A-2

STATE OF NEW JERSEY

In the Matter of Ann Pearl
Hudson County, Sheriff's Department

CSC DKT. NO. 2017-294
OAL DKT. NO. CSV 11832-16

FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION

ISSUED: MAY 17 2017 **BW**

The appeal of Ann Pearl, Keyboarding Clerk 2, Hudson County, Sheriff's Department, removal effective July 5, 2016, on charges, was heard by Administrative Law Judge Thomas Betancourt, who rendered his initial decision on April 13, 2017. Exceptions were filed on behalf of the appellant and a reply to exceptions was filed on behalf of the appointing authority.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting of May 17, 2017, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision except with respect to the standard of review utilized by the Administrative Law Judge regarding the penalty.

However, in determining the proper penalty, the Commission's review is *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission also utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). In determining the propriety of the penalty, several factors must be considered, including the nature of the appellant's offense, the concept of progressive discipline, and the employee's prior record. *George v. North Princeton Developmental Center*, 96 *N.J.A.R. 2d* (CSV) 463. However, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history.

See Henry v. Rahway State Prison, 81 *N.J.* 571 (1980). It is settled that the theory of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 *N.J.* 474 (2007).

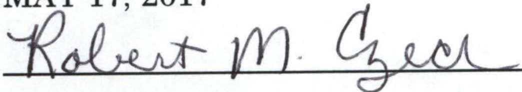
The appellant's disciplinary history includes three verbal warning for insubordination in 2010, a verbal warning for excessive lateness in 2010, two written warnings for insubordination in 2011, a 30 day suspension in 2011 for insubordination, conduct unbecoming a public employee, and other sufficient cause, a 60 working day suspension in 2012 for insubordination and conduct unbecoming a public employee, and a five day suspension in May 2016. As such, in its *de novo* review of the penalty, the Commission finds removal is the appropriate penalty for the sustained charges against the appellant in this matter.

ORDER

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

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
MAY 17, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 11832-16

CSC DKT. NO. 2017-294

ANN PEARL,

Appellant,

v.

HUDSON COUNTY SHERIFF'S DEPARTMENT,

Respondent.

William Hannon, Esq., for Appellant (Oxfeld Cohen, attorneys)

Robert Pompliano, Esq., Assistant County Counsel, for Respondent

Record Closed: March 10, 2017 Decided: April 13, 2017

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Ann Pearl, appeals a Final Notice of Disciplinary Action imposing a penalty of removal effective July 5, 2016, for Incompetency, Inefficiency or Failure to perform duties; Insubordination; Conduct unbecoming a public employee; and Other sufficient cause.

New Jersey is an Equal Opportunity Employer

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, to the Office of Administrative Law (OAL), where it was filed on August 5, 2016.

A prehearing conference was held on August 19, 2016, and a prehearing order, dated August 22, 2016, was entered by the undersigned.

A hearing was held on March 10, 2017, whereupon the record was closed.

ISSUES

Whether there is sufficient credible evidence to sustain the charges set forth in the Final Notice of Disciplinary Action; and, if sustained, whether a penalty of a removal is warranted.

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

David Anthony testified as follows:

He is employed by the Hudson County Sheriff's Department as the manager of the foreclosure unit. He is Appellant's supervisor. On May 17, 2016, Appellant was brought to his office at approximately 11:30 a.m. He had heard yelling and screaming but did not know who was doing so. Appellant, Ms. Pearl, and another worker, Ms. Rivera, were brought into his office and were still screaming. They were highly agitated and screaming at each other. He did not know what the dispute was over. He separated the two. He removed Ms. Rivera from his office and spoke with Appellant first. He did not understand what the dispute was over.

He reported the incident to his supervisor, Undersheriff Francine Shelton, and prepared a report.

Other employees complained. Customers were present when the incident took place.

He was not present at a meeting called by Undersheriff Shelton on May 20, 2016.

He knew Appellant was to receive a five-day suspension for the incident and entered it in his log book.

He does not recall if he spoke with Appellant on either June 1 or June 2, 2016. He does not recall if he gave Appellant the five-day suspension notice. That is usually done by personnel. If he was asked to do it he would.

