

hand, although one of the penalties was modified by the Commission, charges were sustained. 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.

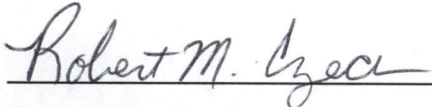
ORDER

The Civil Service Commission finds that the action of the appointing authority in disciplining the appellant was justified. The Commission therefore modifies the first 180 calendar day suspension to a 90 calendar day suspension and upholds the second 180 calendar day suspension. The Commission further orders that appellant be granted 90 days of back pay, benefits, and seniority. The amount of back pay awarded is to be reduced and mitigated as set forth in *N.J.A.C. 4A:2-2.10*. An affidavit of mitigation shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision.

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

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
MARCH 9, 2017



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

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

Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CSV 13300-12
and CSV 09602-13

AGENCY DKT. NOS. 2013-733
and 2013-3452

CONSOLIDATED

**IN THE MATTER OF ESTHER TYNDALL,
CITY OF EAST ORANGE, DEPARTMENT
OF PROPERTY TAXATION.**

Jason L. Jones, Esq., for appellant Esther Tyndall (Weissman & Mintz LLC,
Attorneys at Law)

Marlin G. Townes, Assistant Corporation Counsel, for respondent City of East
Orange (Khalifah L. Shabazz, Esq., Corporation Counsel)

Record Closed: May 29, 2016

Decided: February 3, 2017

BEFORE **JOAN BEDRIN MURRAY, ALJ**:

STATEMENT OF THE CASE

This consolidated matter involves disciplinary charges against appellant Esther Tyndall, who was employed as a Clerk 1, (previously known as Assessing Clerk, Typing), with respondent City of East Orange (the City), Department of Property Taxation (the Department). Appellant appeals from the imposition of two separate one hundred eighty-

day suspensions beginning September 6, 2012, and May 29, 2013. The suspensions stemmed from determinations that appellant engaged in a pattern of performing tasks unrelated to her duties as Clerk 1, that she failed to advise her supervisor that she had taken leave time under the Family and Medical Leave Act (FMLA), that she failed to perform her assigned duties in a timely manner if at all, that she argued with her supervisors when directed to perform a task, that she was hostile and non-communicative in her dealings with them, and that she engaged in other acts of insubordination as set forth below. Appellant contends that she conducted herself in an appropriate manner at all times herein, and that she could not complete her assigned duties due to her large workload and for other reasons.

PROCEDURAL HISTORY

On May 23, 2012, the District issued a Preliminary Notice of Disciplinary Action (PNDA) informing appellant of the charges of insubordination, conduct unbecoming a public employee, and neglect of duty against her. N.J.A.C. 4A:2- 2.3(a)(2), (6), (7). (R-6.) Specifically, appellant was charged with taking leave time under the Family and Medical Leave Act (FMLA) without notifying her supervisor, Tom Small, who was the newly-appointed tax assessor. Further, when she returned from such leave, she engaged in a course of conduct that proved disruptive to the Department. Namely, she persisted in performing duties unrelated to those performed in the Tax Assessor's Office, while neglecting the duties assigned to her. In addition, appellant was charged with ignoring her immediate supervisor's directive to complete a "request for time" form when she was called for jury duty. The PNDA also alleged that appellant provided certain information to a taxpayer, despite being directed not to do so, aiding that person's prosecution of her property tax appeal against the City of East Orange. Further, appellant was charged with refusing to comply with the directives of Diane Ross (Ross), her immediate supervisor, and being argumentative and disrespectful. Finally, the PNDA charges appellant with extending her one-hour lunch break by a half hour, despite being told not to do so.

After a departmental hearing, the District issued an amended Final Notice of Disciplinary Action (FNDA) dated September 5, 2012, sustaining the charges and providing for appellant's suspension for one hundred eighty days. (P-2.) Appellant

requested a hearing, and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on September 27, 2012, for hearing and determination as a contested matter under OAL docket number CSV 13300-12.

The Department issued a separate PNDA dated August 7, 2012, informing appellant of the charges of insubordination and neglect of duty issued against her. N.J.A.C. 4A:2-2.3(a)(2) and (7). (R-9.) Specifically, appellant was charged with failing to perform certain tasks assigned to her, including those that were time-sensitive. Further, the Department alleged that appellant filled out a request for personal time that was effective on that same date, leaving pressing work undone and the office understaffed.

