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STATE OF NEW JERSEY

DECISION OF THE
CIVIL SERVICE COMMISSION

In the Matter of Nancy LaGrotteria,
Ocean County

CSC Docket No. 2014-0901
OAL Docket No. CSV 01675-14

ISSUED: AUG 20 2015 (HS)

The appeal of Nancy LaGrotteria, a Human Services Specialist 2 with Ocean County, of her 60 working day suspension, on charges, was heard by Administrative Law Judge Sarah G. Crowley (ALJ), who rendered her initial decision on July 9, 2015. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 29, 2015, adopted the findings of fact but did not adopt the ALJ's recommendation to modify the 60 working day suspension to a 10 working day suspension. Rather, the Commission modified the penalty to a 30 working day suspension.

DISCUSSION

The appointing authority suspended the appellant for 60 working days on a charge of conduct unbecoming a public employee. Specifically, it asserted that the appellant exercised poor judgment, unprofessional conduct, breach of confidentiality and failure to follow agency policy and procedures with regard to a comment posted on Facebook. Upon the appellant's appeal, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In her initial decision and based on the testimonial and documentary evidence presented, the ALJ found that the appellant's position with the Ocean County Board of Social Services required her to meet with, and process applications

for, individuals seeking welfare benefits. On August 30, 2014, a transgender individual came to the office seeking services. The other clients in the waiting room made fun of this individual by throwing food, taking pictures and making inappropriate comments. Appalled by this behavior, the appellant wrote about it on her Facebook page that evening. Referring to the transgender client by a nickname, the appellant initially posted as follows:

> To my new transgender friend . . . you are my new hero having the strength to come into the board of social services in full transformation and even though the animals in the waiting room were throwing food at you still managed to leave my desk with a huge smile thanks for making my crappy day a little better!

There were several responses to the appellant's initial posting. Some individuals claimed they would come and beat up the people who had been making fun of the transgender client, though the appellant herself made no such threats. The appellant did, however, reveal that she worked for "the board of social services" and referred to the other clients as "fucktards." The ALJ noted that the appellant did not dispute that she posted the comments but defended her actions by stating that she was just venting since she was upset and that she only used the nickname. The ALJ further noted that although the appellant claimed to have privacy tools that restricted access to her Facebook page only to her "friends," her supervisor at work was nevertheless able to access it. Meredith Sheehan, Assistant Administrative Supervisor of Social Work, testified that although she was not a "Facebook friend" of the appellant, she had no trouble accessing the postings after they were brought to her attention. Sheehan also testified that while the appellant only used the client's nickname, the comments revealed where the appellant worked and identified the client as transgender. Sheehan testified that such information would permit identification of the client, and thus, the posting was a breach of the client confidentiality rules. Included in the record before the ALJ were several client confidentiality policies. The "Security Orientation Rules" provided that "all employees are responsible for safeguarding confidential information . . . and shall not disclose any client information to any person except as specifically authorized." The "Code of Ethical Behavior," signed by the appellant, indicated that the appellant would "maintain confidentiality of client information and . . . treat clients and co-workers with dignity, respect and fairness." The Personnel Handbook forbade employees from revealing "any information which directly identifies an applicant or client or which may indirectly lead to such identification." The appellant testified that she only had one day or less of training and was unaware that she was violating any policies.

Based on the foregoing, the ALJ determined that the appointing authority had met its burden of proving that the appellant's Facebook comments breached the confidentiality policies based on the directive in the Personnel Handbook

prohibiting the disclosure of anything that could indirectly lead to the identification of a client, but had not demonstrated that the appellant's actions constituted conduct unbecoming a public employee. With respect to the penalty, the ALJ noted that the violation of client confidentiality in this case could not be taken lightly. However, the ALJ also took account of several mitigating factors. Specifically, the ALJ noted ambiguity in the confidentiality and disclosure rules and the paucity of training in this regard; the "novel" implications of social media; the appellant's lack of intent to violate the client's privacy rights and intent to defend the client; and the appellant's lack of a disciplinary history. Thus, the ALJ recommended that the penalty be reduced to a 10 working day suspension.

