness. On cross-examination, Mahabir could not explain the HIPAA regulations allegedly violated, nor could she speak to whether there were Covid or general "safe harbor" exceptions to HIPAA. She did not participate in the investigation and did not conduct any interviews.

Ibelise Grullon is employed at Preakness as the Secretarial Assistant Bilingual to the Nursing Administration. She confirmed that the facility obtained some iPads for staff use to facilitate tele-visits during Covid. They were not issued to individuals but kept for use by staff as needed. Grullon stated that when appellant returned the iPad to her after July 30, 2020, she turned it on to make sure that it was charged for the next person who might need it. When she opened the device, an email icon popped up on the screen with a number next to it. Grullon said that this surprised her because she understood that the iPads were to be used only for virtual meetings. She proceeded to click on the email icon, then closed it and put it in her desk. On August 3, 2020, she gave the device to the Executive Director, Lucinda Corrado.

On cross-examination, Grullon confirmed that she had no conversations with appellant about his use of the iPad. She had no knowledge of any explanation he might have given. Furthermore, she did not know if she was viewing an application local to the device or in a browser window.

Linda Van Der Veen works in the Preakness IT Department in Nursing Infomatics. She explained that her job entails developing procedures and training staff on electronic medical records. She confirmed that iPads were issued to the several departments to facilitate videoconferencing between residents and medical professionals or family members. Van Der Veen testified that Corrado brought the iPad that appellant had used to her attention because she believed it had been used for non-county business. Corrado requested that she print out emails relevant to Preakness. Van Der Veen did not know if the list of emails she was looking at and that Corrado had already queued up were displaying in an email application or a browser window.

Van Der Veen stated that she then took the iPad to Joe Palma, and together they printed out emails pertaining to Preakness. She provided those printouts to Corrado. In response to my inquiry as to how they conducted such a search, all she could say is that there were photos of a Preakness hallway and emails to someone on the nursing staff. On cross-examination, Van Der Veen could not recall what instructions or explanations, if any, Corrado had provided. She also admitted that she has not been trained in evidence preservation. She could not recall if the iPad was open to an inbox or to a sent folder, or whether they printed anything not related to Preakness. This witness could not answer questions as to the browser used on the iPad, its configurations, or what servers backed up the iPad. The printing was done through a wi-fi connection. Van Der Veen stated that she did not forward any of appellant's emails from the iPad to anyone else.

In response to further questions, Van Der Veen did not know if an iPad is always connected to wi-fi or other internet access, or whether it is configured to use "pop" or "imap" protocols. She personally does not use an iPad. Of the photos that were printed and provided to Corrado, she had no knowledge as to which formed the basis of the disciplinary action. She also acknowledged that the common indicator "sent from my iPad" is not indicated on the prints she procured. Further, she confirmed that neither she nor Palma used any search function to find relevant emails but just merely eyeballed the first emails listed in the sent folder. Van Der Veen took no notes and did not produce a report on the actions she took with the subject iPad. Rather, she was testifying solely from memory.

Respondent also presented Micah Hassinger, Director of Preakness IT Department, in support of this disciplinary action. Hassinger has served in that position for three years. He previously was employed by Bergen County, and has a total of twenty-five years in IT for government or public safety. Hassinger provided general testimony on how an email application on the iPad is set up for an individual's email address. One would need to access the device settings to find the email application if there was not already an icon on the face of the device. When it is selected, the device uses the internet connection to confirm the email address from the email service (Hotmail, Yahoo, Gmail, etc.), and prompts the user for a password. The device then downloads a selected date range of emails from the email server to the email application local to the device.

Hassinger stated that the default setting is a two-week date range. He stated that the iPad used by appellant only had one mail account on the device. It was not accessed by him as he viewed any emails only on a browser, and the emails were not saved on to the county servers.

On cross-examination, Hassinger stated that while imap is a standard configuration, it is not the default. He did not see the relevance of the distinction between imap and pop to this matter. He described the difference between accessing email from an internet server as compared to locally on the device. The act of downloading an email account will store messages on the device, while use of a browser would not. Hassinger did not review the emails that formed the basis of the PNDA. He recalled analyzing the iPad months ago, probably for his certification on the *in limine* motion, but not since. During the hearing, he advised that he had had the iPad for the approximately hour-long period of his testimony. Hassinger admitted that he made no notes nor produced any reports. He was unaware of any discovery requests that might have required his input. Lastly, he acknowledged that once an email account is local on the device, anyone could access or forward messages from it and that individual would never be identifiable.