After a departmental hearing, the Department issued a Final Notice of Disciplinary Action (FNDA) dated May 23, 2013, sustaining the charges and providing for appellant's suspension for one hundred eighty days. (P-3.) Appellant filed an appeal and the Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 8, 2013, under OAL docket number CSV 09602-13.

CSV 13300-12 was initially assigned to be heard by the Hon. Tahesha Way, A.L.J.; CSV 09602-13 was initially assigned to be heard by the Hon. Tiffany Williams, A.L.J. On February 6, 2014, the matters were consolidated and scheduled to be heard by the Hon. Tahesha Way, A.L.J. Thereafter, the consolidated matters were assigned to the undersigned. A hearing was scheduled for October 9, 2014, and October 21, 2014, but was adjourned at the request of respondent with the consent of appellant. The matters were rescheduled to be heard on January 12, 2015, and January 13, 2015, but was adjourned at the request of the appellant with the consent of respondent. The matters were heard on May 11, 2015, and May 12, 2015. After the conclusion of testimony, the record remained open for the receipt of post-hearing submissions. Following a number of requests by both parties for additional time within which to file documents, the record closed upon receipt of the last submission on May 29, 2016.

FACTUAL DISCUSSION

Appellant was hired as an Assessing Clerk/Typing by the Department on April 1, 2007. Her job title changed to Clerk 1 on or about April 9, 2011. She remained in that position until leaving the Department sometime in 2013. These matters pertain to the period of time after the appointment of Thomas Small (Small) as Tax Assessor for the City of East Orange (the City) on March 28, 2011. As director of the Department, Small was appellant's supervisor, and Diane Ross (Ross), the Senior Assessing Clerk in the Department, was appellant's immediate supervisor.

1. AS TO CSV 13300-12

This matter concerns various infractions with regard to appellant's work activities from March 2011 through May 2012. As to these charges, the Department presented testimony by Thomas Small, Diane Ross, and Annmarie Corbitt, and appellant testified on her own behalf. Based upon a review of the testimony and the documentary evidence presented, I **FIND** the following preliminary **FACTS**:

A. Incident as to FMLA Leave

Approximately two weeks after Small's appointment as tax assessor in March 2011, appellant became ill and thereafter was admitted into the hospital. She never informed Small that she was hospitalized, or that she would not be returning to work for an extended period of time. Nor did she notify Ross, her immediate supervisor, that she had fallen ill. Instead, she told her friend, Sonia Harris (Harris), another employee in the Department, that she was in the hospital. Harris obtained the necessary paperwork that appellant needed in order to apply for FMLA leave. Harris was not appellant's supervisor. Small did not know of appellant's whereabouts until he contacted the City's personnel director, who informed him that she had taken FMLA leave. During said leave, appellant did not contact Small. Small relied on the personnel director to send her letters asking that she contact his office intermittently. Appellant returned to her post on August 1, 2011.

B. Incident at the Tax Collector's Office

On October 28, 2011, appellant was working with a senior couple in the tax assessor's office. They wanted to replace their deceased daughter as the record owner of certain property in the City. Their goal was to then apply for property tax relief under the Property Tax Reimbursement Program (Senior Freeze). As Assessing Clerk, Typing, appellant's job was defined by the New Jersey Department of Personnel as follows:

Under direction performs routine clerical work involved in the assessment of real and personal property; does other related duties and typing as required. (See R-3.)

In addition to the above job definition, appellant defined her job duties as Assessing Clerk, Typing, in an attachment to a May 28, 2008, letter to Reginald Lewis, City Administrator notifying him of her passing the Civil Service Exam. (R-4.) She listed the following duties, in pertinent part:

Compiling list to be used in appeal process;
Compiling property record cards on all tax appeals (County and State;)
Reviewing each appeal for tax status and municipal charges;
Notify Assessor of outstanding taxes on all appeals;
Compiling list of appeals on schedule for hearing at the County Board of Taxation;
Process all deeds received from the County Board of Taxation;
Review the usable status with the Assessor;
Key in all deeds into the MOD IV System;
Update Property Record Cards with new ownership information. Ibid.

Appellant's job duties did not include assisting residents in completing and filing the Senior Freeze application. This was a function of the Office of the Tax Collector, headed by Annmarie Corbitt (Corbitt). Corbitt credibly testified that the collection staff fills out the Senior Freeze forms, entering the property block and lot numbers and other information, and verifies that the applicants have paid their property taxes. The applicants can choose to send their receipts directly to the New Jersey Division of Taxation (the State), or Corbitt can sign the form acknowledging that the property tax has been paid.