In its exceptions, the appointing authority states that the initial decision erroneously identified Crystal Leary as a witness and as an employee in the welfare section. Rather, Leary is a member of the public who posted the question, "Where do you work?" to the appellant's Facebook page and who was able to view the entire string of entries. The appointing authority contends that this question from a member of the public refutes the appellant's claim that her Facebook page was not accessible to the public. Moreover, the appointing authority notes that Sheehan, who was not a "Facebook friend" of the appellant, and a variety of non-employees easily accessed the comments despite the privacy tools the appellant claimed to have had in place. By the appointing authority's tally, 46 people checked off the Facebook "like" icon. It posits that many hundreds of people who are friends of these 46 people likely read the postings but did not comment or check off the "like" icon. In short, the appointing authority asserts that the appellant's Facebook page was not private in any way. It further contends that no weight should have been ascribed to the appellant's lack of intent to do harm, stating that a breach of confidentiality is a breach of confidentiality regardless of intent. An employee's commitment to strict protection of client information is a critical component in establishing public trust that the personal information of all applicants for public assistance will be maintained. The appellant's broadcasting of client information demonstrated poor judgment and a lack of respect for her confidentiality obligations. While emphasizing that breaching client confidentiality is conduct unbecoming a public employee, the appointing authority also argues that other negative comments made about other welfare agency clients constituted further conduct unbecoming and undermined public trust. As to the penalty, the appointing authority argues that the 60 working day suspension was actually lenient but also proportionate to the infraction.

Based on its *de novo* review of the record, the Commission disagrees with the ALJ's assessment of this matter. Conduct unbecoming a public employee is conduct that adversely affects morale or efficiency or has a tendency to destroy public respect for governmental employees and confidence in the operation of public services. *See In re Emmons*, 63 *N.J. Super.* 136 (App. Div. 1960). The ALJ found that the appellant had breached one client's confidentiality and referred to other

clients using inappropriate and profane language. As a public employee whose role was to meet with, and process applications for, individuals seeking welfare benefits, her actions clearly constituted conduct unbecoming a public employee.

With regard to the penalty, the Commission's review is also *de novo*. In addition to its consideration of the seriousness of the underlying incident in determining the proper penalty, the Commission 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 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. Moreover, 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). In the present case, the ALJ minimized the appellant's breach of confidentiality by accepting her assertion that she had only intended to circulate her comments to her "Facebook friends" and did not intend to violate the privacy rights of a client. However, at least one of those "Facebook friends" is not a co-worker, and, in all likelihood, many more are members of the general public. Moreover, Sheehan testified that once the comments were brought to her attention, she was able to access them easily even though she was not a "Facebook friend" of the appellant. Nevertheless, the appointing authority's original penalty was too harsh in light of the appellant's lack of a disciplinary history. Accordingly, considering both the seriousness of the conduct at issue here as well as the appellant's lack of prior discipline, the Commission finds that a 30 working day suspension is a more appropriate penalty.

Since the penalty has been modified, the appellant is entitled to 30 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), an 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. Mar. 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 this case, the Commission upheld the charge and only modified the penalty. 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.

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. February 26, 2003), the Commission's decision will not become final until any outstanding issues concerning back pay are finally resolved.

ORDER

The Commission finds that the appointing authority's action in suspending Nancy LaGrotteria for 60 working days was not justified. Therefore, the Commission modifies the penalty to a 30 working day suspension. The Commission further orders that the appellant be granted 30 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. Pursuant to *N.J.A.C.* 4A:2-2.10, the parties shall make a good faith effort to resolve any dispute as to the amount of back pay.