Lucinda Corrado was the final witness presented by respondent. She has been the Executive Director of Preakness since 2006, having previously served for approximately six years as the Assistant Executive Director. Corrado has a master's degree in Public Administration in the field of Health Administration. She gave a brief overview of the Preakness levels of care and capacity, as well as the nursing staff chain of command. Corrado also described the responsibilities of appellant as an Assistant Nursing Supervisor, which can encompass being the highest manager at the facility if the directors and assistant directors are offsite. She also confirmed that Covid created staffing shortages, as well as higher risks and fears amongst both residents and staff.

Corrado described her meeting with appellant on August 3, 2020, after she had reviewed the package of photos printed by Van Der Veen. She provided him with copies of the photos in a sealed envelope, asked him to review them, and provide a response to her as to why he should not be disciplined. Corrado testified that when she reviewed the email and photo sent to Danilowicz on July 29, 2020, at 8:34 p.m., her thought was that

in spite of Covid and the fact that he was in charge that evening, appellant obviously thought he had hours to have sex in the facility with his girlfriend. She also was concerned about the HIPAA violations of transmitting physician's orders or medical records between personal email accounts. Corrado explained that she has to be concerned with the reputation of Preakness from news of patient abuse or injuries, staff altercations, or resident elopements.

On cross-examination, Corrado confirmed that there were originally nine emails that formed the basis of the PNDA she issued against appellant. At that time, she believed she had seen them all on the iPad and that they had been sent from the iPad. She admitted that it came to be determined that the only one sent from the iPad was from appellant to the hospice nurse. Corrado confirmed that she never spoke with Pierre to confirm whether she had requested the records from appellant. She also had no familiarity with the United States Department of Health and Human Services relaxing the requirement for encryption of medical records under HIPAA during Covid. Corrado conceded that she does not have any knowledge of encryption applications. She only knew that one could not use TikTok or similar platforms for virtual visits or appointments pursuant to instructions from the New Jersey Department of Health.

Corrado testified that Grullon brought the iPad used by appellant to her attention. She recalled that an "inbox" of emails was displayed on the tablet. She did not navigate on the device and did not forward any of his emails to her own Preakness work email. She did not believe that anyone forwarded any of appellant's emails to her. Appellant sent her an email with his response to the allegations, suggesting that someone else could have used his email after he was done with the iPad. Corrado confirmed that the only violations that were the grounds for appellant's termination were the medical records transmitted in violation of HIPAA's encryption requirements, and the county policy on use of county property for personal business. She acknowledged that Pierre would have been authorized to receive the medical records of the patient entering hospice care.

On further questioning, Corrado also confirmed that it was not a violation for appellant to be in a relationship with a staff nurse, that they usually worked different shifts, and that appellant had disclosed the relationship. Corrado seemed confused when

presented with time records proving that Danilowicz was on vacation at the time of the personal email from appellant. She never interviewed Danilowicz as part of her disciplinary decision. Yet, she seemed to believe appellant when he said that any personal emails that were found on the iPad got there by accident. Lastly, Corrado admitted that she did not report Pierre to her supervisors for the same apparent use of a personal email to obtain medical records on a Preakness resident.

On the basis of the above, I **FIND** that there was no competent evidence, let alone a preponderance of such evidence, that appellant used the Preakness iPad for anything other than the videoconference with Pierre and a failed attempt to convey necessary medical records to her, which she was authorized to receive. If he inadvertently left his personal email and login credentials on the device or in its browser history, respondent has presented no evidence of his further use of the device. Rather, it was respondent's own employees who inartfully accessed the device and fished around for emails that they thought violated county policy on personal use of work resources. In the process, they pulled up clearly private information (e.g., tax return), most of which pre-dated his access to the iPad on July 30, 2020, and then accused him of inappropriate use based on those. Appellant testified credibly, and without contradiction, that he was unfamiliar with how to use an iPad and had received no training or assistance.