Claudia Macaro testified as follows:

She is employed by the Hudson County Sheriff's Department as assistant supervisor of accounting. On May 17, 2016, at approximately between 10:45 a.m. and 11:00 a.m. she heard a disturbance. She heard two people yelling and went to see. She saw Appellant and Ms. Rivera. She did not determine why they were yelling. She asked both to go to the back office where Mr. Anthony was located.

Both Appellant and Ms. Rivera were still yelling in the back office. She took Ms. Rivera to the front office and Appellant stayed with Mr. Anthony. She does not know what the argument was over, and never found out.

She prepared a joint report of the incident with Mr. Anthony. The report was given to Undersheriff Shelton who is in charge of the civilian employees.

On June 1 and June 2, 2016, Ms. Macaro thinks Appellant was still working, but does not specifically recall. She was aware that Appellant was to receive a five-day suspension. She did not give a copy of the five-day suspension notice to Appellant.

She did not know what the exact days of the suspension were.

Patricia Bustin testified as follows:

She is the chief clerk and the supervisor of both Appellant and Ms. Rivera. She was present on May 17, 2016, but did not witness the argument. She was upstairs in the sales office.

On May 20, 2016, she escorted Appellant to the office of Undersheriff Shelton around 3:00 p.m.

She prepared a report for Undersheriff Shelton regarding the May 20, 2016, meeting.

Undersheriff Shelton had called Ms. Bustin and requested that Appellant and Ms. Rivera be brought to her office. She did not know why at the time. Present at the meeting were Undersheriff Shelton, Ms. Bustin, Sharon Mallory, a union representative, and William Gonzalez. Prior to Appellant entering the office the proposed suspension and the suspension notice for Appellant to sign were discussed. The dates of the suspension were on the notice. Appellant was then brought in. Undersheriff Shelton attempted to explain to Appellant, who became aggravated and frustrated. Appellant stated she was not properly represented. Appellant was told Ms. Mallory was a union representative. Appellant stated she did not request her and left the meeting. Appellant returned in about ten to fifteen minutes. Prior to Appellant's return, Ms. Rivera was given notice of her five-day suspension and left.

Appellant returned with papers and started reading from them. She was angry and frustrated. She was beet red. Ms. Bustin does not recall what Appellant stated while reading. Undersheriff Shelton attempted to explain the days of suspension. Appellant left and was not given the notice of suspension. She was not given permission to leave.

She does not know who requested Ms. Mallory to be present. She was not aware of why there was a meeting before it occurred. She does not recall if Appellant requested a different union representative. When Appellant left for the second time it was after 4:00 p.m.

William Gonzalez testified as follows:

He is the sales department supervisor. Appellant was one of his employees. He did not hear the argument on May 17, 2016.

On May 20, 2016, he escorted Appellant and Ms. Rivera to Undersheriff Shelton's office. The meeting was to discuss the suspension of Appellant and Ms. Rivera. Also present was Sharon Mallory.

Undersheriff Shelton was trying to explain the days of suspension and the reason why to Appellant. Appellant interrupted and stated that her employee rights were being violated and left the meeting. Undersheriff Shelton had told Appellant that Ms. Mallory was a union representative. Appellant responded that she did not request her. Appellant was not given permission to leave. Appellant came back with papers and handed them to the Undersheriff. Undersheriff Shelton tried to speak again and was interrupted again. Appellant then left again, without permission.

The Undersheriff attempted to serve the notice to Appellant during the meeting. Appellant refused to accept it. He is not sure if the Undersheriff gave the notice to Appellant after the meeting. Mr. Gonzalez did give the notice to Appellant sometime thereafter, but is unsure as to what day.

The days of the suspension were on the notice. Appellant never took the notice. The days of suspension were June 1, 2, 8, 14, and 15, 2016.

On June 1, 2016, Appellant went to work. Mr. Gonzalez told Appellant that the day was a suspension day and that she should not be in the office. He then called Richard Sires to advise that Appellant was in the office. Ms. Bustin was present when he spoke to Appellant. This was during the morning hours. Appellant refused to leave even though she was told to do so.

Elizabeth Nevarez arrived and had a private conversation with Appellant. Ms. Nevarez is a union representative. Appellant returned to work after the conversation.

