STATE OF NEW JERSEY

In the Matter of Camilla O'Neal, Trenton, Department of Water and Sewer CSC Docket No. 2020-2533 OAL Docket No. CSV 05061-20	:	**DECISION OF THE CIVIL SERVICE COMMISSION**

ISSUED: JUNE 20, 2022

The appeal of Camilla O'Neal, Laboratory Technician, Water Analysis, Trenton, Department of Water and Sewer, removal, effective January 1, 2020, on charges, was before Administrative Law Judge Mary Ann Bogan (ALJ), who rendered her initial decision on remand on April 25, 2022. Exceptions were filed on behalf of 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, including a thorough review of the exceptions and reply, the Civil Service Commission (Commission), at its meeting on June 15, 2022, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision.

As indicated above, the Commission thoroughly reviewed the exceptions filed by the appellant in this matter. In that regard, the Commission finds them unpersuasive and mostly unworthy of comment as the ALJ's findings and conclusions in upholding the charges and the penalty imposed based on her thorough assessment of the record are not arbitrary, capricious or unreasonable. In this regard, the Commission makes the following comments. The ALJ's determination in this matter is nearly entirely based on her assessment of the credibility of the witnesses' testimony and her conclusions made therefrom. In this regard, upon its *de novo* review of the record, the Commission acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.,* 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human

experience that are not transmitted by the record." *See also, In re Taylor,* 158 *N.J.* 644 (1999) (quoting *State v. Locurto,* 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra).* The Commission appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Commission has the authority to reverse or modify an ALJ's decision if it is not supported by sufficient credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System,* 368 *N.J. Super.* 527 (App. Div. 2004). In this matter, the exceptions filed by the appointing authority are not persuasive in demonstrating that the ALJ's credibility determinations, or her findings and conclusions based on those determinations, were arbitrary, capricious or unreasonable. As such, the Commission has no reason to question those determinations or the findings and conclusions made therefrom.

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 Camilla O'Neal. 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. 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 15TH DAY OF JUNE, 2022

Deirdré L. Webster Cobb
Chairperson
Civil Service Commission

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and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05061-20

AGENCY DKT. NO. 2020-2533

IN THE MATTER OF CAMILLA O'NEAL, CITY OF TRENTON, DEPARTMENT OF WATER AND SEWER.

Seth Gollin, Esq., for appellant Camilla O'Neal (American Federation of State, County and Municipal Employees New Jersey, AFL-CIO, Staff attorneys)

Wesley Bridges, Esq., for respondent City of Trenton

Record Closed: March 10, 2022 Decided: April 25, 2022

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Appellant, Camilla O'Neal, a laboratory technician at respondent, Trenton Water Works (TWW), appeals disciplinary action seeking her removal for incompetency, inefficiency, or failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); and neglect of duty in violation of N.J.A.C. 4A:2-2.3(a)(7), in connection with her alleged failure to follow and complete established procedures for testing two raw water samples and a water sample from the Wawa location and for alleged falsification of testing records. Appellant denies the allegations and alleges that she accurately read and processed the

water samples and cannot be held responsible for actions taken after she completed the testing procedures.

PROCEDURAL HISTORY

This appeal arises from the March 24, 2020, Final Notice of Disciplinary Action. On October 18, 2019, TWW issued a Preliminary Notice of Disciplinary Action charging the appellant under N.J.A.C. 4A:2-2.3(a) with incompetency, inefficiency, or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1); inability to perform duties, N.J.A.C. 4A:2-2.3(a)(3); conduct unbecoming, N.J.A.C. 4A:2-2.3(a)(6); neglect of duty, N.J.A.C. 4A:2-2.3(a)(7); and other sufficient cause, N.J.A.C. 4A:2-2.3(a)(12). After a departmental hearing on February 3, 2020, TWW issued a Final Notice of Disciplinary Action on March 24, 2020, sustaining two of the original five charges, incompetency, inefficiency, or failure to perform duties, N.J.A.C. 4A:2-2.3(a)(1), and neglect of duty, N.J.A.C. 4A:2-2.3(a)(7). (R-9; R-17/J-1.) Appellant was removed.[1] Appellant appealed, and on June 2, 2020, the matter was filed at the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 14F-1 to -13. The matter was heard on April 21, 2021, and May 18, 2021. The record closed after final submissions and completion of post-hearing conference calls on March 10, 2022.

FACTUAL DISCUSSION AND FINDINGS

Background

By way of background, the TWW is a municipal water utility owned and operated by the City of Trenton, New Jersey. TWW provides water and wastewater services to approximately 63,000 metered customers (representing approximately 225,000 users) in Trenton and other Mercer County, New Jersey municipalities. TWW employs approximately 120 persons to operate a water filtration plant and water distribution system, including the testing laboratory where O'Neal worked prior to termination. TWW

[1] On March 20, 2020, Director Smith overruled the recommended departmental suspension penalty and removed appellant from employment. (R-17.)

is a certified laboratory, and as a result is subject to audits conducted by the State at any time and result in revocation of the certification that is essential to the TWW operations.