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

The parties must inform the Commission, in writing, if there is any dispute as to back pay within 60 days of the 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 should be pursued in the Superior Court of New Jersey, Appellate Division.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 29TH DAY OF JULY, 2015

Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Henry Maurer
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 01675-14
AGENCY DKT. NO. 2014-0901

IN THE MATTER OF NANCY LAGROTTERIA, OCEAN COUNTY BOARD OF SOCIAL SERVICES.

Steven Secare, Esq., for appellant Nancy LaGrotteria (Secare & Hensel, attorneys)

Barbara A. O'Connell, Esq., for respondent Ocean County Board of Social Services (Sweeney & Sheehan, P.C., attorneys)

Record Closed: June 17, 2015 Decided: July 9, 2015

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Nancy LaGrotteria, is a Human Services Specialist II for the Ocean County Board of Social Services (OCBSS). Respondent appeals the sixty-day suspension imposed on January 26, 2014, as a result of a posting on her Facebook page. The Board has alleged that it was a violation of the client confidentiality rules and constituted conduct unbecoming an employee. The appellant requested a hearing and

the matter was transmitted to the Office of Administrative Law (OAL), on February 10, 2014, to be heard as a contested case. N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The matter was heard on June 17, 2015, and the record closed on that date.

FACTUAL DISCUSSION

Appellant works for the Ocean County Board of Social Services in Toms River New Jersey as a Human Services Specialist II. She has worked at OCBSS since October 8, 2009. Her current position requires her to meet with, and process applications for individuals seeking welfare benefits from OCBSS. On August 30, 2014, a transgender individual came into OCBSS offices seeking services. The other clients in the waiting room were making fun of this individual, by throwing food, taking pictures and making inappropriate comments. The appellant was appalled at this conduct, and wrote about it that evening on her Facebook page. The initial posting provided as follows:

"To my new transgender friend "******"[1] you are my new hero having the strength to come into the board of social services in full transformation and even though the animals in the waiting room were throwing food at you still managed to leave my desk with a huge smile thanks for making my crappy day a little better!"

There were several responses to the posting, including some individuals who claimed they were going to come down and beat the people up who were making fun of her. The appellant made no such threats herself. She did however reveal that she worked for "the board of social services." The appellant also referred to the other clients in the waiting room as "fucktards." The appellant does not dispute that she posted the comments. She defends her actions stating that she was just venting as she was so upset at the treatment this individual got and that she only used the nick name. Appellant also claimed that she had certain privacy tools on her face book page, so only her "friends" had access to it. However, her supervisor at work was able to access the

[1] Appellant referred to client only by their nickname which has been redacted.

comments. The discipline arose from these comments which respondent claims were unprofessional, a breach of confidentiality rules, and constituted conduct unbecoming an employee.

These essential facts are undisputed and found as **FACT**.

TESTIMONY

For respondent:

Meredith Sheehan, is employed by the OCBSS as an assistant administrator of social work. On August 30, 2014 she was called into a meeting to discuss the Facebook postings of Nancy LaGrotteria. She testified that she is not a Facebook "friend" with Ms. LaGrotteria or any of the other people who had posted comments on her Facebook page. She testified that she had no trouble accessing it after it was brought to her attention. She testified that Ms. LaGrotteria is a Social Services Specialist II. She works in the cash assistance program and her role is to meet with individuals and determine if they are eligible for cash assistance. Ms. LaGrotteria works in building three, which is where the individuals come in to apply for the benefits. The applicants check in with the receptionist, and they are given a number. Eventually, their name is called by an OCBSS worker who goes over their application with them. Ms. LaGrotteria is one of those individuals.

Ms. Sheehan testified that after the posting was discovered; they had an internal meeting with several other individuals and the deputy director. They determined that the posting was a serious breach of the client's confidentiality. Although Ms. LaGrotteria only used the client's nickname, the comments revealed where she worked and stated that the individual was transgender. This information would allow someone to identify the client even without their name. She also testified that the comments breached the internal policy and rules regarding confidentiality of clients. Moreover, the

comments were unprofessional, inappropriate and demonstrated poor judgment. They determined that major discipline was warranted.