The Tax Collector's Office is located next to the Tax Assessor's Office, where appellant works. The two offices have separate entrances off the main hallway in the municipal building. In order to visit the tax collector, one must pass through a closed double doorway that opens into a hallway. At the end of the hallway are two windows that provide counter service. One window is staffed by the cashier. Residents wait in the hallway for service. Behind the windows lies the office space for the tax collection staff, including Corbitt. This area is accessed through a locked door near the windows.

On the aforesaid date, the above-mentioned senior couple approached the cashier's window asking to have their Senior Freeze application filled out. They were upset because the cashier told them that they were not the record owners of the property, and there was no proof that they paid the property taxes. The couple left, then returned to the office with appellant. They stood in the hallway inside the tax collection office, in front of the windows. Other customers were present. Corbitt testified that appellant asked her if she was going to sign the form, to which she replied that she could not. She asked appellant to come into the office behind the windows, testifying that she wanted to tell appellant in private why she was unable to sign the form. Appellant became loud and disruptive, demanding that Corbitt talk to her in front of the couple. Corbitt repeated that she would not sign the form, telling appellant that the couple's daughter died two years ago, and that the property taxes were being paid by the lender. She said that the couple could send their receipts to the State instead. At that point, appellant and the senior couple left Corbitt's office, only to return a few minutes later. Corbitt testified that appellant yelled at her, demanding that she sign the form. When Corbitt declined, appellant told her that she had just called Trenton, and Trenton said she could sign the form. Again, this occurred in the presence of other customers waiting in the hallway. Corbitt did not sign the form. She stated that she was angry and embarrassed by the incident, maintaining that she kept her composure due to the fact that the incident occurred in the crowded hallway of her office. Later that day, she memorialized the incident in an email to Small, appellant's supervisor. (See R-2.)

With the exception of the nature of her demeanor and tone during this incident, which is addressed in the following section, appellant did not dispute Corbitt's testimony.

She explained that she accompanied the couple to the tax collector's office to find out why the form was not signed, and had an exchange with Cheryl at the window. She first testified that she changed the deed itself to reflect that the parents owned the property, but later stated that she changed the address on the deed. She was under the impression that once the address was changed to that of the couple, they were eligible to complete the Senior Freeze application. When rebuffed by Cheryl, she returned to her own office and called Trenton. She did not elaborate as to what she meant by "Trenton." She said that Trenton told her that the tax collector's office could complete the application. She then brought the couple back to Corbitt's office. She acknowledged that Corbitt asked her to join her in the back office, but that she refused to speak with Corbitt privately because she wanted the couple to hear what she had to say. Appellant told Corbitt that she explained the circumstances to Trenton, and was told that Corbitt could sign the application. She testified that Corbitt was upset during this exchange "because she felt as though I was telling her what to do." She denied raising her voice at Corbitt, explaining that she would not do that with seniors present. She said that she did not believe that she was behaving unprofessionally. She asserted that it was her job to help seniors with tax relief, but conceded that it was not listed in her own description of her job duties. (See R-4.)

Small refuted her testimony, credibly testifying that it was not appellant's job to fill out the Senior Freeze applications. Further, these applications were unrelated to the assessing department. Instead, she was required to simply give a Senior Freeze book to the taxpayer, and not take any further action. Small stated that after he received Corbitt's email, he made it clear to appellant that this was her sole responsibility.

C. Incidents as to Appellant's Non-Compliance with Directives

The Department offered undisputed testimony regarding appellant's unwillingness to comply with directives on a number of occasions.

In March 2012, Appellant advised Ross, Senior Assistant Clerk and her immediate supervisor, that she was called to report for jury duty. Ross directed appellant to fill out

a time request form. Appellant refused to do so since she was not taking personal time, even though Ross explained to her that she would not be charged for the time. Ross testified that as part of her job duties, she needed to keep track of time for the Department's staff. Appellant acknowledged that there was a "back and forth" with Ross concerning her refusal to fill out a time request form. She justified her recalcitrance by stating that the time request form was only for personal, vacation, or sick time, not jury duty. She then asked her union representative for guidance. She insisted that usually you need to show only your jury duty letter to the supervisor, and that is sufficient. However, she acknowledged that this was her first experience with jury duty. Eventually, appellant saw the box on the time request form marked "Other", and agreed to complete the form. She also testified that she had not been given any written policy regarding jury duty procedure.

