

A-4



STATE OF NEW JERSEY

In the Matter of Marisha Penn,
Hudson County, Department of
Family Services

FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION

CSC DKT. NO. 2017-2632
OAL DKT. NO. CSV 03111-17

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ISSUED: NOVEMBER 3, 2017 BW

The appeal of Marisha Penn, Human Services Specialist 4, Hudson County, Department of Family Services, 20 working day suspension, on charges, was heard by Administrative Law Judge Joann Lasala Candido, who rendered her initial decision on October 3, 2017. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on November 1, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision to modify the 20 working day suspension to a 10 working day suspension.

Since the penalty has been modified, the appellant is entitled to 10 working days of back pay, benefits, and seniority, pursuant to *N.J.A.C. 4A:2-2.10*. However, the appellant is not entitled to counsel fees. Pursuant to *N.J.A.C. 4A:2-2.12(a)*, the award of counsel fees is appropriate only where an employee has prevailed on all or substantially all of the primary issues in an appeal of a major disciplinary action. The primary issue in any disciplinary appeal is the merits of the charges, not whether the penalty imposed was appropriate. See *Johnny Walcott v. City of Plainfield*, 282 *N.J. Super.* 121, 128 (App. Div. 1995); *James L. Smith v. Department of Personnel*, Docket No. A-1489-02T2 (App. Div. March 18, 2004); *In the Matter of Robert Dean* (MSB, decided January 12, 1993); *In the Matter of Ralph Cozzino* (MSB, decided September 21, 1989). In the case at hand, although the penalty was modified by the Commission, charges were sustained and major discipline was

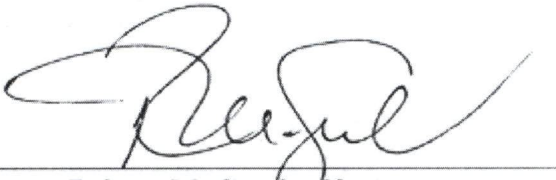
imposed. Thus, the appellant has not prevailed on all or substantially all of the primary issues of the appeal. Consequently, as the appellant has failed to meet the standard set forth at *N.J.A.C. 4A:2-2.12(a)*, counsel fees must be denied.

ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the 20 working day suspension to a 10 working day suspension. The Commission further orders that appellant be granted 10 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as provided for in *N.J.A.C. 4A:2-2.10*. Proof of income earned shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
NOVEMBER 1, 2017



Robert M. Czedh, Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Christopher S. Myers
Director
Division of Appeals and Regulatory Affairs
Civil Service Commission
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attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 03111-17

AGENCY DKT. NO. 2017 2632

**IN THE MATTER OF MARISHA PENN,
HUDSON COUNTY DEPARTMENT OF
FAMILY SERVICES,**

Merick Limsky, Esq., for appellant (Limsky Mitolo, attorneys)

John A. Smith, Esq., for respondent (Office of the County Counsel, Donato J.
Battista, County Counsel), for respondent

Record Closed: September 6, 2017

Decided: October 3, 2017

BEFORE JOANN LASALA CANDIDO, ALAJ:

STATEMENT OF THE CASE

Appellant, Marisha Penn, a Human Service Specialist IV Supervisor, appeals a twenty-day suspension issued by respondent, Hudson County Department of Family Services (Respondent or County), effective February 14, 2017. Respondent alleges that appellant's conduct was unbecoming a public employee on December 13, 2016, when she raised her voice at her employee Marc Percella, resulting in a loud altercation. This conduct unbecoming interfered with the order and effective direction of

public service thus constituting insubordination and a neglect of her duty to the respondent.

PROCEDURAL HISTORY

On January 10, 2017, respondent issued a Preliminary Notice of Disciplinary Action against appellant and an administrative hearing was held on January 27, 2017. A Final Notice of Disciplinary Action issued on February 7, 2017 sustaining the charges of insubordination, conduct unbecoming a public employee and neglect of duty.

On March 6, 2017, the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), for a hearing 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. The hearing scheduled for June 13, 2017 was adjourned at the request of the County. The hearing was then held on September 6, 2017, on which date the record closed.

ISSUE

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

TESTIMONY

The testimony of the witnesses presented is not intended to be a verbatim report. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented.

Roger Quintana

Roger Quintana, personnel officer with the Hudson County Department of Family Services, testified on behalf of respondent. He stated the policy for supervisors directs them not criticize employees in front of their peers or clients, but rather wait until the worker's interview. R-2 In the alternative, speak in a calm but firm manner and direct the employee to the office in as low as possible tone of voice. Quintana testified that appellant did not get along with a social worker, Marc Percella, and directed both employees to cease and desist any further contact with each other.

