STATE OF NEW JERSEY

In the Matter of David Gilmore, Paterson, Department of Economic Development

CSC DKT. NO. 2022-2664
OAL DKT. NO. CSV 03321-22

DECISION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 3, 2023

The appeal of David Gilmore, Director of Community Improvements, Paterson, Department of Economic Development, removal, effective April 19, 2022, on charges, was heard by Administrative Law Judge Gail M. Cookson (ALJ), who rendered her initial decision on March 27, 2023. Exceptions were filed on behalf of the appointing authority and a reply was filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, including a thorough review of the exceptions and reply, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 3, 2023, accepted and adopted the Findings of Fact and Conclusion as contained in the attached ALJ's initial decision and her recommendation to reverse the removal.

The Commission makes the following comments. As indicated above, the Commission thoroughly reviewed the exceptions filed by the appointing authority in this matter. In that regard, the Commission finds them unpersuasive as the ALJ's findings and conclusions in reversing the charges and penalty imposed was based on her thorough assessment of the record and are not arbitrary, capricious or unreasonable.

The Commission notes that the ALJ's decision was made based mainly on her assessment of the credibility or the various witnesses in this matter. In that regard, the ALJ made many specific and detailed determinations and presented numerous reasonable conclusions based on those determinations. Specifically, the ALJ credited much of the appellant's testimony, conversely finding much of what the appointing authority witnesses presented as unpersuasive or not credible in light of both the appellant's credible testimony and other evidence in the record. Of main importance,

the ALJ found the appointing authority's main witness not credible in nearly all respects. Ultimately, the ALJ found:

> For the reasons set forth herein and on the basis of the credibility findings above, I **CONCLUDE** that Paterson has wholly failed to meet its burden of proof with sufficient credible evidence on these allegations and the FNDA must be dismissed in its entirety . . .
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> The claim of sexual harassment in only based upon the "lap dance" comment allegedly made by appellant to Pavon. As found above, I found this allegation was not credible and it certainly cannot be the basis of any pattern or practice. As stated, she failed to report the event to anyone for three months, including to Lobozzo. Moreover, it was clearly out of character for appellant who prides himself upon his standards of professionalism in the workplace and was described credibly as strict and by-the-book.
>
> The claim of general harassment, bullying, lurking or intimidation by appellant towards Pavon was also not supported by the preponderance of the credible evidence. I have found that she was hypersensitive about every glance from him in the direction of the customer service counter. A few photographs of him looking perhaps in her direction do not constitute a representative picture of how he engaged his staff, where he sat, where he walked, or other functions of appellant in his role as Director of Community Improvements over a ten-month period. Again, the testimony of Perez and Cabrera do not credibly support Pavon's testimony because I have found that they had reasons to be biased against appellant.
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> In sum, and on this factual record, I **CONCLUDE** that respondent has not proven by the preponderance of the credible evidence that appellant's conduct, even to the small extent some aspects of the allegations might have occurred, which I have found they did not, was severe or a risk to public safety. A reasonable, objective person would not have considered Pavon to have been intimidated by appellant, or to have found that he "lurked" or bullied her. He exercised his managerial authority to diffuse arguments at the customer service counter and to enforce ethics and other professional standards in the Division. His supervisor, Charles, did little to nothing to hear appellant's side of any of these allegations or to objectively evaluate Pavon's claims before summarily suspending him without pay.
>
> I **CONCLUDE** that there was no intimidation, hostile work environment, or sexual harassment, except in the mind of Pavon, and

> apparently our missing witness Lobozzo. Appellant, the Division Director, sat in a chair and observed the common customer service area. There was no constant badgering, no bullying, and no retaliation, in spite of respondent's attempt to advocate as if there had been.

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 u. 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 from the first date of separation without pay until the date of reinstatement. Moreover, as the removal has been reversed, the appellant is 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 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 David Gilmore. The Commission further orders that the appellant be granted back pay, benefits, and seniority from the first date of

separation without pay until the 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:2.12, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay and 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 3RD DAY OF MAY, 2023

Allison Chris Myers

Allison Chris Myers
Acting Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Nicholas F. Angiulo
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
P. O. Box 312
Trenton, New Jersey 08625-0312

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. CSV 03321-22
AGENCY DKT. NO. 2022-2664

IN THE MATTER OF DAVID GILMORE, CITY OF PATERSON, DEPARTMENT OF ECONOMIC DEVELOPMENT.

Lisa M. Fittipaldi, Esq., for appellant David Gilmore (DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, attorneys)

Marlin G. Townes, III, Esq., for respondent City of Paterson (O'Toole Scrivo, attorneys)

Record Closed: January 26, 2023 Decided: March 27, 2023

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was initiated by a Major Discipline Appeal Form filed preemptively by appellant David Gilmore (appellant or Gilmore) on April 13, 2022, from a departmental hearing held January 28, 2022, followed thereafter by a Final Notice of Disciplinary

Action (FNDA) dated April 19, 2022[1], removing him from his position as the Director of Community Improvements, Department of Economic Development, City of Paterson (respondent or Paterson) on charges that he created a hostile work environment and engaged in conduct unbecoming a civil servant. Specifically, Paterson charged appellant with N.J.A.C. 4A:2-2.3 (a) (2) – Insubordination; N.J.A.C. 4A:2-2.3 (a) (6) – Conduct Unbecoming a Public Employee; N.J.A.C. 4A:2-2.3 (a) (12) – Other Sufficient Cause; and violation of corresponding city policies. The Civil Service Commission transmitted the appeal to the Office of Administrative Law (OAL) under cover of April 25, 2022, as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On April 30, 2022, the matter was assigned to the undersigned. On May 17, 2022, the first of several telephonic case management conferences with counsel was convened. The matter was set down for plenary hearings, but those dates were adjourned in order to allow for the completion of discovery and pretrial motions. By informal motion filed on or about June 28, 2022, appellant sought to compel respondent to produce more responsive answers to discovery demands, including materials which Paterson had claimed were confidential and protected from discovery. I required the respondent to prepare and submit a privilege log and the contested documents for my in camera review pursuant to Payton v. N.J. Turnpike Authority, 148 N.J. 524 (1997). On July 27, 2022, I issued my ruling on that application.

The plenary hearings were held on October 19 and 20, 2022, and then continued on November 28 and 29, 2022. The parties were allowed the opportunity to file written summations following receipt of the transcripts. The record closed on January 26, 2023, upon receipt of the final brief. I requested and was granted one extension of time in which to issue this decision.

FACTUAL DISCUSSION AND FINDINGS OF FACT

[1] The Preliminary Notice of Disciplinary Action (PNDA) was dated December 7, 2021, but not sent to appellant until December 15, 2021, with an immediate unpaid suspension going into effect on December 17, 2021. [R-1.] An Amended PNDA was issued on December 17, 2021, but not provided to appellant until December 28, 2021. [R-2.] I have examined these two documents carefully and there is no difference between them, with the only exception that the later PNDA was served by certified mail.