In another incident, Ross asked appellant to search on the computer for unpaid water bills. She directed her to not make copies of the bills, but simply make a notation of the amount owed, so that the tax appeal petitions could be flagged for non-payment of water services. Appellant disregarded this directive, making copies of the water bills. She testified that she would need to make copies later anyway, as Ross did not have access to the water system. She then corrected her statement, saying that Ross did have access but never used the system. She then said that Ross's code to get into the system was outdated; therefore, Ross did not have access to the water system. She based this on a conversation she overheard in the office. Regardless, appellant did not dispute that Ross directed her to not make copies.

In addition, Small testified that appellant habitually combined her one-hour lunch break with her two fifteen-minute breaks, leaving the office for one and a half hours. He credibly testified that she continued to do so, even after he told her it was an unacceptable practice. In response, appellant told Small that under the prior tax assessor, the practice was to permit a combined lunch period. Small countered that he later became informed that this was not the case. Nevertheless, it is undisputed that she was given notice that she was limited to a one-hour lunch break, and disregarded that directive.

In addition to the evidence underlying the above preliminary facts, other pertinent testimony follows:¹

D. Incident as to Notifying the NJHMFA about Alleged Over-Assessments

Sometime in October 2011, a taxpayer approached appellant in the tax assessor's office to complain about her assessment being high, in preparation for filing a property tax appeal. Appellant stated that she was unable to provide the person, Mrs. Bellamy (Bellamy), with pertinent information. Appellant testified that she later received a telephone call from Linda Gargiulo (Gargiulo), who was the Operation Manager of the Housing Affordability Service (HAS) within the New Jersey Housing and Mortgage Finance Agency (NJHMFA). This state agency monitors the assessments of affordable housing units. According to appellant, she did not initiate the call to Gargiulo, instead stating that Bellamy had taken appellant's business card, and must have called Gargiulo herself to question the assessment. Appellant stated that she directed Gargiulo to contact Small. However, communications from Gargiulo indicate that a detailed conversation ensued. (See R-7; R-8.)

Small then received an email from appellant dated October 27, 2011, stating: "Good Morning Tom, Attached please fine [sic] the information regarding the affordable housing units prices." (R-7.) Appellant attached an email from Gargiulo referencing their discussion about certain properties in the City that were over-assessed pursuant to NJHMFA regulations. Ibid. Small testified that he had no prior notice of a conversation between appellant and Gargiulo until he received the email. He never directed appellant to confer with the NJHMFA, nor was it part of her job duties. Small then received a copy of a letter addressed to appellant from Gargiulo. (R-8.) The letter included a spreadsheet listing approximately forty properties in the City with their current values under the affordable housing program. The Department was directed as follows: "Your prompt attention to adjusting the assessed values would be appreciated . . ." Ibid. Small testified that a reduction in assessments would have resulted in a loss of revenue to the City. He

¹ For purposes of clarity and in order to distinguish the two appeals, the lettering of the sections is continuous through the undisputed and disputed testimony in CSV 13300-12.

then had a number of conversations with Gargiulo, and was able to rectify the situation only with the intervention of the City's legal department.

E. Second Incident at the Tax Collector's Office

Several months later after the first incident detailed in Section B above, Corbitt again found appellant in her office hallway helping two seniors fill out the Senior Freeze applications. She did not engage her, but simply walked past and entered the back office. Corbitt stated that she spoke to someone about this, and was told to send a memo to Small. On July 10, 2012, she emailed Small about the second incident. (See R-1.) Appellant, on the other hand, denied helping seniors in Corbitt's office after the October 2011 incident.

F. Appellant's Tone and Demeanor

Both Ross and Small credibly testified as to appellant's inappropriate tone and demeanor. Ross stated that appellant responded to most directives with a harsh, disrespectful tone, and was routinely argumentative. Small stated that appellant continued to have problems following instructions, and at times would simply refuse to do certain tasks.

ADDITIONAL FINDINGS OF FACT

In view of the divergent testimony regarding certain matters noted above in Sections D, E, and F, it is necessary for me to assess the credibility of the witnesses for purposes of making factual findings as to the disputed facts. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its

rationality, internal consistency and the manner in which it “hangs together” with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

After carefully considering the evidence and evaluating the demeanor and credibility of the witnesses, I found Corbitt, Small, and Ross to be forthright and credible. They presented candid testimony as to pertinent facts; further, their testimony was not undermined or impaired on cross-examination. For example, Corbitt’s anger at appellant for barging into the tax collector’s office and trying to force her to sign the Senior Freeze application was palpable. Her description of the incident was detailed and believable. On the other hand, an evaluation of the totality of appellant’s testimony casts doubt on the reliability of her version of events; namely, that she was not loud or disruptive in the tax collector’s hallway. Her acknowledgment that she rejected Corbitt’s request to speak privately in the back office points to her desire to keep the matter public. It also is evidence of appellant’s lack of professionalism and good judgment. In fact, she admitted that Corbitt was upset “because she felt as though I was telling her what to do.” Appellant’s self-assessment in this regard was correct. Her testimony that she was not loud, disruptive, or unprofessional does not hang together with the other evidence, including her own contradictory statements.