On June 2, 2016, Appellant again went to work. Two officers arrived and asked Appellant to leave at least three times. One officer was Sergeant Ruiz. The other was a female officer, but he does not know her last name. Sergeant Ruiz advised Appellant that if she did not leave she would be arrested. He did so in a calm and very professional manner. Appellant left after first trying to call a union representative. He believes Appellant left around 4:00 p.m.

Wilson Ruiz testified as follows:

He is a sergeant with the Hudson County Sheriff's Department. He spoke with Appellant on June 2, 2016. Officer Zulima Cabrera was with him. He was advised by Richard Sires that Appellant would be served with a termination notice. The paperwork was served and Appellant was asked to leave.

Mr. Sires had told Appellant to leave after he served her. Sergeant Ruiz gave Appellant time to gather her belongings. Appellant wanted to speak with a union representative. He told Appellant that if she did not leave he would arrest her as a defiant trespasser. Appellant then left without incident. He escorted her.

Sergeant Ruiz believed that Appellant spoke with a union representative outside the building. He heard her state "I don't know what to do." Her demeanor was calm.

Francine Shelton testified as follows:

She is an undersheriff with the Hudson County Sheriff's Department. She is responsible for the civilian personnel. She is familiar with Appellant.

Undersheriff Shelton was informed of the incident that occurred on May 17, 2016. She was informed by David Anthony. She had asked that reports be prepared. She issued minor discipline to both Appellant and Ms. Rivera. Each received a five-day suspension. The Notice of Minor Disciplinary Action prepared for Appellant states the days of the suspension: June 1, 2, 7, 14, and 15, 2016. The days are spread out so as to not cause a hardship upon salaries. Ms. Rivera received the same discipline as Appellant.

She saw Appellant on May 20, 2016 during a meeting. The Undersheriff had summoned Appellant to the meeting, which took place in the afternoon. Also present were Mr. Gonzalez, Ms. Bustin, Sharon Mallory, a union representative. She spoke with both Appellant and Ms. Rivera individually in her office with the others present. The purpose of the meeting was to inform them of the disciplinary action being taken for the May 17, 2016 incident. Neither Appellant nor Ms. Rivera was interrogated.

Undersheriff Shelton introduced participants in the meeting to Appellant, and then read the Notice of Minor Disciplinary Action to Appellant. She was not able to read the entire document but did read the dates of the suspension. Appellant became irate and did not want to speak with her. Appellant said she was entitled to union representation. Appellant continued to interrupt the Undersheriff, stating that she thought it unfair, and that she did not agree. She then stormed out of the office as the Undersheriff was getting towards the end of reading the charges. Appellant returned and handed Undersheriff Shelton a document pertaining to Weingarten. Undersheriff Shelton inquired of Appellant what it was. Appellant said she would not speak with her any further. Undersheriff Shelton informed Appellant that Ms. Mallory was a union representative. She attempted to serve the Notice of Minor Disciplinary Action upon Appellant who turned her back on the Undersheriff and refused to take it.

She was informed that Appellant arrived at work on June 1 and 2, 2016.

She did not prepare or sign the form 31A, the Preliminary Notice of Disciplinary Action.

Richard Sires had requested that Ms. Mallory be present at the meeting of May 20, 2017.

She placed a handwritten note on the Notice of Minor Disciplinary Action which states "Ms. Pearl walked out of meeting as I was reading the charges to her."

Sharon Mallory testified as follows:

She is an employee of the County of Hudson. She is also a union delegate. She had not met with Appellant prior to May 20, 2016. She was summoned to Undersheriff Shelton's office to be the union representative for Appellant. She recalls the Undersheriff reading the notice about the five-day suspension. Does not recall what the discipline was about. She recalls the Undersheriff giving the actual days of the suspension. Appellant did not want to hear what the Undersheriff was saying. After the days of suspension were read Appellant left and returned with Weingarten rights. Appellant was a little upset. The Undersheriff tried to hand Appellant the notice. She refused to accept it. Appellant stated that Ms. Mallory was not the delegate of her choice. Ms. Mallory stayed for the entirety of the meeting. She did not speak with Appellant prior to the meeting. Ms. Mallory saw the Notice of Minor Disciplinary Action the day of the meeting. She sent a copy to Floyd Worley, a union representative. Appellant did not request a different union representative at the meeting. Neither Appellant nor Ms. Rivera was interrogated at the meeting.