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**:

Respondent[2] called as its first witness Michael Powell, who is the Director of Economic Development for Paterson. He oversees several divisions including Community Improvements, Planning and Zoning, Historic Preservation, and Redevelopment. Appellant is the Director of the Division of Community Improvement. Powell explained that his primary responsibility is to guide the economic development in Paterson. He has a Master's degree from Cornell in City Planning and has spent his career mostly serving poor communities.

Powell testified that he sent Gilmore a memorandum on June 17, 2020, that clarified his role and responsibilities as the Director of the Division of Community Improvements. Powell testified that he sent the memorandum because there was a need to clarify "lanes" between appellant and Jerry Lobozzo, who oversaw the Uniform Construction Code office, also within Community Improvements, in light of infighting and ongoing litigation. Powell also received permission to hire an Assistant Director to help bring some order to the Division. As a result, Osner Charles was hired as the Assistant Director of Economic Development in late 2019. Powell described the functions of Community Improvements as including both inspecting and levying fines for code violations, as well as zoning inspections. Paterson worked with the State Department of Community Affairs to provide better joint enforcement efforts.

On cross-examination, Powell explained the difference between city and State code jurisdiction. Powell also confirmed that Lobozzo was subordinate to appellant, but that he had clarified for appellant what he could and could not request of the Code Official. Powell sits in a different building that Community Improvements. He acknowledged that he had had no direct communications with appellant. Powell was familiar with appellant only generally from interactions at council meetings and other

[2] It did not go unnoticed by me that respondent's counsel used the polite salutation of Mr. or Ms. in its Brief for everyone in this matter with the exception of appellant, referring to him as simply Gilmore.

places. He is not familiar with appellant's management style within the Division that he oversees; but he described the overall layout of the office as an "H" with Housing and Code on the sides with a customer service desk in the middle serving both aspects.

Powell admitted that he read and signed the PNDAs and the FNDA only on the basis of reading the investigation report, all of which were written by outside counsel. On further examination, Powell agreed that the CSC job descriptions contain enough over-inclusive "waffle" language to cover each position's responsibilities without getting too restrictive.

Osner J. Charles testified that he served as Paterson's Assistant Director of Economic Development for only three years, starting a little before Covid hit. After he was hired, appellant directly reported to him rather than Powell. Charles testified that he received a February 26, 2021, email from Lobozzo complaining that Gilmore was trying to get a new Customer Service hire, Sandra Pavon, to go outside of the UCC reporting structure and report to him instead. Charles noted that the reporting structure subsequently (months later) changed due to the ongoing litigation, with both Lobozzo and appellant directly reporting to him.

Charles received another email from Lobozzo on August 3, 2021, again seeking clarification of the hierarchy in the Division of Community Improvement. Therein, Lobozzo expressed his continued concerns about the appellant trying to involve himself in the Construction Office's duties and direct the Construction Office's personnel. Lobozzo also wrote that he and his staff had been expecting and hoping for a written memorandum to appellant from Charles, which apparently never came.

Despite the change in the reporting structure, Charles stated at the hearing that issues with appellant and his interactions with the Construction Office's staff persisted according to Lobozzo. Charles stated that he had a conversation with the appellant where he told him that an investigation was occurring and that he should refrain from sitting across from Pavon or having any contact with her. Charles subsequently sent emails to Gilmore on September 28, 2021, and September 29, 2021, where he notified

appellant that harassment claims against him from Pavon were being investigated and he gave him a directive to refrain from being in her area.

Charles received additional emails from Lobozzo during November and December 2021 declaring that appellant continued the alleged intimidating behavior by sitting across from Pavon. Lobozzo attached photographs of same. Charles testified that he spoke with appellant again, instructing him not to sit across from her because she felt that he was harassing her. Charles admitted that the "pit" was an open area, with workstations on the Housing side of the Community Improvement. Pavon never communicated with Charles until after his immediate suspension, the basis of which is predominantly emails from Lobozzo. In late December, after appellant had been suspended, Pavon sent an email directly to Charles claiming that appellant was lurking around the outside parking lot.

On cross-examination, Charles admitted that there was no written reorganization memo until an August 9, 2021, email, which was preceded by Lobozzo's complaint to him that nothing written had been sent out yet. Charles could not confirm whether photos sent by Lobozzo were taken by him, by Pavon, or someone else. He did confirm that appellant had concerns that Lobozzo was impeding his ability to produce monthly reports that included UCC data.

Charles agreed that it did appear that appellant's first notification of Pavon's harassment claims did not occur until September 28, 2021. When shown the photos Lobozzo provided, Charles admitted that the Division layout and the distance between where appellant and Pavon sat was hard to determine and was obstructed by plants, holiday decorations and personal items typical of an employee's desk. While he never used the term "forbidden chair" referenced by Lobozzo, Charles stated that he had verbally warned appellant not to sit across from Pavon in the area known as the "pit."

In reviewing the photographic exhibits with Charles, he acknowledged that there were no photos of appellant lurking outside; that there were no photos of him in the customer service area; that it appeared that the phone was not up at appellant's face looking directly at Pavon; and that he knew appellant had recently become a

grandfather and might have photos of the baby on his phone. Charles also admitted on cross-examination that all photos he saw came to him from Lobozzo who was the person who complained the most about appellant. Further, Charles confirmed that it was against city policy to take photos of other persons in the office.

On further examination, Charles testified that Pavon, as a probationary employee from February to May, could have been evaluated by appellant as this was before any reorganization, although Lobozzo would have had the overall say on her performance as his direct report. Charles also confirmed that appellant might have been monitoring his customer service staff in light of complaints about unanswered phones and employee time clock issues.

Wanda Perez testified next for respondent. She has been employed in the Construction Code office of Community Improvements for twenty-two years, and for the last ten has been in the title of Clerk 1. Requests for information from the public (OPRA) was one of her responsibilities. Appellant had been her supervisor in that capacity until this later reorganization.

Perez stated that she recalled an incident when Pavon was speaking to a citizen about a permit which could no longer be issued immediately as that person hoped. Perez said that appellant came over to the customer service area, interrupted Pavon and took over talking to this citizen. Perez felt he disrespected Pavon. She believed this took place in late November or early December 2021. Lastly, Perez claimed that she saw appellant sitting near the customer service area and that his cell phone was upright, and he seemed to be taking pictures.

On cross-examination, Perez recalled that there was another incident in the fall when Pavon and a customer were getting louder and louder as they spoke to each other about something. It was a day when Lobozzo was not in the office. Appellant came over and did seem to calm down the customer, who kept asking to speak to a supervisor. Perez said that appellant gave the woman information about where she could complain. Perez admitted that there were plants and decorations on the counter, as well as taped to the plexiglass barrier in front of Pavon. Perez confirmed that she

took no photos of appellant for this matter. She also acknowledged that she had been disciplined by appellant in the past for not undertaking OPRA requests in a timely manner.