Testimony

DiAsia Brooks (Brooks) has been the chief chemist at TWW for about seven years. Brooks testified that O'Neal was hired in March 2018 and undertook ninety-day new-employee training, that included working with a senior laboratory technician. Brooks identified the Bacteriological Manual and Quality Assurance Plan, which describes the testing that is performed in the bacteria lab,[2] (R-5), and is covered in the new-employee training. During the training, new employees are given hands-on training in the actual standard operating procedures (SOPs) used at TWW, like the Colilert procedure, which is used to test for bacteria in drinking water. (R-6.) Because O'Neal had previously interned at TWW, she had no issues "jumping right into it" after the training period ended.

The Colilert procedure is the water testing procedure at issue here. The procedure was used to test raw water samples, collected at an on-site location and water samples collected at off-site locations. The off-site collections took place, near a health facility called R-Health, and a second water sample was collected near a Wawa store. Off-site water sample collections are typically called distribution samples or field collection samples.

Brooks explained the layout of the laboratory and the types of equipment that were present at the time of the incident. The plastic snap-top sterile sampling container is used to collect and process raw water samples. (R-19.) The screw-top sterile sampling container is used to collect samples, typically for field collections or distribution collections like water sample collections for the R-Health and Wawa samples. (R-20.) The water bath is used when performing the Colilert procedure, to warm samples to a certain temperature. (R-21; R-22.) The incubator is used to keep bacteria samples at a constant temperature for a specific time period. (R-23.)

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[2] Edited March 15, 2016, this is the manual that was in place in November 2019.

After processing, the laboratory technician reads the samples and records the results of the processed sample in a chain-of-custody card and a laboratory notebook. (R-25.) After that, samples must be safely discarded. To do so, processed samples are placed in a biohazard waste bag, or autoclave bag. The autoclave bag is placed into the autoclave machine to be sterilized without any damage. (R-24.) An autoclave machine is a large machine that sterilizes its contents at a certain temperature and pressure. Once sterilized, the contents of the autoclave bag is discarded.

The Colilert procedure is used when testing both raw water and distribution samples for the presence of bacteria. The laboratory technician collects the samples in sampling containers and records details regarding the samples on the chain-of-custody card and in the laboratory notebook. Next, two Colilert packets are mixed with the water samples and the containers are placed inside the water bath for eight minutes.[3] After eight minutes, samples are removed from the water bath and placed inside the incubator for eighteen to twenty-two hours. The technician then documents the chain-of-custody card and the laboratory notebook. At eighteen to twenty-two hours, the laboratory technician reads the samples[4] by comparing each processed sample against the comparator[5] dispensed into the identical vessel to see if that sample is total coliform present or total coliform absent.[6] After that, if the samples are positive[7] for coliform, they are placed under a fluorescent light to determine whether the sample is E. coli present or absent. Brooks stated that TWW tests for E. coli because it is a harmful bacteria that should not be placed in the distribution system. The technician checking the analysis is responsible for documenting the test results on the chain-of-custody card and in the laboratory notebook. The processed samples are then discarded in the biohazard bags, and "that would be the end of the procedure [] [for] the[] two samples."

Brooks testified that on November 13, 2019, she arrived at work "at the same time" as O'Neal, at approximately 7:30 a.m., and before O'Neal read the samples at issue here.

[3] The process of putting the samples inside the incubator is called planting.

[4] Colilert testing is based on color, and the color indicates whether there is a certain amount of bacteria present.

[5] The comparator, sold by Idexx, is a liquid color and fluorescence reference used to distinguish a positive from a negative test result (total coliform absent or present).

[6] The water bath timing and the incubator timing is the same for distribution and raw water samples.

[7] Brooks explained that a negative sample could also be tested for E. coli, but that testing is not required.

Brooks recalled that she saw the distribution samples but did not see any raw water samples when she "glanced" in the incubator that morning.

Brooks acknowledged that O'Neal was the first person to report the positive R-Health sample. Brooks did not notice this sample as positive when she glanced into the incubator. Brooks explained: "you can't necessarily—with the way that everything is aligned together you can't [] see every single sample unless you literally open it up and move everything away from each other . . . . There's a bunch of samples next to each other so you can't really decipher positive versus not positive." She acknowledged that if there were a positive sample directly in the front of the incubator, she would be able to see that. However, she doesn't recall seeing the R-Health sample showing a yellow indicator in the of the incubator that morning.

About noon that same day, Brooks found two raw samples floating inside the water bath when she opened it to put additional samples in. She took a picture and sent it to Taya Brown-Humphrey, the plant superintendent, and asked her to come to the laboratory. (R-26.) These samples appeared to have a yellow color tone and the water appeared "hazy," Brooks explained that is not a normal color because a freshly gathered water sample would typically be clear. (R-22.) After she discovered the raw samples in the open water bath, she asked O'Neal about it since O'Neal recorded her initials in the laboratory notebook and was the person in the chain-of-command who conducted the analysis of the samples in question. Specifically, O'Neal documented that she read the raw water samples at 7:48 a.m. and there was an absence of E.coli. (R-4.) Laboratory technicians are responsible for ensuring the accuracy of the test results recorded in the laboratory notebook. (R-5.) Brooks asserts that O'Neal responded with a "combination of answers" like "Yes, I don't know" and never explained why she documented that she read the raw duplicate samples, even though the samples were later found in the water bath. Brooks acknowledged that no other technicians explained why the raw duplicate samples were sitting in the water bath.