Regarding the verbal altercation between appellant and Percella on December 13, 2016, Quintana testified that he can only make a recommendation for a penalty. A hearing officer determines the discipline imposed. Appellant has not had any prior disciplines in her position as supervisor, but had received a written warning on February 9, 2010, while a social worker HSSI for insubordination, prior to her promotion. The substance of that prior charge was that appellant and two other employees did not leave an area when directed to do so. Appellant entered into a settlement agreement with Hudson County in September 2012 for a second charge accepting a reduction of a ten-day suspension to seven days for exhibiting a public disturbance when appellant slammed her hand on the reception desk and yelled at the security guard.

Debra Picariello

Debra Picariello, assistant administrator and appellant's supervisor, testified on behalf of respondent with regard to the incident on December 13, 2016. Picariello testified that she and appellant went into the office of assistant administrator Janet Wraga to discuss Percella being in appellant's office. The office door to Wraga's office was ajar when Percella entered and at which time he started yelling at appellant, calling her a baby. Percella and appellant left the office, yelling at each other. Percella exited first and appellant followed him. He yelled at her and she yelled back. There were workers and clients present.

Picariello testified that there are employment memoranda, which discuss the appropriate conduct of both employees and supervisors. She stated that this incident should never have escalated, and that appellant as a supervisor, should never have yelled back. She further stated that appellant and Percella always seemed to have an issue with each other.

Janet Wraga

Janet Wraga, assistant administrator with respondent, testified on behalf of respondent regarding the December 13, 2016 incident. She stated that appellant first went to Picariello's office to complain that Percella had entered her office. Both appellant and Picariello then went to Wraga's office to discuss Percella. Percella followed appellant into the office after which a loud argument ensued between appellant and Percella outside her office. Wraga stated that appellant could have handled the matter differently, despite Percella's conduct, which she felt was also inappropriate.

Jason Collazo

Jason Collazo, a Human Service Specialist I with the Hudson County Department of Family Services, testified on behalf of respondent. He stated that on December 13, 2016, he heard appellant and Percella yelling at each other from a distance. He noticed that appellant was following Percella, who was shouting at appellant that she should grow up and stop acting like a baby.

Marisha Penn

Appellant testified on her own behalf. She has been an employee of Hudson County for fourteen years and is currently a Human Service Specialist 4 Supervisor. Appellant stated that sometime in May 2015 an issue arose with Percella when he did not comply with her directive to handle many clients from her unit due which was understaffed. After that incident, both parties disliked each other to the point where a

directive was put in place that each was not to have any contact with the other. At or about the same time, Percella's direct supervisor was placed in Penn's office to share space. Appellant advised the supervisor that she and Percella were not to have contact with each other and it was agreed that Percella would not come into the office unless his supervisor was present.

On December 13, 2016, when appellant was alone, Percella entered her office to drop off paperwork for his supervisor. Appellant immediately left the office and went to Picariello's office. Picariello and appellant then went to Wraga's office. Percella also entered Wraga's office and began yelling at appellant, calling her names. They both exited the office and appellant yelled at him to stay out of her office. There were clients and co-workers in the area. Appellant had, on several occasions, complained to her supervisors that Percella needed to stop coming into her office while she was alone or, in the alternative, to move his supervisor's basket or his supervisor elsewhere. Appellant has a written warning and a seven-day suspension, neither of which occurred while she was a supervisor.

I **FIND** the testimony offered by all witnesses to be consistent straightforward and uncontroverted.

FACTS:

Based on the evidence presented at the hearing and the testimony of all witnesses and appellant which testimony is essentially undisputed, I make the following findings of relevant fact in this matter:

1. Appellant is employed by respondent as a Human Services Specialist IV supervisor.
2. Appellant's supervisor had issued a cease and desist order of contact between appellant and social worker Percella since an argument ensued between them in 2015.
3. On December 13, 2016, Percella entered appellant's office while she was alone, in violation of the terms of the cease and desist order.

4. As a result, appellant and Percella became involved in a loud altercation with each other.
5. Appellant, a supervisor, inappropriately raised her voice with this employee in front of co-workers and clients, rather than attempting to quietly resolve their dispute.
6. Appellant was given a twenty-day suspension for her inappropriate conduct, effective February 14, 2017.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

An appointing authority may discipline an employee on various grounds, including insubordination, conduct unbecoming a public employee and other sufficient cause. N.J.A.C. 4A:2-2.3(a). Such action is subject to review by the Merit System Board, which after a de novo hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962). In an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149.

In the present matter, appellant was charged with insubordination and conduct unbecoming a public employee, violating Civil Service Rule N.J.A.C. 4A:2-2.3(a)(6) for raising her voice at an employee in front of co-workers and clients in violation of respondent's policy and procedure, which reads in part:

"Do not criticize any employee, especially subordinates, in front of their peers or clients. If possible wait until after the workers interview if not then instruct the worker in a non-judgmental tone of voice to report to you at the conclusion of the interview calmly explain your concerns/observations to the employee and ask for an explanation." R-3

I **FIND** that appellant failed to follow this procedure when she raised her voice at an employee in front of clients and employees, rather than take him aside and speak to him calmly.