Teresa Cabrera was also called as a witness by respondent. Cabrera has worked for seven years in the UCC department as a Clerk 2. Appellant had been her supervisor in her initial position. Cabrera stated that she saw appellant holding his phone up while facing Pavon. To her, it was obvious that he was using the phone to photograph or video Pavon. Cabrera recalled the incident when Pavon was arguing with customers at the customer service desk. Appellant approached and ultimately referred them to the Mayor's office if they wanted to complain. On another occasion, Cabrera observed appellant in his car "lurking" in the parking area and she was concerned for Pavon.

On cross-examination, Cabrera confirmed that appellant had been her supervisor when she was responsible for preparing demolition permit reports. She denied that she agreed to continue doing those even after her transfer from Housing to the UCC side of the Division.

Mohammad Alam has worked as a Technical Assistant in the Construction Code office after initially being employed as a Keyboarding Clerk in Housing. He described the typical customer service tasks. Alam testified that he saw appellant sitting in the chair across from the customer service desk. During the incident with the difficult customer with whom Pavon was arguing, Alum stated that appellant took him aside to the pit area to speak with him. Alum also testified that he saw an image of Pavon on appellant's phone but was unsure what that was about.

On cross-examination, Alam clarified the fact that the customer incidents were about citizens being impatient with inspections, one of which concerned Housing and not the UCC. With respect to his direct testimony on the image he saw on appellant's phone, Alum admitted that he was passing by but never was behind appellant. He also agreed that the phone was not upright.

Sandra Pavon began her employment as a Technical Assistant in the Construction Office on February 21, 2021. She was responsible to review building permit applications for completeness, seals, prices, pre-approvals etc. She testified that she had issues with appellant from her first day. Appellant seemed to be walking back and forth staring at her and watching how she did everything. On her third day on the job, appellant called Pavon in for a meeting in his office. She testified that he pointed towards a stack of construction folders and indicated that people were doing illegal things and that he was going to take them to court and have them put in jail. Pavon testified that she went back to her desk and was really confused about to whom she reported. After she returned to her desk, Lobozzo inquired if anything was wrong, and she told him about her meeting with Gilmore. As a result, Lobozzo contacted Charles to have a meeting. Charles met with her and Lobozzo and told them that Gilmore was not to intervene in any of Pavon's affairs or work during her 90-day probation period.[3]

Pavon testified that appellant would sit at the empty desk and chair before lunch sometimes and then all afternoon. Pavon stated that on her 91st day of employment, which would have been about May 21, Pavon went to City Hall to obtain her identification card. Upon returning to her office, co-workers told her that appellant had been looking for her. As a result, she approached him to show him her identification card. Pavon said that appellant then said that he thought she was coming to give him a lap dance. She further testified that appellant had a habit of sitting sideways in a chair across from her desk, staring at her, and holding his phone like he was taking pictures or recording her. This made her feel uneasy. As a result, Pavon began taking pictures of appellant to have proof of what was occurring.

After her probationary period, Pavon stated that appellant intervened in Construction Code matters and made demands of her at the customer service desk. She cited to an incident involving an illegal electrified fence that appellant insisted needed to be inspected immediately. This took place on a day when Lobozzo was on

[3] Appellant was not in that meeting, nor is there any evidence that Charles conveyed this restriction to him. Moreover, the evidence relied upon as substantiation as to what transpired was an email from Lobozzo dated February 26, 2021, memorializing his thoughts and notes on the meeting from the day before. As discussed throughout, Lobozzo was never called as a witness even after I suggested to respondent that his nonappearance might justify an adverse inference.

vacation. There was also an incident with a woman who operated a day care center. Pavon claims that they were not arguing but admitted they were both being "passionate" about their positions. Appellant came over after the customer asked for him by name as a supervisor with whom she was acquainted from prior applications. Appellant wrote down Charles' contact information for her and gave it to her so she could complain.

Pavon testified that there was one occasion where she was talking with several co-workers in the Construction Office on a Friday afternoon, and they were laughing. Gilmore approached them and asserted that they seemed happy and inquired if they had been drinking. Pavon testified that his statement had a tremendous impact on her since she has been in Alcoholics Anonymous for 26 years and has not had a drink since then. This also led to her having to reveal that she was a member of Alcoholics Anonymous because she received an inquiry as to why she was upset.

Pavon stated that a friend of appellant – Ernest Rucker – was a frequent visitor to the office and would meet appellant for lunch and also hang out. She asserted that Rucker joked out loud in the customer service area about whether it was okay for him to walk through the area or if she was going to complain about sexual harassment. These allegations were from August and October, and she conveyed them in emails to in-house counsel and the outside counsel investigating her complaint.

Pavon also complained in mid-September that appellant had confiscated some donuts and boxes of coffee donated to the office for his own enjoyment, then took them to the Police Department and claimed the credit for the gesture. Appellant then sent out an email to the office reminding staff about the city gift and ethics policies. Pavon found all of these incidents to be very intimidating, including that appellant was still sitting in the chair that faced her. She found it hard to get her work done because of his interference and retaliation, and she would often have to work late because of the backlog. When she did, Pavon claimed that appellant would be sitting in his car outside while it idled for extended periods of time until she came through the door to go home.

On cross-examination, Pavon acknowledged that she was not clear when she started her employment that appellant was the Director of the Community Improvement

Division and that the UCC was a sub-division. She also could not say to whom Lobozzo reported at that time. After that first meeting with him, Pavon did not have any other meetings with appellant in his office, but she insisted that he nevertheless made demands of her. After she and Lobozzo met with Charles during her first week of city employment, Pavon stated that Charles went into appellant's office and upon his return, confirmed that he had told appellant not to bother Pavon during her probationary period.

Pavon further testified that she "felt" like appellant was videotaping her, but she admitted she had no proof. In late July, she after she had started taking photos of him sitting in the chair across from her, Pavon described appellant as staring directly at her with a maniacal look on his face for a long time. In reference to a photo, she took on July 29, 2021, Pavon agreed that the phone was not up near his face but lower at his chest level, yet she insisted that could still indicate he was photographing her. Pavon reiterated that he lurked outside many times, although not "always."

Pavon was cross-examined with respect to her complaint she filed in mid-August. She concurred that she had named numerous witnesses in her initial complaint but was not aware of how many or who Bridges interviewed.[4] She did not recall that she was interviewed three times. She also did not know why Lobozzo had reprinted or forwarded earlier emails; but she speculated that the Legal department had requested that of him.

Even after the conclusion of the Bridges' investigation, about which Pavon apparently had been informed, she felt intimidated by appellant parking his car near hers, allegedly waiting and watching for her to leave the office. She also complained that he was posting on social media about her although she was apparently not mentioned in them. She also claimed that appellant ranted at a council meeting posted on YouTube that referenced being falsely accused of sexual harassment, which could only have been about her – again, not by name – but "everyone" knew she had filed a complaint.