The samples, Brooks asserted, should have been transferred from the water bath into the incubator, and then at the end of the analysis the samples should have been disposed of in the biohazard bag. When Brown-Humphrey arrived she also asked O'Neal

about the samples, O'Neal responded that she either did not know or did not remember how the raw samples came to be in the water bath. After that, Brooks checked the biohazard bag, and did not find raw samples there. Around that same time, Senior Laboratory Technicians, John Puliti and Eric Best came into the laboratory. Puliti said he did not see any raw duplicate samples inside the incubator that morning, and Best was not asked because he does not typically check the incubator.

Brooks also stated she found a Wawa sample in the autoclave bag that presented as total coliform that same day. She never saw the Wawa sample before it was taken out of the biohazard bag. She acknowledged that by the time she viewed the Wawa sample it was not a valid sample because it was past the time for the sample to be a valid positive sample and was no longer regulated at the proper temperature. Brooks acknowledged, the subsequent resampling at the Wawa location, came back as negative. Also, there is no available test that could determine whether not the test that O'Neal documented as negative was accurate or not.

The chain-of-custody card that O'Neal documented indicates that on November 13, 2019, at 7:48 a.m. she read and documented the results from the two raw duplicate containers that were planted on November 12, 2019. The record indicates that "both samples were total coliform positive," represented by a "+" sign, and that the samples were negative for E. coli. (R-4.) The samples should have been pulled out of the incubator and disposed of in the biohazard bag once they had been analyzed. Brooks acknowledged that a senior laboratory technician, Herminio Guerra, told her that he processed the samples. That means that Guerra documented that he planted the samples on November 12, 2019, at 2:53 p.m. when he conducted the Colilert procedure and transferred the samples from the water bath and placed them in the incubator.[8] Guerra also certified in the laboratory notebook that he collected the raw samples on November 12, 2019, at 2:45 p.m.

Brooks explained, had O'Neal simply reported to a senior laboratory technician, the quality assurance person, or the laboratory manager that the samples were not fully

[8] Chain-of-custody card number 50657. (R-4.)

processed and could not be read, because they were found floating in the water bath, the samples could have been recollected, processed and properly documented and she would not have been disciplined. As licensed operator O'Neal is responsible for ensuring that what she reports is what took place. To report otherwise is unethical and creates an issue with the public.

Brooks also found O'Neal's responses about the Wawa sample to be inconclusive. When O'Neal was asked about the Wawa sample, she said, "the sample was out of hold, so it doesn't matter." (R-2.) Brooks said that she "imagine[d]" that when O'Neal said, "[t]he sample was out of hold, so it doesn't matter" she "could have been" referencing the fact that the sample just came out of the biohazard bag, so it was "out of holding or out of the autoclave biohazard bag." Brooks recalled that O'Neal remarked that the Wawa sample was negative at the time that she read it.

Brooks found that the alleged misstatements regarding the raw duplicate samples to be a more serious infraction, because the record did not reflect . . . what actually occurred. She did not see samples in the incubator that morning, nor did Puliti, and there were no raw samples inside the biohazard bag when the remaining samples were retrieved; only raw samples in the water bath. Brooks testified that laboratory technicians are only permitted to report what they find and what they see. The subsequent negative testing of the Wawa and R-Health samples did not change the way Brooks viewed the correctness or incorrectness of O'Neal's actions on November 13, 2019.

Taya Brown-Humphrey (Brown-Humphrey), superintendent at the water treatment plant, testified that she has been employed by the City of Trenton in its water-plant operations for twenty-one years. In this capacity, Brown-Humphrey oversees the entire facility—operations, laboratories, and maintenance. Brooks is in charge at the laboratory.

Brown-Humphrey testified that the water-treatment-plant operations must be able to rely on the accuracy of the laboratory testing records created by laboratory technicians. The information is public, and the records are audited by the Department of Environmental Protection (DEP) which reviews the chain-of-custody cards as part of the

audit. If the DEP determines that the records are inaccurate the plant could be fined or lose its certification. Here, O'Neal documented the water samples as having been read. This created a false report.

Brown-Humphrey first learned of the November 13, 2019, incident when Brooks called her into the laboratory to report that two raw samples were found in the water bath and no one could provide an explanation as to where the samples came from, although the samples were noted as having been read and documented in the laboratory notebook. She reported the incident in a memo to Steve Picco, then-acting director for Water and Sewer. (R-3.) In Brown-Humphrey's memo, the samples are referred to as "bacteria samples" because they were being tested for bacteria. Brown-Humphrey was concerned because at that stage of the process, the samples should have been in the incubator, not the water bath, and then disposed of in the biohazard bag. She confirmed that the technician who read the samples is responsible for documenting the sample results on the chain-of-custody card.