Richard Sires testified as follows:

He is the Principal Personnel Technician. Both Appellant and Ms. Rivera were disciplined on May 20, 2016, for their involvement in an incident on May 17, 2016. Each received a five-day suspension. The suspension days are spread out to avoid hardship for the employees. He became aware of the suspension on or after May 20, 2016. He notified the union through Floyd Worley. He did this via email to Mr. Worley dated May 24, 2016. In the email he noted that Appellant refused service of the notice and that escalation of discipline was being discussed. He also mailed this via certified mail.

Mr. Sires knew that June 1 and 2 were suspension days. He was working both days. He became aware that Appellant was at work on June 1, 2016. He had received a call prior to 9:00 a.m. He explained to the caller that Appellant needed to leave or discipline may escalate. He called the undersheriff and the legal department to advise them.

He also spoke with Elizabeth Navarez on June 1, 2016, to advise that Appellant was at work. Ms. Navarez came to the office and spoke with Appellant. Mr. Sires was not with Ms. Navarez when she spoke with Appellant. Appellant still refused to leave. Ms. Navarez returned to Mr. Sires after speaking with Appellant. He asked Ms. Navarez to prepare a report. He noted that Appellant signed in to work on June 1, 2016, at 8:05 a.m., and signed out at 4:05 p.m.

On June 2, 2016, Appellant returned to work. Mr. Sires then prepared a form 31A, Preliminary Notice of Disciplinary Action. He advised the undersheriff and sent the form to the law department. It was then signed by Undersheriff Andrew Conte.

He served the form 31A on Appellant about 3:00 p.m. on June 2, 2016, with Sergeant Ruiz and another officer. He told Appellant she was immediately suspended and had to leave. Appellant refused to sign the document. He then asked Sergeant Ruiz to have Appellant leave. A copy of the form 31A was mailed to the union.

Mr. Sires then reviewed Appellant's disciplinary history, which consisted of the following: 1/2/10, Insubordination with a penalty of verbal warning; 3/26/10, Insubordination with a penalty of verbal warning; 8/13/10, Insubordination with a penalty of verbal warning; 11/5/10, Excessive Lateness with a penalty of verbal warning; 2/14/11, Insubordination with a penalty of written warning; 9/29/11, Insubordination, Conduct unbecoming a public employee, Neglect of duty, Other sufficient cause with a penalty of 30-day suspension; 10/10/12, Insubordination, Conduct unbecoming a public employee with a penalty of 60-working-day suspension; the 5-day suspension arising out of the incident of May 17, 2016; and, the present matter.

The email that he sent to Mr. Worley was not sent to Appellant. He believes he mailed a copy to Appellant and that Mr. Gonzalez gave it to her.

Ms. Navarez does not work in the sales office and is not Appellant's supervisor.

He does not recall Appellant showing up for work during her previous thirty-day and sixty-day suspension.

On June 2, 2016, he spoke with Appellant while she was sitting at her desk. She was not disruptive. He handed her the notice of discipline. She refused to sign it. She is not required to sign it. Sergeant Ruiz was a witness. Mr. Sires believes that Appellant understood, but she did say "I don't understand" and "I'm not clear."

Appellant's Case

Ann Pearl, Appellant, testified as follows:

She began her employment with the Hudson County Sheriff's Department in July 2000. She was a Senior Clerk Typist and worked Monday through Friday from 8:00 a.m. to 4:00 p.m.

On May 17, 2016, Ms. Rivera was "quite vocal." Ms. Pearl was on the telephone. When she finished the call Ms. Rivera said "people don't even turn on their computer." Ms. Pearl made it a point to counter Ms. Rivera. Ms. Pearl got up to report this to the back office. Ms. Rivera was "instigative." Ms. Pearl felt her comments were derogatory to the employees. Ms. Pearl was the senior employee at this time. Ms. Pearl stated that she would not refer to her interaction with Ms. Rivera as a disagreement. She wanted to counter Ms. Rivera and report it to her supervisor. She stated "at a certain time we all moved in there" referring to Mr. Anthony's office. She stated Mr. Anthony understood how upset she was and asked her to write something up.