[4] It appears that only Cabrera was also interviewed. No other witness was interviewed by him although the emails indicate that he sought to interview appellant who then referred him to his attorney. Apparently, nothing came of this effort. Bridges was also not called as a witness by respondent.

Pavon added detail to the coffee and donut incident, stating that she not only saw appellant take them to his office, but she went over and saw them on his desk. Horatio McCoy later told her that appellant directed him to help get them over to the Police Department. Lastly, she claimed that her counter was not always as cluttered with plants and other personal items as appellant claimed.

David Gilmore testified on his own behalf. He was hired as the Contract Compliance Officer by Paterson in March 2015, and within the first year, transitioned to the Director of Community Improvements, the position from which respondent seeks to remove him in this matter. He detailed his earlier career, including his work in Connecticut as a State Inspector for its Rental Assistance Program. He then became the first Director of the Waterbury Office of Housing, implementing its initial policies and procedures, and hiring its first staff persons. Appellant described his Paterson job responsibilities, as well as his concern for the deteriorating housing conditions in the city for persons with low or moderate income.

As Director, appellant oversaw both the housing and construction code subdivisions of Community Improvements. Lobozzo reported to him from the code side up until August 2021. Appellant reported to Powell and his predecessor Ruben Gomez. He referenced in his testimony that he was commended for his stellar efforts and recommended for a raise in 2017. He described himself as a hands-on manager who runs a tight ship. Appellant wanted to tighten the reins in the Division which had been loose before he got there, with rumors of a number of "non-kosher" things happening on the UCC side of the office. Appellant reorganized schedules so that it would be more definite when the public could speak with inspectors. He also testified to some automation changes, and generally, a more professional approach to office decorum and performance.

Appellant explained that his corner office was out of the way from where customers approached the staff, so he tended to get out on the floor or in that open area of cubicles known as the "pit." This was his routine before either Pavon or Charles were hired. The desk and chair that became a focus for respondent had been occupied

by a female employee who left on maternity leave before the pandemic, but even then, there was usually an empty spot or two on that side of the office. Appellant denied that he stared or intimidated Pavon or anyone else working the customer service counter. He was actively monitoring everyone as he believed a supervisor should. Appellant also denied photographing her or anyone else, citing to the policy on personal photos and social media, to which he adhered.

Appellant testified that he was unaware until late September that there were any claims of intimidation or harassment against him. Appellant was shocked by the allegations and stated he had never been accused of sexual harassment in his career. Appellant found Pavon's claim that he used the expression "lap dance" with her a complete fabrication. He also denied ever lurking outside. One time after he was suspended, he and his friend Rucker went to the office to retrieve his medications that he had had sent there because they required refrigeration and his own residential mailbox was unreliable.

Appellant had also been unaware of any reorganization meetings that seemed to have included just Lobozzo and Charles, and tangentially, had no proper vote of the city council. Appellant was of the opinion that he was legally accountable for everything that happened in the Division, including the UCC inspection issues. He described himself as being fervently concerned about public safety, citing the instances of the electrified fence and the childcare center that were the subject of Pavon's testimony.

Appellant acknowledged that he had disciplined Wanda Perez in the past because of her delinquency on turning around OPRA requests in a timely manner pursuant to the statute. He also had had to admonish Cabrera because in the last, she had brought in Spanish eggnog which the other staff would drink but also purchase from her. He recalled the one lunch incident when there was a lot of laughter and ruckus, during which he said in a light-hearted tone that he hoped there was not drinking going on. Appellant testified that he never singled anyone out, it was not directed at Pavon, and he had absolutely no idea of her history of AA.

On September 28, 2021, appellant was advised by an email from Charles for the first time about a complaint filed by Pavon against him. He also was unaware that the city had retained an outside firm to investigate her complaint. While Charles' email implied that appellant already knew, Charles seemed to acknowledge this was news to appellant and sent another email the next day. Appellant further testified that neither Powell nor Charles ever told him not to interact with Pavon nor reprimanded him about same between February 2021 until September 28, 2021. Gilmore clarified that up until August 9, 2021, he was still reporting directly to Powell. Further, he explained that as of September 28, 2021, Lobozzo had filed a complaint against Paterson and named him as an individual defendant. Between September 28 through December 17, appellant stated that he refrained from approaching Pavon and all communications with her ceased, although it was not until the PNDA issued that he knew of the specifics of her allegations. He also clarified that he might have still been in the vicinity of customer service because of his responsibilities as Director and supervisor of Housing.

Appellant also testified to his perspective on the incidents with citizens that occurred at the customer service desk with Pavon. With respect to the childcare owner, she had specifically asked for him and told Pavon she did not want to speak with her anymore. Appellant defused the situation and calmed her down, stating that Paterson residents can often be like this. He also, as was his habit, to provide general information to the customer as to how to register a complaint so that they never felt that there was no recourse. Appellant insisted at the hearing that he did not instruct the woman to file a complaint against Pavon.

Appellant also stated that he had no idea that Lobozzo and Charles were meeting in order to reorganize the structure of the Community Improvements Division as he was not copied on any of the emails exchanged between Lobozzo and Charles.[5]

[5] Appellant testified that the reorganization communications between Lobozzo and Charles were all occurring while Gilmore was still Lobozzo's direct supervisor, and yet he was not involved in any of those discussions. Appellant spent some time at this hearing to discuss what he considered to be the legal errors in this reorganization and how it left him still potentially liable for what took place in the office. He also stated that he did file a grievance with the union and Michael Jackson. I have no jurisdiction to address this reorganization and whether it was proper or properly approved and implemented. For purposes of this dispute, it provides merely backdrop to the conflicting contentions as to whether, where and over whom appellant was supervising UCC staff, and any charge of insubordination.

He testified that the atmosphere in Community Improvements had become toxic and he felt that Lobozzo and others were conspiring against him, trying to "dirty him up," and that Pavon and Bridges were recruited towards that effort. He believed that Lobozzo had encouraged Pavon to make complaints and take photos and that he might have even taken some of the photos presented in this case. Appellant felt "railroaded" without any genuine due process. He also noted that the subject line of the disciplinary emails referred to a five-day suspension, so he also felt blindsided by the immediate suspension without pay PNDA.

Appellant was also questioned on the view he had of Pavon and the customer service counter from the pit. He described the plants and decorations on the counter and the paper notices taped to the plexiglass. Appellant asserted that Pavon's head was only visible if she was sitting down. He denied ever taking photos or videos of her, or that he had ever been told by a supervisor not to sit there. While appellant confirmed that he is a very active and visible presence in Paterson politics, he denied that he ever posted on social media or reported verbally anything about Pavon. He also reiterated that he did not even know of her allegations in August 2021. Appellant acknowledged that he changed his mind about running for mayor because of potential state and federal lawsuits that he intended to file about various and numerous charges of illegal and unconstitutional actions by the council and city.