Brown-Humphrey looked at the picture (sent by Brooks) of the raw water samples in the water bath, (R-26), and asked O'Neal why the samples were in the water bath. O'Neal responded, "I don't know." Brown-Humphrey acknowledged that none of the technicians present at the time of the incident or at the time of her involvement with the incident provided an explanation as to why the samples were in the water bath and to this day, she does not know how the samples ended up in the water bath. O'Neal reported that she read and documented the water samples that day, and O'Neal never said that she did not put them in the biohazard bag, and she did not have an explanation for why they were not in there, either. Best was not asked about the situation; Guerra was not present at the time she questioned O'Neal. Guerra never provided an explanation for the samples that he collected that were in the water bath.

The reason Brown-Humphrey concluded that O'Neal falsified the chain-of-custody cards for the raw water samples is that the samples were not found in the biohazard bag after Brooks emptied the bag. Because the raw samples were still in the water bath, the samples could not have been tested; O'Neal, however, made the entry on the chain-of-custody card regarding the results of tests that could not have yet been completed and

after the incident, O'Neal did not provide a satisfactory explanation for the test results on the raw duplicate samples from November 13, 2019.[9]

Further, Brown-Humphrey did not find O'Neal's answer of "I don't know," when asked why the samples were in the water bath, acceptable, "because if she had read the samples and followed the procedures just a few hours before that—she should know why those samples were either in the water bath or where the samples she read were." During an audit the laboratory technician is expected to be able to explain the testing results.

Brown-Humphrey also questioned the results of the Wawa sample pulled from the biohazard bag that day because it had a dark color and looked positive for coliform, "the same exact color as the R-Health sample." She had never been made aware that the Wawa sample was positive, only that the R-Health sample was positive. Neither Brooks nor O'Neal knew that the Wawa sample was positive. Brown-Humphrey questioned the accuracy of the Wawa sample result because she had never seen a sample turn a color shade after it has been in a biohazard bag and "sometimes samples sit in the biohazard bag for days and they never change color." She conferred with Brooks, O'Neal, Best, and Puliti, and "everybody told me they hadn't seen [samples change color in the biohazard bag] before." The samples were pulled from the biohazard bag about twenty-three hours after they were planted. She confirmed Brooks' testimony that by that time, there was no available laboratory procedure that would have enabled Brown-Humphrey to determine whether the Wawa sample had been positive or negative when it was read.

Brown-Humphrey acknowledged that she could have taken O'Neal's word for it, and added, "but I didn't." Even though the retested sample results were negative, she was concerned with the color of the sample that was retrieved from the biohazard bag, and that the tested location is right down the street from the R-Health sample that tested positive for bacteria as those results may indicate an issue in the system.

Brown-Humphrey also acknowledged that in addition to not knowing how the raw samples ended up in the water bath, she does not know if O'Neal read the raw samples

[9] Brown-Humphrey later acknowledged that pursuant to a letter sent to O'Neal, she was not permitted to communicate with any personnel over the investigation.

and she does not know if O'Neal put the raw samples in the biohazard bag. The biohazard bag is not secure—anyone in the lab can access it. She does not know if the raw samples that Brooks found in the water bath were the same raw samples that O'Neal indicated she read earlier that morning and further, she does not know whether the raw samples that were discovered in the water bath were the same ones that were planted by Guerra the day prior. She agreed, they could be different raw samples.

David Smith (Smith) is the chief engineer for the Trenton Department of Water and Sewer. At the time of O'Neal's termination, he served as the acting director. He has been employed with the City of Trenton since June 2019. As the chief engineer, Smith worked at the Cortland Street office overseeing engineering activities, including capital projects. He met routinely with senior-level management at the filtration plants and with Director Picco. He stated that the potential consequence of having inaccurate laboratory records is that during an audit, depending on the inaccuracies that are found in the records, the laboratory could lose its certification.

Smith first became involved four months after the incident, when Brown-Humphrey informed him about the incident. Smith was not involved in the investigation.

Smith explained that he decided to terminate O'Neal after reviewing a compilation of documents, including Brown-Humphrey's November 14, 2019, memorandum, (R-3), and information from the departmental hearing. He found that O'Neal falsified records and failed to follow protocol; he does not feel the water utility should have any tolerance for such actions. (R-17.) He based his conclusion on the fact that there were bacteria samples that were placed in the water bath had never made it to the incubator. O'Neal created a false record when she documented test results even though it was later found that the subject samples remained in the water bath. Failure to follow the protocol and falsifying records is a "big problem," and an "I don't know" answer is a "major red flag." You need to know what is going on and the laboratory technicians need to be trusted.

O'Neal's actions created risks and liability for the utility. The utility cannot condone falsification of records and must hold employees accountable for their actions. Falsification is one of the worst offenses that a utility employee could commit, as it directly

inhibits the utility's ability to understand water quality and its ability to respond to issues related to water quality regarding the health and welfare of the more than 225,000 customers that the utility serves.