On May 20, 2016, she was told by Mr. Gonzalez that Undersheriff Shelton wanted to see her. She called the Undersheriff to inquire what it was about. She was told she would be informed when they met. Present at the Undersheriff's office were Mr. Gonzalez, Ms. Bustin, Undersheriff Shelton and someone introduced as a union representative. Ms. Pearl confirms that this was Sharon Mallory. She did not request Ms. Mallory.

Undersheriff Shelton invited her in the office and offered her a seat. Ms. Pearl did not feel like sitting. The Undersheriff started reading from a piece of paper. Ms. Pearl heard "shouting match" and felt discipline might be in store. Upon hearing this she excused herself and got the Weingarten Rights.[1] When she first left she believes she said "excuse me." She returned and handed the Weingarten Rights to the Undersheriff.

Undersheriff Shelton asked what it was. Ms. Pearl did not feel she needed to say anything. She felt her submission of the Weingarten Rights was her statement. She sensed that a violation of her rights. She had no opportunity to speak with the Undersheriff prior to the meeting. At that point she did not know what communication needed to take place, other than merely asserting her rights.

---

[1] Weingarten Rules refer to NLRB v. Weingarten, 420 U.S. 251, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975), which upheld a National Labor Relations Board (NLRB) decision that employees have a right to union representation at investigatory interviews.

She then looked at the clock and it was the end of the work day. She told the Undersheriff that it was 4:00 p.m. and her work day is over. She left the meeting without the notice of discipline. The Undersheriff gave her back the Weingarten Rights.

She does not recall the Undersheriff trying to serve her with the disciplinary notice. She does not recall the Undersheriff stating the suspension days.

When she returned to work that Monday[2] she called Floyd Worley and left a message that she needed his involvement. There was no other discussion this week.

Ms. Pearl recalls Ms. Macaro calling Ms. Pearl into her office to ask if Ms. Pearl knew she was suspended. Ms. Pearl did not. Mr. Gonzalez was also present. She does not recall if Mr. Gonzalez said anything. What was uppermost in her mind was what Ms. Macaro said. Ms. Macaro did not tell her she had to go home. No one that day gave her notice of the suspension. This was probably on June 1, 2016.

There was a woman in the office that identified herself as someone from the union. She spoke of the suspension and the possible escalation of it. She gave Ms. Pearl her card. She told Ms. Pearl that ignoring the suspension could escalate. The union representative was looking at paperwork. Mr. Pearl "took it to mind."

Mr. Sires spoke with her on what Ms. Pearl believes to be June 2, 2016, and told her she was immediately suspended. At that point Ms. Pearl reached out for a union representative. Before she spoke with Mr. Sires Mr. Worley called her inquiring about what was going on. She is unsure if Mr. Worley called on June 1 or June 2, 2016.

Mr. Sires was clearly saying there was a suspension. She reached out for a union representative again. Another worker offered to call Sharon Mallory. Ms. Pearl was waiting for a call back. She was under the impression that Sergeant Ruiz was waiting with her for a union representative to call back. When she was told by Sergeant Ruiz she had to leave she left. She then met with Ms. Mallory and discussed what

[2] Presumably May 23, 2016, as May 20, 2016, was a Friday.

happened. The next day she filled out a grievance that was given to her by Ms. Mallory.

During her two previous suspensions she did not return to work. She doesn't believe she would have gone to work had she received notice.

She disputes the description of her interaction with Ms. Rivera as an argument. She decided to report the incident to Mr. Anthony. She disputes that she and Ms. Rivera were ever separated. She cannot recall if customers were present during the incident with Ms. Rivera. There was no one present at the sales door. Ms. Pearl was questioned by Mr. Anthony regarding the incident with Ms. Rivera.

At the June 20, 2016, meeting with Undersheriff Shelton she does not remember Ms. Rivera being there. She stated she walked to the meeting alone.

The Weingarten Rights form she keeps at her desk. She had not read it prior to May 20, 2016. She felt it applied to her matter.

She was not interrogated by the Undersheriff.

She decided to leave the May 20, 2016, meeting at 4:00 p.m., stating "four o'clock is four o'clock."