Appellant continued his testimony by noting that he actually worked at the computer on the desk in the pit and that the respondent's photos were very selective. Rebutting the respondent's witnesses, appellant stated that he was never advised that his long-time friend Rucker could not visit him at the office. It was also not credible that Rucker would have joked about sexual harassment as they did not even know of those allegations at the time Pavon said that happened. He also refuted the claims about the donuts and coffee. Appellant stated that it was clear policy that the office should not accept any gratuity or gift in excess of $100 because it was tantamount to garnering favor from the inspectors who inspected and enforced the UCC, and staff who issued permits. As a diabetic, he did not eat any of them anyways and took them to the police department. As the Director, he then issued a general email to the Community Improvement staff reminding them of the gift policy.

Appellant commented on the "electric fence" incident that arose at the customer service desk while Lobozzo was out of the office. Appellant was aware that the industrial electrified rolling gate had been installed on the residential property of a contractor without a permit or variance. He did consider that to be an issue of public safety and not just a paper violation because of the electrification. He cited it as an example of the uneven application of the regulations that he had been trying to root out of the department. As Director, he was certainly authorized to intercede if citizens and staff got loud or argumentative.

Appellant further disputed the allegations of Pavon that he sat outside in her car, lurking there and staring at her when she exited. They both had handicap placards and there were only two such spots at the building, so it was hardly unusual for them to be parked next to each other. He again denied any bullying, intimidation, or harassment of her.

On cross-examination, appellant conceded that he did not always sit in the chair across from the common customer service counter prior to Pavon being hired, but before then that specific work area had been occupied by someone who left on maternity leave. Appellant reaffirmed that he was the Director and had supervisory responsibility over both halves of the office until mid-August, so he moved around and observed many staff persons. While he agreed that he could have moved his staff's work stations after learning of Pavon's complaint, but again, that did not happen until the end of September. He was also cross-examined on the daycare center incident without any variation to his prior testimony. Appellant confirmed that he always wanted to leave the customer with an avenue to express dissatisfaction with himself or any of his staff, none of which was ever personal to Pavon.

Appellant admitted that he spoke with Pavon her first week about staying on top of reports and OPRA requests from the staff responsible for same, including Perez. He also advised her not to get too friendly with citizens coming to their office for regulatory

needs. Appellant denied spying on Pavon and said he took a panoramic view of the office.[6]

Ernest Rucker was presented as a witness for appellant. He described the instance in December when they drove together to the office to obtain appellant's medication. They both waited in the vehicle while McCord brought them out to them. He recalled seeing Lobozzo snapping a photo of them. Rucker never saw Pavon on that visit. With respect to her allegations about his comments inside the office in August, Rucker denied ever saying anything like that and knew nothing of her complaint. On cross-examination, he estimated that he might have gone with appellant to the office three times to retrieve the diabetes medication that was still being delivered there.

Michael Jackson testified on behalf of appellant. He is a supervisor within the Paterson Public Works Department, but also the President of Local 3474A covering certain city white collar employees. He has been in that position for seven years. Jackson is familiar with appellant and his tenure at the city. He was in Community Improvements once or twice a week and did observe appellant sitting in the pit. Jackson never heard any complaints against appellant concerning hostile work environment or sexual harassment, nor did he ever hear appellant use crude language. He never saw any photos or videos taken by appellant of Pavon. He could not see appellant's phone, nor could appellant see much more than Pavon's head.

Jackson confirmed that appellant filed a grievance against the Division reorganization that changed the direct report and hierarchy without his input. They tried an informal sit-down conversation but obtained no change. Jackson was not familiar with other instances in which the city hired an outside firm to investigate a complaint leading to disciplinary action.

On cross-examination, Jackson confirmed that he was in the building twice a week during the period 2016 through 2021. It became less frequent afterwards due to

[6] In addition, there was cross-examination on the issue of discovery and proceedings at the departmental level that I excluded because this hearing is *de novo*.

fewer union members. Jackson had observed that appellant preferred to work in the pit area rather than be closed off in a back corner office, unless he was having a private conversation. On further questioning, Jackson agreed that he might have heard on a second-hand basis of an outside firm investigating the Fire Chief in a past situation.

Horatio McKoy also testified for appellant. He has worked in the Economic Development Department since 2014 as a Constituent Service Liaison. He worked in the Mayor's Office for four years and then the Planning and Zoning Division since 2018. His office was next to appellant. McKoy alternated his location between his office and the customer service counter. McKoy testified that he observed appellant sitting in the pit both before and after Pavon was hired. He never heard him using crude talk and never observed him taking photos.

McKoy stated that there had been issues with phone calls in the customer service area not being answered promptly. He testified that Pavon could be charming to the customers but would also get loud or argumentative on occasion. Appellant would come over to the counter to intercede and interact with the customers at times.

McKoy confirmed that he assisted appellant with moving the coffee and donuts from the Housing coffee room to the police department. He also recalled meeting Rucker and appellant outside one day in order to bring appellant his medication. At that time, he saw neither Pavon nor Lobozzo.

On cross-examination, McKoy confirmed that he worked only with Housing and not the UCC side of the office. Most of the housing issues were handled over the phone and might concern trash or recycling not being collected or an illegal apartment or abandoned residence being reported. Appellant worked outside of his office most of the day, especially because they were short staffed. McKoy described the pit as set up with four cubicles. He was unaware of appellant's personal use of a cell phone.

Jesus Castro was called next by appellant as a witness on his behalf. Castro is presently the Zoning Official for Paterson, but during the period relevant to these allegations, he worked in Housing under the supervision of appellant. Castro stated that

appellant worked mostly in the pit and not in his office. He interacted with staff and customers, and would step in if there were arguments or disputes at the customer service counter. Castro confirmed that Pavon could get combative and argumentative with customers. He also recalled that Cabrera brought in a type of Spanish eggnog and was selling it to other employees. Castro did not purchase any, and in fact, appellant had warned against selling food in the office. In general, he described appellant's management style as strict and said he was a straight shooter.

On cross-examination, Castro agreed that appellant used his cell phone a lot, but he had no way of knowing if it was personal or for business. Castro had filed a grievance and a civil lawsuit but is still employed by Paterson and has no animosity toward the city.

Hazel D. Hughes also testified on behalf of appellant. Hughes has worked for Paterson for almost thirty years as a Senior Account Clerk. She also has served as a Local 3724 President for approximately twenty years. That union represents white collar employees, municipal clerk staff, and civilians in the fire and police departments. Neither appellant nor Lobozzo are in that union. Hughes has worked with appellant on his staff disciplinary actions, including one against Cabrera. Perez was also disciplined by appellant several times for being late and absences, as well as not responding to OPRA requests in a timely manner. Perez did not grieve those disciplinary actions.

Hughes stated that there have been no sexual harassment complaints against appellant, and never knew him to use crude language or sexual innuendos. Any complaints against appellant were made only after he had written up that employee. Hughes would generally tell those persons to just do their job and then go home.