John Puliti (Puliti) has worked as a senior laboratory technician for the City of Trenton for approximately twelve years and has been a senior laboratory technician for nineteen years. On November 13, 2019, Puliti arrived to work at 7:00 a.m. Guerra, also a senior laboratory technician, was at work then too. No one else was in the office at that time. When he arrived, Puliti routinely logged the temperatures of the refrigerator the incubator, and the water bath in the temperature logbook. That morning he didn't take the temperature of the water bath because it was off. Instead, he recorded "off" in the logbook. He could not see inside the water bath. When he checked the temperature of the incubator he noticed a bacteria sample from R-Health that was yellow. This meant it was positive for total coliform. He informed Guerra. He put the sample under the UV light, but it did not fluoresce, indicating it was positive for coliform, and negative for E. coli. He returned the sample to the incubator. He did not report his finding at that time because no one from management was in yet. He believes if the Wawa sample had been yellow, he would have noticed it. Puliti did not look for other raw samples in the incubator, and he did not notice any other samples that were yellow in color.

When O'Neal arrived at 7:30 a.m., Puliti and Guerra told her about the positive sample for coliform. Puliti recalled that Brooks came in around 8:30 a.m.; he did not recall seeing her earlier that morning. He is "pretty sure [the readings were done] before" Brooks arrived. Puliti left the laboratory around 9:00 a.m. to re-collect the R-Health sample and samples from two other locations. When he returned to the laboratory around 11:30 a.m., Brooks and Brown-Humphrey were both there and the samples from the biohazard bag had been removed and placed on the counter. He noticed the positive Wawa sample. The water bath was open, and he observed two raw samples sitting on a rack that was placed on the top of the water bath. Puliti denied that he ever reported to Brown-Humphrey that a negative sample, like the Wawa sample could never turned positive after being read. His experience with samples turning positive after being read is that when they are in the autoclave bag longer than they are supposed be, there's

contamination in the bag—it's like the biohazard waste bag, and the sample can turn a different color.

Herminio Guerra, (Guerra) has been a senior laboratory technician for about fourteen years with the City of Trenton and worked in the laboratory with Puliti at the time of the incident. Guerra was responsible for collecting samples and performing the Colilert procedure. He performed the Colilert procedure of the water samples at issue here. Guerra maintains that the two samples found on the rack in the water bath could not be the ones he processed because in addition to completing the Colilert procedure by placing the samples in the incubator, he "submerges" the samples in the water bath and did not leave them on a rack on top of the water bath. His documentation also reflects that he completed the procedure.

Around 7:10 a.m. on November 13, 2019, Guerra confirmed that he and Puliti noticed that the R-Health sample had turned a yellowish-orange color. He stated that all the other samples were "good" because he and Puliti "glanced" at them and did not notice discoloration. He especially looked at the Wawa sample, which was negative, after observing the R-Health sample because their locations are near each other. A negative sample is very light, and the color of a positive sample "can be distinguished [] really quick." It is "habit," he explained—you come in and the first thing you do is you look at it [to see] that everything is good." The incubator has a glass door, he explained, and when you open it up you can see everything that is inside. When O'Neal arrived about twenty minutes later, she pulled the R-Health sample from the incubator and performed the reading. Guerra is not sure who advised Brooks about the positive result, but he recalls the samples were not in the incubator when she arrived because although he did not see O'Neal read the samples, he recalled that O'Neal pulled the samples out of the incubator and that she does not have any responsibility for the water bath. Guerra believes it was Brooks who placed water samples in the water bath. He specifically recalled that Brooks had not arrived before O'Neal, and he had not seen Brooks prior to or at the time that O'Neal would have conducted the reading.

Camilla O'Neal (O'Neal) testified that she had interned at TWW throughout high school in the summers and in her senior year of high school and junior year of college.

At the time of the incident, she served as a laboratory technician after having been trained in both field work and laboratory work.

On the day of the incident, O'Neal arrived at work around 7:30 a.m. Puliti and Guerra gave her a "heads up" that they unofficially checked the samples and noticed that the R-Health sample was positive. O'Neal proceeded to read the distribution samples and the raw samples. She took them out of the incubator, performed a visual check of them with the comparator, and then checked them under a UV light to see if they fluoresced. The samples did not fluoresce; however, the R-Health sample was positive for total coliform. After that, O'Neal recorded the results in the laboratory notebook and on the chain-of-custody cards. She then discarded the samples in the biohazard waste bag. O'Neal specifically recalls discarding all of the samples that day, including the raw samples, in the biohazard waste bag. After that, O'Neal left the bacteria laboratory and resumed her other regular duties that day.

When Brooks arrived at work, around 8:00 or 8:30 a.m. that day, she reported the positive R-health sample. Sometime later that day Brooks asked O'Neal if she knew why raw samples were in the water bath, to which O'Neal responded that she did not know. Brooks checked the documentation on the chain-of-custody card and noticed that O'Neal had recorded the results. Brooks asked O'Neal how the samples could be in the water bath if O'Neal had already read them. O'Neal was not able to answer that question because she had completed the process and already discarded the samples in the autoclave bag, not in the water bath.

When Brown-Humphrey arrived to ask her about the samples. O'Neal again responded, "I don't know" when Brown-Humphrey asked how the samples ended up in the water bath. O'Neal reported that she already completed the reading process, discarded the samples, in the autoclave bag, and left the lab.