Crystal Leary works at the OCBSS in the welfare section. She testified that there are policies about not breaching the confidentiality of any clients. She testified that this means to even mention that someone applied for benefits should be kept confidential and the posting which identified the transgender individual by her nickname violated this policy. Ms. Leary testified that there were enough identifying features, such as the nickname, and where Ms. LaGrotteria worked, that a breach of confidentiality occurred. She testified that they did consider that Ms. LaGratteria had no prior discipline, or they might have sought a more significant penalty. However, they felt the violation was serious enough to merit major discipline.

Ms. Leary identified several OCBSS policies regarding the confidentiality of clients. She identified the "Security Orientation Rules" which provide that "all employees are responsible for safeguarding confidential information . . . and shall not disclose any client information to any person except as specifically authorized". Ms. Leary also identified the "Code of Ethical Behavior" which was signed by appellant, wherein she agreed to "maintain confidentiality of client information and to treat clients and co-workers with dignity, respect and fairness." The last policy document identified by Ms. Leary is from the Personnel Handbook, which states that:

> "Confidential is an essential element of the relationship between the client and the agency. Federal and State laws and codes require confidentiality with respect to all forms of applicant and client information. Agency employees are prohibited from disclosing any information which directly identifies an applicant or client or which may indirectly lead to such identification."

Ms. Leary testified that the identification of the transgender individual, even by her nickname violated the foregoing policy, especially since Ms. LaGrotteria had indicated where she worked. The final document identified by Ms. Leary was a Resolution prohibiting violence in the workplace. Ms. Leary testified that some of the responses to Ms. LaGrotteria related to people coming down there to beat up the

people making inappropriate comments. Ms. Leary thought this commentary was prohibited by the foregoing resolution, even though none of these comments were made by appellant regarding violence in the workplace. Ms. Leary identified the documents which indicated Ms. LaGotteria had received copies of all of these polices. She also testified that all employees receive some training but she was not clear what the training entailed or how much training was given to employees on these or any other policies.

For appellant:

Ms. LaGrotteria began working for the OCBSS in October of 2008. She is a Human Services Specialist. Her position requires her to interview clients and assist them in determining if they are eligible for benefits. The clients check in with the receptionist and when a worker is free, they are called by name to meet with them. One day, a transgender individual came into the office and was waiting in the waiting area to be called. While she was waiting, the clients in the waiting room started calling her names, taking pictures of her and throwing food at her. Ms. LaGrotteria testified that it was terrible and she was appalled and disgusted by the treatment. When she finally called this individual, there was not enough time to go over the application, so she told her to come back in the morning and she would take her right away so she did not have wait again. Ms. LaGrotteria testified that when she got home, she was so disgusted at the treatment this individual had received that she posted a comment on my Facebook page about it. She thought she had controls on her Facebook page which would prevent anyone other than her friends from viewing. She also used the individual's nickname, which was totally unrelated to their real name. She testified that she was just venting. She did not mean any harm and did not think she was breaking any rules. She testified that she only had one day or less of training and was not aware that she was violating any policies or rules.

The above is found as **FACT**.

LEGAL DISCUSSION AND CONCLUSION

The Civil Service employee's rights and duties are governed by the Civil Service Act, N.J.S.A. 11A:1-1 to 12.6. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointment and broad tenure protection. See Essex Council Number 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. 1971); Mastrobattista v. Essex County Park Commission, 46 N.J. Super. 138, 147 (1965). The Act also recognizes that the public policy of this State is to provide public officials with appropriate appointment, supervisory and other personnel authority in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). A public employee who is thus protected by the provision of the Civil Service Act may nonetheless be subject to major discipline for a wide variety of offenses connected to his or her employments. The general causes for such discipline are enumerated in N.J.A.C. 4a:2-2.3.