Prior to her testimony at this hearing, appellant shared with Hughes the photographs that were the subject of Pavon's complaint. She took it upon herself to walk through the Housing office quickly and she sat in the chair in the pit. Hughes noticed that she could only see the top of Pavon's head if she was sitting down. Hughes works in a different building from Community Improvements.

On cross-examination, Hughes confirmed that appellant had sent her the relevant photographs to her private email account about a month before this hearing.

Andrea Kinion was called as a witness for appellant because of her experience in the Paterson Affirmative Action Office from 2004 to 2017. She had been employed by the city starting in 1995. Although I did not qualify her as an expert witness, she did testify factually about her background, training, and experience in investigating these types of matters. Kinion had reviewed the Bridges investigation in this matter and was surprised that he had not interviewed all persons who were or might have been witnesses to Pavon's allegations.

Kinion also noted that subordinates often counter-complained about being corrected by their supervisors, which she stated does not amount to harassment because it is a normal part of exercising oversight authority.

On the last day of the hearing, Pavon was recalled as a rebuttal witness to clarify that she took the photographs marked as R-11, -12, and -13, and then gave them to Lobozzo.

I **FIND** that respondent's witnesses were much less credible than appellant and his witnesses. Credibility means the testimony, as a whole, holds or hangs together and makes sense. Critically, there was absolutely no hard evidence that appellant recorded or photographed Pavon. If respondent was going to make a pattern and practice of intimidation and harassment – as opposed to just sitting in a chair thirty feet away -- the basis of immediately suspending a supervisor without pay, it should have undertaken a forensic investigation of his device. Strictly speaking, the only evidence of photography taking place in the office was with appellant as the subject of photographs taken by Pavon, Lobozzo, or their friends.

I also **FIND** that Pavon was hypersensitive about every glance or comment, especially for a new employee; for instance, personally taking appellant's comment to the group about not drinking in the office. He never said anything to her, had no knowledge of her past AA history, and did not make her disclose that to himself or

anyone else. She found every glance to be menacing and his physical location in or outside the office to be directed at her personally. While appellant came across as having a high sense of importance and righteousness, he had earned commendations for his strict and hands-on approach to managing the department prior to the hiring of Charles and Pavon.

Furthermore, most of the alleged evidence against appellant came from emails from Lobozzo to others, including to Charles. This is embedded double hearsay because the emails were relied upon for the truth of the matters set forth therein, but Charles is citing to Lobozzo who is citing to Pavon. The only witness who had direct knowledge of those matters was Pavon, whose testimony, as stated, I **FIND** was less than credible.

Further, there is an absence of substantiation that appellant was told not to sit in the pit in the "forbidden chair" by Charles, at least before September 28. I note again that Lobozzo was not his supervisor, although for much of the relevant period, appellant was Lobozzo's supervisor. Yet, relying upon photos taken in late December, after the PNDA and immediate suspension were already in effect, respondent asserts that appellant was insubordinate to those directives. It is also significant that Charles admitted that the "pit" was on the Housing side of the office and that there was nothing wrong with appellant sitting there. The preponderance of the credible evidence supports that he had done so before Pavon or Charles were hired, and that it was not his management style to stay in his back corner office.

More importantly, I **FIND** a great deal of exaggeration and coordination among the testimonies of respondents' witnesses that appellant was sitting directly across from Pavon. Notwithstanding an obvious attempt to make the visual evidence look more damning through zoom, the distance between the pit and the customer service desk was estimated to be thirty feet, with obstructions between those end points.

Pavon's allegation that he expressed disappointment or used inappropriate sexual banter she was not giving a "lap dance" in May 2021 was not corroborated, and it was vehemently denied by him. Despite the fact that the respondent called her two

co-workers to testify, they did not mention it. There is no question that she never complained about this at the time it occurred in May 2021, and mentioned it only when she wrote up her August complaint. The only charge of confusing her about the office hierarchy came in her first week, when it is undisputed that Lobozzo and all Community Improvements staff were under appellant's supervision. There are no allegations that Gilmore bothered Pavon during her probationary period; in fact, Pavon admitted that he kept himself in the background.

Similarly, Alum was the only one who said that appellant took a disgruntled customer into his office and then Alum essentially testified that he knew what went on there when he had no means of observing same. He was also the only one who said he saw an image of Pavon on appellant's phone, but he never reported that to anyone. In addition, I **FIND** that both Cabrera and Perez, who had received discipline from appellant in his capacity as their supervisor, had a reason to be biased against him and were thus less than credible.

There is also a claim by Pavon that she felt embarrassed and uncomfortable when appellant reminded a boisterous group of staff that they should not have any alcoholic products in the office. I **FIND** that the only credible evidence is that this was directed broadly by a manager to some staff which happened to include Pavon, about whose background appellant had no knowledge. Similarly, the "donut incident" has also been overblown and unsupported. Appellant enforced the ethics policies of the office while Pavon stalked the donuts. I also **FIND** it significant to the question of her credibility that she did not file the complaint until August 19, 2021, and Gilmore had no knowledge of her complaint until September 28, 2021, making her allegations of Rucker's sexual harassment comments not believable. Whether "encouraged" or "coached" by Lobozzo, or just seeing life through an almost paranoid lens, Pavon viewed every action by the Director personally.

In sum, this removal action factually revolves around some initial and limited confusion on the part of Pavon when she started in her position with Paterson in February 2021 as to the hierarchy in the office, which at the time entailed her reporting to Lobozzo who reported to Gilmore. This appears to have been the genesis of

reorganization discussions between Lobozzo and Charles, but never with appellant. There was an unreported and unsupported allegation by Pavon that appellant used the phrase "lap dance" to her in May 2021. There is credible testimony that Pavon sometimes clashed with customers and that occasionally Gilmore would approach the customer service area to defuse the conflict and solve the issue if possible. There is no competent evidence that he ever egged on a member of the public to file a complaint against Pavon.

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). Governmental employers also have delineated rights and obligations. The Act sets forth that it is State policy 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).

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. The issues to be determined at the de novo hearing are whether the appellant is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. See Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962). In this matter, the respondent bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Matter of Revocation of the License of Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, I must

"decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959) (citation omitted). Preponderance may also be described as the greater weight of 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).

For the reasons set forth herein and on the basis of the credibility findings above, I **CONCLUDE** that Paterson has wholly failed to meet its burden of proof with sufficient credible evidence on these allegations and the FNDA must be dismissed in its entirety. There are several charges set forth in that disciplinary action, including conduct unbecoming a public employee. "Conduct unbecoming a public employee" has been described as any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service. See In re Emmons, 63 N.J. Super. 136, 140-42 (App. Div. 1960); cf. Moorestown Twp. v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965), certif. denied, 47 N.J. 80 (1966). In the circumstances of this case, the charges of insubordination and "other" causes can be merged into the conduct unbecoming a public employee allegation. See Bell v. Burlington County Dept. of Highways and Bridges, 1998 N.J. AGEN LEXIS 187, *9-10 (1998).