“Unbecoming conduct” is broadly defined as any conduct that adversely affects the morale or efficiency of the governmental unit or that has a tendency to destroy public respect and confidence in the delivery of governmental services. In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Conduct unbecoming need not be predicated on violations of the employer's rules or policies, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct. Karins v. City of Atlantic City, 152 N.J. 555 (1998). Accordingly, I **CONCLUDE** that appellant's inappropriate loud tone of voice and her following a worker into a common office with her voice raised, deviated from the “standard of good behavior” expected of every public employee.

Insubordination is defined as intentional disobedience or refusal to accept a reasonable order, assaulting or resisting authority; and disrespect or use of insulting or abusive language. Black's Law Dictionary 870 (9th ed. 2009) defines insubordination as a “willful disregard of an employer's instructions” or an “act of disobedience to proper authority.” Id. at 802. Webster's II New College Dictionary (1995) defines insubordination as “not submissive to authority: disobedient.” Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined. Similarly, case law generally interprets the term to mean the refusal to obey an order of a supervisor. See e.g. Belleville v. Coppla, 187 N.J. Super. 147 (App. Div. 1982); Millan v. Morris View, 177 N.J. Super. 620 (App. Div. 1981); Rivell v. Civil Service Comm'n, 115 N.J. Super. 64 (App. Div. 1971), certif. denied, 59 N.J. 269 (1971). According to Webster's II New College Dictionary (1995) “insubordination” refers to acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Stanziale v. County of Monmouth Bd. of Health and Merit Sys. Bd., 350 N.J. Super. 414 (App. Div. 2002), certif. denied, 174 N.J. 361 (2002).

Based upon the **FACTS** provided, the record does not show that appellant was willfully disobedient to a supervisor, and as such, I **CONCLUDE** that respondent has not demonstrated by a preponderance of the legally competent and credible evidence that appellant committed acts of insubordination.

Lastly, appellant was also charged with neglect of duty, violating N.J.A.C. 4A:2-2.3(a)(7). Neglect of duty can arise from an omission to perform a duty or failure to perform or discharge a duty and includes official misconduct or misdoing, as well as negligence. Steinel v. City of Jersey City, Initial decision, 7 N.J.A.R. 91, 95 (March 21, 1983), modified on other grounds, Civ. Serv. Comm'n, 7 N.J.A.R. 100 (May 12, 1983), modified on other grounds, 193 N.J. Super. 629 (App. Div. 1984), aff'd, 99 N.J. 1 (1985). Generally, the term neglect connotes a deviation from normal standards of conduct. In re Suspension or Revoc. of the License of Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977).

I **CONCLUDE** that respondent has not met its burden of proving, by a preponderance of the competent and credible evidence, that appellant failed to perform her job duties. The only evidence and testimony in the record dealt with an altercation that occurred on December 13, 2016 and nothing else.

PENALTY

Factors determining the degree of discipline to be imposed include the employee's prior disciplinary record and the gravity of the misconduct in the instant case, as well as the concept of progressive discipline. W. New York v. Bock, 38 N.J. 500, 522-524 (1962). The New Jersey Supreme Court has recognized that the principle of progressive or incremental discipline is not a "fixed and immutable rule" that must be applied in every disciplinary setting. In re Herrmann, 192 N.J. 19, 33 (2007); In re Carter, 191 N.J. 474, 484 (2007). Rather, "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter,

supra, 191 N.J. at 484. Progressive discipline is not a necessary consideration “when the misconduct is severe, when it is unbecoming to the employee’s position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.” Herrmann, supra, 192 N.J. at 33.

Under the facts presented, a suspension is appropriate. While appellant did have a prior discipline, it was not in her position as a supervisor. In light of appellant’s inappropriate conduct and behavior as a supervisor when she followed an employee, raising her voice at him in front of employees and clients, a ten-day suspension is appropriate, and I so **CONCLUDE**.

ORDER

Based upon the above, I **ORDER** that appellant be suspended without pay for a period of ten days.

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.

October 3, 2017
DATE

Joann Lasala Candido
JOANN LASALA CANDIDO, ALAJ

Date Received at Agency:

Suma Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties:

OCT 4 2017

APPENDIX

Witnesses:

For appellant:

Marisha Penn

For respondent:

Roger Quintana

Debra Picariello

Janet Wraga

Jason Collazo

Exhibits:

For appellant:

None

For respondent:

- R-1 Human Services Specialist job description
- R-2 County of Hudson Employee Handbook
- R-3 Correcting/Counseling Subordinate Employees policy
- R-4 Personnel Order (for identification only)
- R-5 Final Notice of Disciplinary Action dated March 26, 2012
- R-6 non-disciplinary counseling notice

R-7 Written Warning dated February 9, 2010

R-8 Final Notice of Disciplinary Action dated February 7, 2017

R-9 Memo dated December 13, 2016

R-10 Memo dated December 13, 2016

R-11 a-b Memo dated December 13, 2016