She does not believe Ms. Macaro told her she was suspended. She disputes that Mr. Gonzalez gave her the notice of discipline.

Ms. Pearl refutes that Ms. Navarez told her she was suspended. She was told there was a suspension.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see In re Polk, 90 N.J. 550 (1982). Credibility findings "are often influenced by matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

David Anthony was a credible witness. He was calm and straightforward in his testimony. He did not embellish. He simply stated what he saw and heard.

Claudia Macaro was also credible. She testified in a direct and professional manner. She related what she saw and heard in a straightforward manner.

Patricia Bustin too was a credible witness. She was able to relate what she saw and heard in a clear manner.

William Gonzalez was credible also. He too was straightforward and direct in his manner.

Sergeant Wilson Ruiz testified in a professional manner. He was direct and to the point. He was quite credible.

Undersheriff Francine Shelton was credible. She related what she saw and heard at the meeting of May 20, 2016, in a straightforward and direct manner.

Sharon Mallory was also credible. She stated what she saw and heard without hesitation.

Richard Sires was likewise credible. He testified in a calm and straightforward manner.

I had great difficulty with the testimony of Petitioner, Ann Pearl. She seemed at times not able to answer simple questions. Often she took a great deal of time to formulate an answer. Her recollection of events differed markedly from other witnesses. Pointedly, her recollection of the events surrounding her argument with Ms. Ruiz strain belief. She recollects that she went to Mr. Anthony's office on her own. Others recollect that she was brought to the office because of the argument. Her statement that she left Undersheriff Shelton's office at four o'clock as this was the end of her shift – "four o'clock is four o'clock" – was astonishing. Her insistence that she was never told of the five-day suspension is simply not believable. How she related her conversation with Ms. Navarez was bizarre. When asked if Ms. Navarez told her of the five-day suspension her response was she was told "there was a suspension" but refuted that Ms. Navarez told her of the five-day suspension. It was difficult to credit much of what she said as credible. Simply put, I did not believe her version of what transpired on May 17, 2016, May 20, 2016, June 1, 2016, and June 2, 2016.

FINDINGS OF FACT

I **FIND** the following **FACTS**:

1. Appellant, Ann Pearl, was employed by the Hudson County Sheriff's Department as a Senior Clerk Typist.

2. On May 17, 2016, Appellant became involved in an argument with a co-worker, Ms. Rivera.

3. The argument became loud. Both Appellant and Ms. Rivera were summoned to the office of David Anthony, the manager of the foreclosure unit.

4. Both Appellant and Ms. Rivera were still arguing loudly when brought to Mr. Anthony's office. The matter was reported to Undersheriff Francine Shelton.

5. Undersheriff Shelton is responsible for the civilian employees of the Hudson County Sheriff's Department.

6. Both Appellant and Ms. Rivera were disciplined for their involvement in the argument of May 17, 2016. Each received a five-day suspension.

7. On May 20, 2016, both Appellant and Ms. Rivera were brought to Undersheriff Shelton's office for the purpose of being served with the five-day suspension notice.

8. While Undersheriff Shelton was reading the Notice of Minor Disciplinary Action to Appellant she walked out of the office.

9. Petitioner returned with a Weingarten Rights form and handed it to Undersheriff Shelton.

10. Appellant refused to accept the Notice of Minor Disciplinary Action from Undersheriff Shelton.

11. Appellant left the office at approximately 4:00 p.m. without accepting a copy of the Notice of Minor Disciplinary Action.

12. The days Appellant was suspended were June 1, 2, 7, 14, and 15, 2016.

13. Appellant was served with a copy of the Notice of Minor Disciplinary Action by William Gonzalez.

14. Appellant went to work on June 1, 2016, the first day of the five-day suspension.

15. Appellant was informed by William Gonzalez, the office supervisor, that June 1, 2016 was a suspension day and that Appellant should not be in the office. Mr. Gonzalez then called Richard Sires, the Principal Personnel Technician, to advise him.

16. Appellant was also advised on June 1, 2016, by Elizabeth Navarez, a union delegate, that she was suspended. Petitioner refused to leave.