I **FIND** that Preakness had no procedures or protocols in place for investigating an alleged employee disciplinary incident; nor for handling chain of custody issues with respect to work-issued electronic devices. No one took any notes or issued any reports setting forth what they undertook in this specific investigation. Personal emails were plainly accessed but we do not know from where they were accessed (browser v. application), how those were selected, or where they were printed. The images have no identifying metadata or e-location information. The device was not forensically examined or preserved. The iPad was not assigned individually but rather, was communal for the staff in general. No instruction had been provided. Furthermore, relevant persons – Pierre, Danilowicz -- were not even interviewed, and little effort was made to listen to appellant's version of events.

I **FIND** that the assumptions that informed Corrado's decision to suspend appellant without pay were faulty from the inception of this disciplinary action. Even after it was clear that appellant and Danilowicz had a social relationship and that she was out of state on vacation at the time of the private email sent before appellant used the iPad, Corrado absurdly maintained her fictionalized rationale that he should not have been having sex in the halls of Preakness.

ANALYSIS AND CONCLUSIONS OF LAW

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 an important inducement 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). The Act states that State policy is to provide appropriate appointment, supervisory and other personnel authority to public officials so they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). To carry out this policy, the Act authorizes the discipline and termination of public employees.

N.J.A.C. 4A:2-2.3(a) provides that a public employee may be subject to major discipline for various offenses. The burden of proof is always on the appointing authority in disciplinary matters to show that the action taken was justified. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). The employee's guilt of the charge(s) must be established by a preponderance of the competent, relevant and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk License Revocation, 90 N.J. 550 (1982). Precisely what is needed to satisfy the standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958). Preponderance may also be described as the greater weight of the credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). Credibility, or, more specifically, credible testimony, in turn, must not only

proceed from the mouth of a credible witness, but it must be credible in itself, as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). All issues are redetermined de novo on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); West New York v. Bock, 38 N.J. 500 (1962).

In this matter, there are several allegations that were presented by Preakness: (1) incompetency or failure to perform the job duties; (2) conduct unbecoming an employee; and (3) other sufficient causes, namely, violating resident's rights, HIPAA and County policy. Between the PNDA and the FNDA, respondent acknowledged that they had improperly attributed appellant's personal emails to the work iPad and that those could not form the basis of disciplinary action. I **CONCLUDE** that it is shocking that respondent brought this removal case at all. During a high-risk and highly stressful time in nursing healthcare facilities because of the Covid pandemic, appellant did his best to communicate vital information to a hospice nurse who was authorized to receive same. That nurse was working from her home (backyard, in fact) at the time of her videoconference with appellant. Appellant, who received zero training and zero guidance on the use of the iPad or any special considerations for medical record transfers during Covid from respondent, did his level best to complete the medically necessary administration of this patient transfer.

Moreover, the numerous evidentiary mistakes made by respondent including, but not limited to, failure to have internal investigation procedures in place, failure to document and maintain careful chain of custody of the electronic device upon which this entire case relied, and failure by anyone to take notes or document in a report any of the steps taken by any of them with respect to their handling of the device voids whatever allegation of a bare minimum transgression by appellant might have been otherwise brought. The lack of forensic protocols raises a genuine risk of spoliation of the evidence relied upon herein.

With respect to County policy, respondent relies on "Use of County Property" in its Personnel Policies and Procedures Manual (eff. June 9, 2015), which states: "No county officer or employee should utilized [sic] County materials or facilities for any substantial personal purpose." [Exhibit R-1 at 77 (emphasis added).] That manual also sets forth

with respect to "Computer Use, Electronic Mail, and Internet Policy" the following, in relevant part:

> - Employees are advised that all computers owned by the County are to be used for business purposes only during working time (as defined above), and that they have no expectation that any information stored in a County computer is private. Because e-mail messages are considered as business documents, the County expects employees to compose e-mails with the same care as a business letter or internal memo.
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> * * *
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> - Any messages or transmissions sent outside of the organization via e-mail or the Internet will pass through a number of different computer systems, all with different levels of security. Accordingly, employees must not send privileged and/or confidential communications (i.e., Social Security numbers, medical and/or HIPAA protected information, dependent information or other information protected from unlawful disclosure), via e-mail or the Internet unless the message is properly encrypted, and should consider a more secure method of communication for such data.
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> [Exhibit R-1 Personnel Policies and Procedures Manual at 33-34.]