In an appeal concerning major disciplinary action, the burden of proof is on the appointing authority to show that the action taken was justified. N.J.S.A. 11:2-21; N.J.A.C. 4A:2-14 (a). This applies to both permanent career service employees and those in their working test period relative to such issues as removal, suspension, or fine and disciplinary demotion. N.J.S.A. 11A:2-14; N.J.S.A. 11A:2-6. The State has the burden to establish by a preponderance of the competent, relevant and credible evidence that the employee is guilty as charged. Atkinson v. Parsekian, 37 N.J. Super. 143 (1962); In re Polk Licence Revocation, 90 N.J. Super. 550 (1980).

This matter involves a major disciplinary action brought by the respondent appointing authority against appellant imposing a sixty day suspension for a violation of N.J.A.C. 4A:2-2.2(a) 3 and N.J.A.C. 4A:2-2.3(a) 6, conduct unbecoming a public

employee. The conduct in question involves certain postings on the appellant's Facebook page, which respondent claims violated several rules regarding the confidentiality of clients. Respondent has also alleged conduct unbecoming and a violation of the violence in the workplace policy. The appellant does not dispute the postings, but claims she did not specifically identify the client, and they were in defense of the client. Appellant also argues that the rules are not very clear, as there was very little training on these policies. Finally, appellant argues that under the progressive discipline concept a sixty day suspension was unwarranted.

Based upon the testimony and findings, I **CONCLUDE** that the respondent has satisfied its burden of proving that appellant's comments on her Facebook page technically breached the confidentiality policies based upon the directive in the personnel manual that prohibits disclosing anything that could indirectly lead to the identification of a client. However, I **CONCLUDE** that the respondent has not demonstrated a violation of any other rules or a violation of the violence in the workplace policy and/or conduct unbecoming an employee.

PENALTY

Once a determination is made that an employee has violated a statute, rule, regulation, etc., concerning his/her employment, the concept of progressive discipline must be considered. West New York v. Bock, 38 N.J. Super. 500 (1962). The concept of progressive discipline involves consideration of the number of prior disciplinary infractions, the nature of those infractions and the imposition of progressively increasingly penalties. Aggravating and mitigating factors must be considered in the determination of discipline on a public employee.

In the instant case, the respondent has satisfied their burden of demonstrating a technical violation of the rules relating to a disclosure that could indirectly lead to the identification of a client. However, in mitigation of this finding is the fact that the rules are not very clear regarding confidentiality and disclosure and there is very little training

in this regard. Furthermore, the implications of social media are novel to everyone. In further mitigation is the fact that there was absolutely no intention on the part of the appellant to violate the privacy rights of the client. On the contrary, the appellant was speaking in defense of the client. Finally, under the concept of progressive discipline, we must consider that this is the first disciplinary infraction of any type that the appellant has received in her five years of employment. Nonetheless, a violation of the confidentiality of a client in this context cannot be taken lightly and the bar cannot be set too low in this regard. Accordingly, I **CONCLUDE** that a sixty-day suspension was not warranted and the penalty is reduced to a ten-day penalty, which is appropriate under these circumstances.

ORDER

Since the charges have modified, I **ORDER** that appellant is entitled to back pay if the penalty has already been served, benefits, and seniority pursuant to N.J.A.C. 4A:2-2.10.

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.

July 9, 2015
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: July 9, 2015

Date Mailed to Parties: July 9, 2015

SGC/mel

APPENDIX

WITNESSES

For appellant:

Crystal Leary

Meredith Sheehan

For respondent:

Nancy LaGrotteria

EXHIBITS

For appellant:

For respondent:

R-1 Copy of Face book postings from Nancy LaGrotteria

R-2 OCBSS Code of Ethical Behavior

R-3 Section 102 OCBSS Personnel Handbook

R-4 OCBSS Security Orientation for Employees Handout

R-5 Resolution 98-1-14 regarding Violence in the Workplace