The claim of sexual harassment in only based upon the "lap dance" comment allegedly made by appellant to Pavon. As found above, I found this allegation was not credible and it certainly cannot be the basis of any pattern or practice. As stated, she failed to report the event to anyone for three months, including to Lobozzo. Moreover, it was clearly out of character for appellant who prides himself upon his standards of professionalism in the workplace and was described credibly as strict and by-the-book.

The claim of general harassment, bullying, lurking or intimidation by appellant towards Pavon was also not supported by the preponderance of the credible evidence. I have found that she was hypersensitive about every glance from him in the direction of the customer service counter. A few photographs of him looking perhaps in her direction do not constitute a representative picture of how he engaged his staff, where he sat, where he walked, or other functions of appellant in his role as Director of Community Improvements over a ten-month period. Again, the testimony of Perez and Cabrera do not credibly support Pavon's testimony because I have found that they had reasons to be biased against appellant.

Furthermore, respondent's allegations against appellant are significantly weakened by its failure to call Lobozzo as a witness. After asking counsel if they would be called and then warning counsel that I found his absence somewhat glaring and obvious in light of how involved he was in these alleged events, albeit behind the scenes, I directed counsel to brief the issue of whether I should draw an adverse inference from that fact.

It was Lobozzo who kept forwarding photos of Gilmore and reciting so-called encounters which he admitted he did not see or hear. Lobozzo wrote about those meetings and conversations in various emails which were admitted into evidence and used by the respondent to justify bringing the charges in the first place. The record, however, does not contain what was said in those meetings or what promises were made, and there was no opportunity to cross-examine Lobozzo as to his motivations in making the statements and complaints in the first place. One might almost say that Lobozzo orchestrated this entire controversy, although that also could not be probed because of the failure of respondent to present him as a witness. It is undisputed that there are lawsuits being battled out in court between Lobozzo and Gilmore and Paterson. This administrative action appears to be a tangent.

There is a similar concern with the absence of Bridges as a witness insofar as his investigation and interviews formed the principal basis of the issuance of the PNDA by Charles. His absence meant that his failure to interview potentially significant

corroborating or exculpating witnesses to Pavon's allegations against appellant could not be probed or subjected to cross-examination.

The "missing-witness inference" provides a mechanism by which an adverse party may obtain a jury instruction or adverse inference where a party fails to call a witness who would "elucidate relevant and critical facts in issue[.]" Washington v. Perez, 430 N.J. Super. 121 (App. Div. 2013) (quoting State v. Clawans, 38 N.J. 162, 170 (1962)). The New Jersey Supreme Court also addressed the missing-witness inference in State v. Hill, 199 N.J. 545, 560-61 (2009). In deciding whether to apply an adverse inference, the court must consider various factors. To guide that assessment, the Hill Court set forth a four-pronged test: (1) that the uncalled witness is peculiarly within the control or power of only the one party, or that there is a special relationship between the party and the witness or the party has superior knowledge of the identity of the witness or of the testimony the witness might be expected to give; (2) that the witness is available to that party both practically and physically; (3) that the testimony of the uncalled witness will elucidate relevant and critical facts at issue; and (4) that such testimony appears to be superior to that already utilized in respect to the fact to be proven. Id. at 561-62. See also Torres v. Pabon, 225 N.J. 167 (2016). Here, I **CONCLUDE** that all four prongs are met in this case; in fact, it is beyond question. Thus, I **CONCLUDE** that an adverse inference must be drawn from the absence of Lobozzo's testimony at this hearing; that is, one must assume that his testimony and cross-examination would not have gone well or aided respondent's case but rather, would have revealed its fissures and perhaps the motivations behind appellant's removal.

In sum, and on this factual record, I **CONCLUDE** that respondent has not proven by the preponderance of the credible evidence that appellant's conduct, even to the small extent some aspects of the allegations might have occurred, which I have found they did not, was severe or a risk to public safety. A reasonable, objective person would not have considered Pavon to have been intimidated by appellant, or to have found that he "lurked" or bullied her. He exercised his managerial authority to diffuse arguments at the customer service counter and to enforce ethics and other professional standards in the Division. His supervisor, Charles, did little to nothing to hear

appellant's side of any of these allegations or to objectively evaluate Pavon's claims before summarily suspending him without pay.

I **CONCLUDE** that there was no intimidation, hostile work environment, or sexual harassment, except in the mind of Pavon, and apparently our missing witness Lobozzo. Appellant, the Division Director, sat in a chair and observed the common customer service area. There was no constant badgering, no bullying, and no retaliation, in spite of respondent's attempt to advocate as if there had been.

Insofar as I have concluded that Paterson has not supported its case for the disciplinary action it has taken against appellant, I need not reach the question of whether his unpaid suspension and removal were the appropriate level of discipline. Nevertheless, I want to address this in case that issue is reached by the Commission so that it may have the benefit of my credibility and fact findings from the witnesses and documents over which I presided.

A system of progressive discipline has evolved in New Jersey to serve the goals of providing employees with job security and protecting them from arbitrary employment decisions. Progressive discipline is considered to be an appropriate analysis for determining the reasonableness of the penalty. See Bock, supra, 38 N.J. at 523-24. The concept of progressive discipline is related to an employee's past record. The use of progressive discipline benefits employees and is strongly encouraged. The core of this concept is the nature, number and proximity of prior disciplinary infractions should be addressed by progressively increasing penalties. It underscores the philosophy that an appointing authority has a responsibility to encourage the development of employee potential.

In addition to considering an employee's prior disciplinary history when imposing a penalty under the Act, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Ibid. Depending on the conduct complained of and the employee's disciplinary history, major discipline may be imposed. Id. at 522-24. Major discipline may include removal, disciplinary demotion, a fine, or suspension of no greater than six

months. N.J.S.A. 11A:2-6(a), -20; N.J.A.C. 4A:2-2.2, -2.4. I concur that there are circumstances when bypassing progressive discipline and seeking removal has been deemed appropriate, but this is not such a case.

> [P]rogressive discipline has been bypassed when an employee engages in severe misconduct, especially when the employee's position involves public safety and the misconduct causes risk of harm to persons or property. *See, e.g.*, Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980); Bowden v. Bayside State Prison, 268 N.J. Super. 301, 306 (App. Div. 1993), *certif. denied,* 135 N.J. 469 (1994).
>
> [In re Herrmann, 192 N.J. 19, 33-34 (2007).]

Prior to the filing of these charges, appellant had only received one written warning, which I ruled was irrelevant. There was no attempt in this matter to use progressive discipline. While a charge of great seriousness can result in removal without going through prior disciplinary sanction steps, I **CONCLUDE** that respondent has not supported such action here, let alone an immediate, unpaid suspension. Appellant was a managerial employee of Paterson with barely a blemish on his record, and a history of professionalism. There was no evidence of any prior accusations of sexual or any other type of harassment. There was decided evidence of managerial and/or political conflict between Lobozzo and appellant; yet, the former never testified and the latter was never interviewed during the investigation or at any point in the process of respondent's consideration of Pavon's complaints, or during the reorganization.