Respondent has presented no competent evidence that appellant used the County iPad for a substantial personal purpose. The weight of the evidence demonstrates, instead, that he used the iPad on July 30, 2020, for the sole purpose of consulting with and getting records to a hospice nurse in order to facilitate the transfer of a Preakness resident to hospice end-of-life care.

I also **CONCLUDE** that the alleged HIPAA violation must fail as well. The only basis for this was that the transfer of the information was not encrypted. It was sent and received by authorized persons. Yet, respondent entirely ignored the Covid exceptions on HIPAA published by the federal Department of Health and Human Services. Therein, HHS set forth:

> [Office of Civil Rights] will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID-19 nationwide public health emergency. This notification is effective immediately.
>
> A covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID-19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients. OCR is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rules in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID-19 nationwide public health emergency. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID-19.
>
> [https://www.hhs.gov/hipaa/for-professionals/special-topics/emergency-preparedness/notification-enforcement-discretion-telehealth/index.html (emphasis added).]

Accordingly, there is no basis for disciplining appellant on the alleged HIPAA violation. Appellant went above and beyond his own technology skill levels in order to provide care in the transitioning of a patient to end-of-life hospice services to an authorized person who herself was working under restrained circumstances due to Covid.

In addition, I **CONCLUDE** that there was zero evidence of a personal use of the iPad. Preakness retrieved his sent emails from the iPad but there was no competent, forensic evidence demonstrating that they were sent by appellant from the iPad. Quite to the contrary, the evidence is plain that he did not, and the respondent has admitted as much. Even if he had, it was certainly not "substantial" personal use. The preponderance of the credible evidence proved that the personal email to appellant's girlfriend pre-dated his access to the iPad and was sent to her through only a private device while she was out of state on vacation. Corrado's insistence that appellant was having sex for hours in the facility hallways is patently unfounded.

ORDER

Accordingly, it is **ORDERED** that the charges alleging conduct unbecoming and other sufficient causes, as set forth in the Final Notice of Disciplinary Action of the Passaic County Preakness Healthcare Center dated October 26, 2020, against Marc-Elie Georges resulting in his termination and removal effective October 23, 2020, are hereby **REVERSED**.

It is further **ORDERED** that back pay and any other accompanying employment benefits shall be reinstated to appellant Marc-Elie Georges from the first day of his unpaid suspension, August 4, 2020, but excluding the seventy-nine (79) working days for which he waived back pay. It is further **ORDERED** that counsel fees should be awarded to the appellant as the prevailing party, subject to submittal of an affidavit of services and supporting documentation to the appointing agency, if settlement of fees is not successful, in accordance with N.J.A.C. 4A:2-2.12.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

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

Gail M. Cookson

March 11, 2022
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 3/11/22

Mailed to Parties: 3/11/22
id

APPENDIX

LIST OF WITNESSES

For Appellant:

Marc-Elie Georges

Joanna Danilowicz (By Joint Stipulation)

For Respondent:

Cristi V. Mahabir

Ibelise Grullon

Linda Van Der Veen

Micah Hassinger

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

A-1 [not in evidence]

A-2 [not in evidence]

A-3 [not in evidence]

A-4 [not in evidence]

A-5 [not in evidence]

A-6 [not in evidence]

A-7 [not in evidence]

A-8 [not in evidence]

A-9 [not in evidence]

A-10 Email from Georges to Pierre, dated July 30, 2020, forwarded to counsel January 19, 2022.

A-11 [not in evidence]

A-12 [not in evidence]

A-13 [not in evidence]

A-14 Timecard for Joanna Danilowicz

For Respondent:

R-1 County of Passaic, Personnel Policies and Procedures Manual, Computer Use, Electronic Mail, and Internet Policy

R-2 County of Passaic, Personnel Policies and Procedures Manual, Use of County Property

R-3 Acknowledgement of Receipt by Georges of Personnel Policies and Procedures Manual, dated April 7, 2014

R-4 Acknowledgement of Receipt by Georges of Confidentiality Agreement, dated March 21, 2014

R-5 Acknowledgement of Receipt by Georges of Preakness HIPAA Code of Conduct, dated April 7, 2014

R-6 Timecard for Georges

R-7 [not in evidence]

R-8 E-Mail Sent by Georges, dated July 29, 2020

R-9 E-Mail Sent by Georges, dated July 30, 2020