17. Appellant remained at work June 1, 2016.

18. Appellant again went to work on June 2, 2016.

19. Appellant was served with a notice of termination on June 2, 2016, by Richard Sires.

RESIDUUM RULE

Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)(3); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52:14B-10(a) and N.J.A.C. 1:1-15.1(c).

Hearsay are statements other than ones made by the declarant while testifying at a hearing, offered into evidence to prove the truth of the matter asserted. N.J.R.E. 801(c). Hearsay is usually not admissible because it is deemed untrustworthy and unreliable (N.J.R.E. 802) unless it falls within an exception enumerated in N.J.R.E. 803 or 804. However, hearsay is admissible in an administrative proceeding such as this one subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate

> competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
>
> [Id. at 51.]

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability. N.J.A.C. 1:1-15.5(a).

In accordance with the residuum rule, I accepted into evidence a statement prepared by Elizabeth Navarez. Competent evidence exists in the form of the testimony of Mr. Gonzalez and Ms. Pearl to corroborate what is found in the statement.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); Polk, supra, 90 N.J. 550. 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, the judge 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., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" 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). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein, supra, 26 N.J. at 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

Appellant is charged in the Final Notice of Disciplinary Action (FNDA)[3] with incompetency in violation of N.J.A.C. 4A:2-2.3(a)(1); insubordination in violation of N.J.A.C. 4A:2-2.3(a)(2); conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6); and, other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)(12).

"Conduct unbecoming a public employee" encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect for government employees and confidence in the operation of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Id. at 555 (citation omitted). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, 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." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted).

Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person.

As to the charge of incompetency, no evidence was presented. Therefore, as to this charge Respondent has not met its burden of proof.

As to the charges of insubordination, conduct unbecoming a public employee and other sufficient cause, Respondent has met its burden of proof by a preponderance of the credible evidence. In reaching this conclusion it is important to note that Appellant's conduct on May 17, 2016, during the verbal confrontation with Ms. Rivera

---

[3] The Final Notice of Disciplinary Action was not introduced into evidence. It was provided in the package submitted to the OAL when the matter was transferred by the Civil Service Commission.

was not considered. That conduct was dealt with in the Notice of Minor Disciplinary Action providing for a five-day suspension dated May 20, 2016. Appellant's conduct on May 20, 2016, during the meeting with Undersheriff Shelton, and her conduct on June 1, 2016, and June 2, 2016, meet the standard of insubordination, conduct unbecoming a public employee, and other sufficient cause. It is unacceptable for an employee to refuse to listen to her superior during a meeting regarding a disciplinary matter. It is unacceptable for an employee to remove herself from such a meeting without permission. It is unacceptable for an employee to leave work prior to the conclusion of such a meeting. It is unacceptable for an employee to refuse to accept a disciplinary notice, and then claim it was never served upon her. It is unacceptable for an employee to arrive at work during days she was suspended. This is particularly egregious as she was advised of the suspension by Undersheriff Shelton and William Gonzalez, who served her the notice personally. It is unacceptable for an employee to refuse to leave work after being told she was suspended and had to leave by both Mr. Gonzalez and the union delegate Elizabeth Navarez. It is unacceptable for an employee to have to be escorted from work under threat of arrest for her refusal to leave.

An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. W. New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty 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.

> [In re Hernmann, 192 N.J. 19, 33-34 (2007) (citing Henry, supra, 81 N.J. 571).]

Although the focus is generally on the seriousness of the current charge as well as the prior disciplinary history of the appellant, consideration must also be given to the purpose of the civil service laws. Civil service laws "are designed to promote efficient public service, not to benefit errant employees . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlining the statutory scheme." State-Operated Sch. Dist. v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998). "The overriding concern in assessing the propriety of the penalty is the public good. Of the various considerations which bear upon that issue, several factors may be considered, including the nature of the offense, the concept of progressive discipline, and the employee's prior record." George v. N. Princeton Developmental Ctr., 96 N.J.A.R. 2d (CSV) 463, 465.

In Bock, supra, 38 N.J. at 522, which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." Herrmann, supra, 192 N.J. at 29 (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523-24.

As the Supreme Court explained in Herrmann, supra, 192 N.J. at 30, "[s]ince Bock, the concept of progressive discipline has been utilized in two ways when determining the appropriate penalty for present misconduct." According to the Court:

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct. . . .

> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that 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.
>
> [Hermann, supra, 192 N.J. at 30-33 (citations omitted).]

In the matter of In re Stallworth, 208 N.J. 182 (2011), a Camden County pump-station operator was charged with falsifying records and abusing work hours, and the ALJ imposed removal. The Commission modified the penalty to a four-month suspension and the appellate court reversed. The Court re-examined the principle of progressive discipline. Acknowledging that progressive discipline has been bypassed where the conduct is sufficiently egregious, the Court noted that "there must be fairness and generally proportionate discipline imposed for similar offenses." Id. at 193. Finding that the totality of an employee's work history, with emphasis on the "reasonably recent past," should be considered to assure proper progressive discipline, the Court modified and affirmed (as modified) the lower court and remanded the matter to the Commission for reconsideration.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, supra, 38 N.J. at 523-24, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979).

The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter, Appellant has a substantial disciplinary history. She has three verbal warnings for insubordination in 2010. She has a verbal warning for excessive lateness in 2010. She has two written warnings for insubordination in 2011. She was suspended for thirty days on September 29, 2011, for insubordination, conduct unbecoming a public employee, and other sufficient cause. She was suspended for sixty working days on October 10, 2012, for insubordination and conduct unbecoming a public employee. She was suspended five days on May 20, 2016, for her behavior on May 17, 2016.

Based upon the above authorities, I **CONCLUDE** that progressive discipline should apply. The question remains whether removal is warranted, or that a lesser penalty be imposed.

Unless the penalty is unreasonable, arbitrary, or offensively excessive, it should be permitted to stand. Ducher v. Dep't of Civil Serv., 7 N.J. Super. 156 (App. Div. 1950). Appellant's entire record of performance must be considered when attempting to determine if the judgment of the appointing authority was unreasonable, arbitrary or capricious. See Bock, supra, 38 N.J. 500.

A court should overturn a final agency decision "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence." In re Carter, 191 N.J. 474, 482 (2007) (quoting Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). As the Court observed in Carter, a reviewing panel:

> must defer to an agency's expertise and superior knowledge of a particular field. Although an appellate court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue," if substantial evidence supports the agency's decision, "a court may not substitute its own judgment for the agency's even though the court might have reached a different result."

[Id. at 483 (citations omitted).]

I **CONCLUDE** that the respondent has proved by a preponderance of the credible evidence that that appellant was guilty of the charge of insubordination, conduct unbecoming a public employee and other sufficient cause set forth in the Final Notice of Disciplinary Action.

I further **CONCLUDE** that the penalty of removal is neither arbitrary, unreasonable nor offensively excessive, and therefore should be upheld.

ORDER

It is hereby **ORDERED** that Appellant's appeal is **DENIED**;

It is further **ORDERED** that the Final Notice of Disciplinary Action providing for a penalty of removal, effective July 5, 2016, is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey**

08625-0312, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

APRIL 13, 2017
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: April 13, 2017

Date Mailed to Parties: April 13, 2017

db

APPENDIX

List of Witnesses

For Appellant:

Ann Pearl, Appellant

For Respondent:

David Anthony

Claudia Macaro

Patricia Bustin

William Gonzalez

Wilson Ruiz

Francine Shelton

Sharon Mallory

Richard Sires

List of Exhibits

For Appellant:

P-1 District 1199J Grievance Form

For Respondent:

R-1 Email from David Anthony to Francine Shelton dated May 18, 2016

R-2 Letter from David Anthony to Francine Shelton dated May 17, 2016

R-3 Office Incident report dated May 18, 2016, by Claudia Macaro and David Anthony

R-4 Notice of Minor Disciplinary Action dated May 20, 2016

R-8 Memo by William Gonzalez

R-9 Email from Francine Shelton to Richard Sires dated May 25, 2016

R-10 Weingarten Rights form

R-13 Email from Louis Rosen to Urmila Patel dated May 24, 2016

R-14 Hudson County Sheriff's Office Business Daily Attendance Record dated June 1, 2016

R-15 Elizabeth Navarez memo dated June 1, 2016

R-16 Preliminary Notice of Disciplinary Action dated June 2, 2016, with Notice of Immediate Suspension