O'Neal testified, "Once [the samples] left my hands I can't speak to that, I don't feel it's realistic for me to be able to speak to it when anybody can have access."

Findings

It is my obligation and responsibility to weigh the credibility of the witnesses in order to make a determination. Credibility is the value that a factfinder gives to a witness' testimony. The word contemplates an overall assessment of a witness' story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Credible testimony has been defined as testimony that must not only proceed from the mouth of a credible witness but must be credible in itself and must be such as the common experience and observation of mankind can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955) (quoting In re Perrone's Estate, 5 N.J. 514, 522 (1950)). In assessing credibility, the interests, motives, or bias of a witness is relevant, and a factfinder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses, and the finder of fact is not bound to believe the testimony of any witness. In re Perrone's Estate, 5 N.J. 514.

Witness Brooks, who testified for TWW, provided clear testimony as to the laboratory operations and the Colilert SOP. In contrast, Brook's testimony as to appellant's failure to follow and complete established water testing procedures and falsification of records was less than direct and did not specifically demonstrate how the investigation proves that O'Neal did not perform her job duties. Brooks relies on a faulty premise—that raw water samples were found in the water bath, therefore concluding that O'Neal did not properly process the samples and misrepresented the records on the chain-of-custody cards and laboratory notebook, a serious violation of water-testing practices. Brooks also held O'Neal accountable for the Wawa sample because it appeared positive after siting the autoclave bag past its readable time.

It appears that Brooks is uncertain as to what she is looking to hold O'Neal responsible for doing or not doing. At one point, she attempts to hold O'Neal responsible for explaining why the samples were in the water bath and not transferred to the incubator. In doing so she ignores her own testimony that Senior Laboratory Technician Guerra performed the Colilert procedure on two raw samples and that his recording (and

testimony) confirmed that those raw water samples were transferred from the water bath to the incubator. Brooks did not dispute that he did not do that. Also, the evidence, specifically the chain-of-custody cards, document that Guerra processed the samples on November 12, 2019, at 2:53 p.m. by conducting the Colilert procedure and transferred the samples to the incubator.

Brooks' testimony that she did not see any raw samples in the incubator that morning when she glanced in is consistent with her own testimony. She explained and acknowledged in her testimony that "you can't necessarily—with the way that everything is aligned together you can't [] see every single sample unless you literally open it up and move everything away from each other . . . . There's a bunch of samples next to each other so you can't really decipher positive versus not positive." She acknowledged that if there were a positive sample directly in the front, she would be able to see that. However, she doesn't recall seeing the R-Health sample showing a yellow indicator in the incubator that morning. Guerra, Puliti and O'Neal all testified that they observed samples in the incubator that morning. Guerra and Puliti provided detailed testimony about performing an unofficial reading on the R-Health sample that they removed from the incubator and found to be positive. Guerra also noticed the Wawa sample in the incubator and unofficially found it to be negative.

Brooks also acknowledged that O'Neal was the first to tell Brooks that the R-Health sample was positive for coliform.

Brooks never saw the Wawa sample before it was taken out of the biohazard bag. She agreed that by the time she viewed the sample it was not valid because it was beyond the processing time. But part of the respondent's willingness to discipline O'Neal is because O'Neal said that the Wawa sample was "out of hold". Further, it is concerning that no other witnesses who regularly work in that laboratory recalled seeing Brooks in the laboratory early that morning before O'Neal read the samples, like she testified. Brooks' statement that negative samples do not turn positive after sitting in the biohazard bag was disputed by senior laboratory technicians, whose job duty is to perform the Colilert procedure.

Brown-Humphrey came to the conclusion, that O'Neal did not properly process the samples and she could not have read the raw water samples because the picture of raw water samples showed them to be in the water bath.

It was determined that O'Neal was the responsible person because she made the entries on the chain-of-custody cards and could not provide a satisfactory explanation as to why the samples were in the water bath or why the Wawa sample appeared positive. None of the witnesses for the respondent produced evidence or testimony to prove that O'Neal did not read and dispose of the samples in the autoclave bag. Instead, Brown-Humphrey acknowledged that she does not know if O'Neal read the raw samples and she does not know if O'Neal put the raw samples in the biohazard bag. She admitted, the biohazard bag is not secure—anyone in the lab can access it, and she admitted that O'Neal would not use the water bath to perform any of her job responsibilities. She further acknowledged that she does not know if the raw samples that Brooks found in the water bath were even the same raw samples that O'Neal indicated she read earlier that morning and further, she does not know whether the raw samples that were discovered in the water bath were the same ones that were processed by Guerra the day prior. She agreed, they could be different raw samples.

Respondent's lack of investigation into the incident created an incomplete record. Guerra, who conducted the Colilert procedure, was never questioned, and no one asked him if he saw the raw samples in the incubator that morning. Had they done so they would have learned that Guerra stated he completed the entire Colilert procedure that day and specifically recalled transferring the samples from the water bath to the incubator, consistent with the recording he made on the chain-of-custody card.