In this case, I also have taken into consideration the bad feelings, distrust, and litigation between these two principal managers in this Division office, which preceded this incident. Respondent claims that the reorganization was because of their obligation to take remedial measures to stop alleged harassment of an employee, but the employee it means in that assertion was Lobozzo. In fact, this disciplinary action has many of the earmarks of a vendetta and a means of removing appellant from city government for reasons having nothing to do with Sandra Pavon and everything to do

with a clash of lawsuits infecting the Division on whose side management appears to have settled on Lobozzo.

In sum, I concur with appellant and **CONCLUDE** that these trumped-up disciplinary charges rest primarily on testimony from biased witnesses, hearsay, and fuzzy photos of appellant sitting in a chair. Not only has respondent not supported its burden of proving the allegations, but even if it had, a discipline of no more than thirty (30) days would have been warranted.[7]

ORDER

For the reasons set forth above, it is **ORDERED** that the disciplinary charges filed against appellant David Gilmore are **REJECTED**. It is further **ORDERED** that the discipline imposed of removal by the respondent City of Paterson is **REVERSED**.

It is further **ORDERED** that appellant David Gilmore is entitled to back pay and any other benefits and seniority that would have otherwise accrued had he not been removed. It is further **ORDERED** that reasonable 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

[7] As an advocate of alternative dispute resolution methods, especially in circumstances where the "relationship" amongst the parties is continuing, I would urge the city to engage a neutral to diffuse the tensions between Gilmore and Lobozzo, with perhaps some separation to different divisions.

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 27, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 3/27/23

Mailed to Parties: 3/27/23

id

APPENDIX

LIST OF WITNESSES

For Appellant:

David Gilmore

Michael Jackson

Horatio McKoy

Jesus Castro

Hazel D. Hughes

Andrea Kinion

For Respondent:

Michael Powell

Osner J. Charles

Wanda Perez

Teresa Cabrera

Mohammad Alam

Sandra Pavon

LIST OF EXHIBITS IN EVIDENCE

For Appellant:

P-1 NJ CSC Job Specification - Director of Community Improvements

P-2 Paterson City Code §5-83 – §5-93

P-3 NJ CSC Job Specification – Assistant Director of Economic and Industrial Development

P-4 Various Emails re UCC and fire hazard issues, dated June to August 2021

P-5 Various Emails re office hierarchy, dated August 2020 to August 2021

P-6 Email from Charles to Gilmore re hostile work environment, dated September 28, 2021

P-7 Reply Email from Gilmore to Charles, dated September 28, 2021

P-8 Reply Email Charles to Gilmore re outside investigation, dated September 29, 2021

P-9 [not in evidence]

P-10 [not in evidence]

P-11 [not in evidence]

P-12 [not in evidence]

P-13 Labor Agreement Paterson and A.F.S.C.M.E. AFL-CIO Local 347A (White Collar Supervisors) July 1, 2014, through June 30, 2019

P-14 Emails from Gilmore to Powell and others re departmental hearing, dated December 2021

P-15 Various discovery documents and Pavon's complaint

P-16 Wesley Bridge's report from City, dated August 7, 2022

P-17 Letter re Dave Gilmore Salary Increase, dated January 17, 2017

P-18 [not in evidence]

P-19 City of Paterson Personnel Action Listing by Employee ID

P-20 [not in evidence]

P-21 [not in evidence]

P-22 [not in evidence]

For Respondent:

R-1 Preliminary Notice of Disciplinary Action, December 7, 2021; with cover letter, dated December 15, 2021

R-2 Amended Preliminary Notice of Disciplinary Action, December 17, 2021; with cover letter, dated December 28, 2021

R-3 Final Notice of Disciplinary Action, April 19, 2022

R-4 Paterson Personnel Policies and Procedures Manual – Policy Against Unprofessional Conduct and Policy Prohibiting Harassment in the Workplace

R-5 Distribution Email re: City of Paterson Personnel Policies and Procedures Manual, dated May 5, 2021

R-6 Memorandum from Powell to Gilmore re referrals, dated June 17, 2020

R-7 Minor Notice of Disciplinary Action, dated June 5, 2020

R-8 Email from Lobozzo to Charles, dated February 26, 2021

R-9 Email from Lobozzo to Charles, dated August 3, 2021

R-10 Email from Lobozzo to Charles, dated November 24, 2021

R-11 Email from Lobozzo to Charles, dated December 1, 2021

R-12 Email from Lobozzo to Charles, dated December 7, 2021

R-13 Email from Lobozzo to Charles, dated December 13, 2021

R-14 Email from Charles to Gilmore, dated September 28, 2021

R-15 Email from Charles to Gilmore and attached Policies, September 29, 2021

R-16 Email from Pavon to Powell and Charles, December 27, 2021

R-17 Email from Pavon to Powell and Charles, dated December 30, 2021

R-18 Pavon's Employee Complaint Form and attachments

R-19 Email from Pavon to Bridges, dated September 23, 2021

R-20 Emails between Pavon and Bridges, dated September 17 to 28, 2021

R-21 Email from Pavon to Bridges with attachments, dated October 1, 2021

R-22 Email from Pavon to Bridges, dated October 4, 2021

R-23 Email from Pavon to Bridges with attachments, dated October 4, 2021

R-24 Email from Pavon to Bridges with attachments, dated October 6, 2021

R-25 Email from Pavon to Lack, dated August 27, 2021

R-26 Email from Pavon to Lack, dated September 10, 2021

R-27 Email from Pavon to Lack, dated February 15, 2022

R-28 [not in evidence][8]

R-29 [not in evidence]

R-30 [not in evidence]

R-31 [not in evidence]

R-32 [not in evidence]

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[8] As discussed in colloquy with counsel at the hearing, appellant posed an objection to the admittance into evidence of Exhibits R-28 – 32 on both procedural and substantive grounds. First, the timing of this submission forms one basis for my determination to exclude them herein. The hearings in this matter were started on October 19, 2022, and all document exchanges should have concluded before then. N.J.A.C. 1:1-10(e). The hearings were then continued to November 28 and 29, 2022. Thanksgiving was November 24, 2022, and many people also take the day after off. I worked remotely that day. On November 28, 2022, at 10:08 a.m., counsel for the city sent an email with a cloud-based link to these documents, a link which could not be opened. While the cover letter was dated November 23, 2022, no documents or link to them were electronically received that date. Thus, these were proffered very late in the OAL process. Moreover, and even as rebuttal documents, they address only the issue of what discovery Gilmore and his counsel were provided for the departmental hearing and when. Insofar as this matter at the OAL is conducted *de novo*, **I FIND** them to be irrelevant in addition to untimely.