It is disingenuous that respondent would question O'Neal's involvement in one part of the Colilert procedure, that she was not responsible for performing on these samples, and not question the other laboratory technicians who were also involved in processing the samples first part of the Colilert procedure.

Both Brooks and Brown-Humphrey appeared to re-paraphrase O'Neal's answer "I don't know" in response to the question of why the samples were in the water bath to find that she could not explain what happened to the samples after she finished reading them and therefore, she did not do her job. In context, O'Neal's testimony is direct and credible when she states she discarded the samples in the biohazard bag, and added she could not speak to what happened once the samples were disposed of in the biohazard bag, because as all witnesses confirmed, the biohazard bag is not secured and anybody could access them.

Smith, who became the acting director sometime after the incident, did not have direct knowledge of the incident. He reviewed respondent's internal documents and investigation several months after the incident and based his conclusion regarding O'Neal's termination on the water samples found in the water bath that never made it to the incubator. Smith concluded that O'Neal falsified the chain-of-custody cards and laboratory notebook when she documented test results for water samples that remained in the water bath. However, his own senior level management who he stated he met with regularly, and who created much of the internal documents, could not state with certainty why the samples were in the water bath, whether the samples found in the water bath were the same ones that Guerra processed or that O'Neal read, and no one who testified, except for Guerra, had any idea on how those samples either got into the water bath or remained there during processing.

Guerra and Puliti have direct knowledge of the incident and the events leading up to the incident. Guerra performed the Colilert procedure and testified with certainty that he transferred the samples from the water bath to the incubator. He also observed and described the appearance of the Wawa sample he observed in the incubator the next day and was able to explain why the sample appeared negative. Both Guerra and Puliti detailed their observation of the R-Health sample they removed from the incubator when they performed an unofficial reading. Although Guerra did not watch O'Neal read the samples, he recalled being there when O'Neal took the samples out of the incubator that morning. Guerra provided the only possible alternative explanation as to the events of that day when he stated that he believed it was Brooks who put the samples in the water bath.

As for O'Neal, she testified directly and succinctly about the events of November 13, 2019, and her testimony was more consistent with that of the senior laboratory technicians Guerra and Puliti who she worked with. It appears that because of her remarkable prior disciplinary record she cannot escape the appearance that it was her wrongdoing that caused the alleged incomplete processing, misreading, and falsification of water samples in the laboratory that day.

Here, respondent's witnesses did not conduct a full investigation, and instead drew conclusions that O'Neal is at fault. While it is understandable that her superiors would assert that O'Neal has not been a reliable employee and may have misrepresented findings in the past, her history cannot be used to prove these charges.

Having had the opportunity to consider the testimony and review the documentary evidence, I **FIND**:

Here, the investigation consists of memos created by respondent's witnesses, chain-of-custody cards, the Bacteriological Manual and Quality Assurance Plan and SOP for total coliform Colilert. Respondent did not demonstrate that O'Neal failed to follow the procedures outlined in the SOP when two raw water samples were found in the water bath after she recorded that she read the samples. Nor did respondent demonstrate that O'Neal failed to accurately record the Wawa sample found to be positive after it was taken from the biohazard bag, past its testing time even though O'Neal recorded the sample as negative. The respondent based its conclusion on two raw water samples with an unknown origin found midday in the water bath and a positive Wawa sample found after its readable time frame had expired. Respondent did not have proof to determine that O'Neal was the technician in the chain-of-custody and responsible here, when no one, including the respondent, could provide testimony or evidence on how the raw water samples came to be in the water bath when the chain-of-custody card documented by Guerra demonstrates that he transferred the samples to the incubator from the water bath the day before.

During her testimony, appellant credibly stated she discarded the samples into the autoclave bag, and stated with accuracy that the Wawa sample was no longer valid. It is

the obligation of a laboratory technician to accurately record the water-sample findings and to follow SOP properly. However, here proofs relied upon by respondent to hold O'Neal accountable, at best rests on bare boned conclusions. Other than Guerra's belief that Brooks placed the samples in the water bath, no one knows for sure how the raw water samples ended up in the water bath. It is significant that respondent failed to gather a more thorough record in particular a statement from Guerra, who performed the Colilert procedure , and in doing so would have been responsible for transferring the raw water samples from the water bath to the incubator, like he stated he did.

Finally, it is not disputed that appellant's past performance on the job has been less than stellar; however, charges cannot be brought based on past incidents.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be 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. In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant, and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. 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). Both guilt and penalty are redetermined on appeal from a determination by the appointing authority. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). An appeal to the Civil Service Commission 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 Cnty. Bd. of Soc. Servs., 197 N.J. Super. 307 (App. Div. 1984).

Appellant worked at the TWW until she was terminated on March 24, 2020. The TWW is a certified regulated water utility in Trenton. Respondent asserts that appellant's actions put TWW at risk of a regulatory audit and fines and possible revocation of its certification, putting the 225,000 customers who rely on the utility for water at risk of harm.

Here, the respondent has charged the appellant with incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), and neglect of duty, in violation of N.J.A.C. 4A:2-2.3(a)(7).

As to the charge of incompetency, inefficiency, or failure to perform duties, in violation of N.J.A.C. 4A:2-2.3(a)(1), the Administrative Code does not define these grounds for disciplinary action. However, case law has determined that incompetence is a "lack of the ability or qualifications necessary to perform the duties required of an individual" and "[a] consistent failure by an individual to perform his/her prescribed duties in a manner that is minimally acceptable for his/her position." Sotomayer v. Plainfield Police Dep't, 1999 N.J. AGEN LEXIS 738 (December 6, 1999) (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983); Clark v. New Jersey Dep't of Agric., 1 N.J.A.R. 315 (1980)), adopted, MSB (January 24, 2000), http://njlaw.rutgers.edu/collections/oal/. "Inefficiency" has been defined as the "quality of being incapable or indisposed to do the things required of an officer" in a timely and satisfactory manner. Glenn v. Twp. of Irvington, 2005 N.J. AGEN LEXIS 35 (February 25, 2005), adopted, MSB (May 23, 2005), http://njlaw.rutgers.edu/collections/oal/. The respondent's evidence as to the Wawa sample is conclusionary and inconsistent with the Manual, which states, "any color change to yellow is not valid beyond 22 hours." Furthermore, respondent did not provide sufficient testimony or evidence to demonstrate by a preponderance of the credible evidence that appellant falsified or improperly recorded the raw water sample results just because two raw water samples with an unknown origin were found in the water bath. Respondent did not prove that O'Neal failed to follow protocol by failing to complete the Colilert procedure, or that she failed to discard the samples in the biohazard bag and properly document the chain-of-custody card and laboratory notebook. Therefore, I **CONCLUDE** that respondent has not met its burden of proof on this charge.

The term "neglect" means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). "Duty" means conformance to "'the legal standard of reasonable conduct in the light of the apparent risk.'" Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing. Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job. Here, respondent determined that appellant neglected her duty when she processed two raw water samples and a water sample collected near the Wawa location. Respondent did not provide sufficient testimony or evidence to demonstrate by a preponderance of the credible evidence that appellant's conduct was such that she improperly performed the SOP for Colilert when recording the water sample results because raw water samples were found in the water bath and not in the biohazard bag or that appellant may have misread or falsified the Wawa water sample because it was later found in the biohazard bag appearing positive after its readable time frame had expired. Therefore, I **CONCLUDE** that the preponderance of the credible evidence demonstrates that respondent has not met its burden of proof on the charge of neglect of duty.

Appellant does have a disciplinary history that correlates to similar conduct; however, this history is not admissible to prove the charges. W. New York v. Bock, 38 N.J. 500, 512 (1962) (wherein the Supreme Court addressed this issue and made clear that an employee's prior disciplinary record is appropriately considered only after a finding of guilt when determining a penalty).

ORDER

I **ORDER** that the action of the respondent appointing authority removing the appellant from her position as a laboratory technician is hereby **REVERSED**, and the charges of violation of N.J.A.C. 4A:2-2.3(a)(1), incompetency, inefficiency, or failure to perform duties, and violation of N.J.A.C. 4A:2-2.3(a)(7), neglect of duty, are **DISMISSED**.

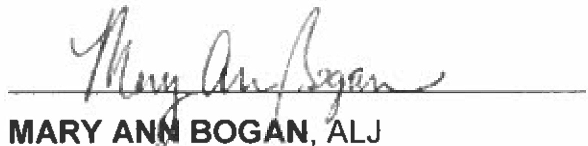
It is further ordered that appellant is entitled to back pay, pension credit, service credit, and all other emoluments. The amount of back pay awarded is to be reduced and mitigated to the extent of any income that was earned or that could have been earned by appellant during this period. Proof of income shall be submitted by or on behalf of appellant to the appointing authority within thirty 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.

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

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

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

April 25, 2022
DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: ______________________

Date Mailed to Parties: ______________________

MAB/nmn

APPENDIX

WITNESSES

For appellant:

Camilla O'Neal

John Puliti

Herminio Guerra

For respondent:

DiAsia Brooks

Taya Brown-Humphrey

David Smith

EXHIBITS

Joint:

J-1 FNDA dated 3/24/2020 with Attachments

J-3 FNDA dated 8/6/2019

For appellant:

R-2 Brooks Memo Dated 11/14/2019

R-3 Humphrey Memo Dated 11/14/19

R-4 Chain-of-Custody Cards and Notebook Page 11/13/2019

R-5 Bacteriological Manual

R-6 SOP Total Coliform Colilert

R-11 FNDA dated 8/6/2019

R-13 PNDA 093019 0014

R-14 Brooks Memo 101119 0059

R-17 FNDA dated 3/24/2020 with Attachments

R-18 Verbal Warning dated 5/9/2019

R-19 Photo - Raw Duplicate Container

R-20 Photo - Distribution Sample Container

R-21 Photo - Water Bath Closed

R-22 Photo - Water Bath Open

R-23 Photo - Incubator Front Glass Door

R-24 Photo - Biohazard Bag

R-25 Photo - 2020 Lab Notebook

R-26 Photo Taken 11/13/2019 of Raw Duplicates

Appellant

Incorporated into R or J exhibits