In addition, I am persuaded by Corbitt’s credible testimony that she again saw appellant in her office several months later with another senior couple.

As to the incident in which appellant is alleged to have contacted the NJHMFA about over-assessments of property in the City, I credit the testimony of Small while finding appellant’s version of the incident to be improbable. Interestingly, this matter occurred at approximately the same time as the incident in the tax collector’s office. Appellant is charged with contacting a manager at NJHMFA to question if a homeowner’s property was over-assessed. She testified that it was the homeowner who contacted the NJHMFA, who then contacted appellant. She further stated that she told the NJHMFA administrator to contact Small. This is a highly unlikely scenario. Appellant’s testimony simply does not hang together with the other evidence, including an email and letter directed to appellant from Gargiulo at the NJHMFA referencing their conversation. I note that the letter makes no reference to Gargiulo being contacted by the homeowner. Once

again, it is clear that appellant reached out to a higher authority without permission from her supervisor.

Ross's testimony regarding appellant's non-compliance with directives was also credible, as opposed to appellant's versions of why her work was not completed. An example is her contradictory testimony regarding Ross not having access to the water system. I also credit Small's testimony concerning appellant's recalcitrance and refusal to do certain tasks. The manner in which appellant justified her actions makes it clear that she did not feel bound by office protocol or directives.

Based upon a review of the testimony and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional pertinent **FACTS**:

On or about October 28, 2011, appellant entered the tax collector's office with a senior couple. Other customers were present. Appellant tried to induce Corbitt, the Tax Assessor, to complete and sign the couple's Senior Freeze application. This was outside of appellant's job duties; the Senior Freeze applications were handled by Corbitt's office. Corbitt declined to process the application. Appellant persisted, yelling at Corbitt and disrupting the business of the office. She rejected Corbitt's attempt to bring her into the private office in order to explain why she could not sign the form. She then brought the couple back to the tax assessor's office, returning to Corbitt's office a few minutes later. Appellant claimed that she had spoken to Trenton, and that Corbitt could sign the form. The incident caused Corbitt to be embarrassed and angry. Several months later, Corbitt witnessed appellant helping another couple in the hallway of the tax collector's office, despite having been told by Small to not do so.

On or about October 2011, without the permission or knowledge of Small or Ross, appellant contacted the NJHMFA to advise that certain properties in the City were over-assessed. This was in response to a homeowner who believed the assessment on her property was too high. This act was outside of her job duties. As a result of her intervention, the Department was contacted by the NJHMFA with a directive to reduce

the assessments on approximately forty properties in the City. In order to rectify the situation, the matter had to be referred to the City's legal department.

Appellant habitually used a harsh, disrespectful tone with her supervisors, and was argumentative when asked to perform a task.

2. AS TO CSV 09602-13

This matter concerns various infractions with regard to appellant's work activities from June 2012 through August 7, 2012, the period of time when municipalities defend against property owners' tax appeals before the County Boards of Taxation. As to these charges, the Department presented testimony by Thomas Small, Diane Ross, and Ryan Linder, and appellant testified on her own behalf. The pertinent facts surrounding this appeal are not disputed. Therefore, based upon a review of the testimony and the documentary evidence presented, I **FIND** the following pertinent **FACTS**:

A. Incident as to Appellant's Failure to Prepare the Tax Appeal Calendars

On or about June 19, 2012, Small emailed the Department's staff instructing them on certain procedures that would be in place while he was on vacation, which was during tax appeal season. (R-10.) In short, Ross was left in charge. The staff was directed to not ask Ross for specific work requests in writing. Small said this was necessary because appellant was in the habit of demanding that all tasks required of her be put in writing. Nonetheless, on June 21, 2012, Ross prepared a memo directing appellant to perform certain tasks with regard to pending tax appeals, to wit: "Please see attached list for Tax Appeals calendars date July 23, 25 & 26 will you please pull application and make copies. Also please advise me whether water is current for the following properties." (R-13.) The memo also directed appellant to check the status of the water bills for the July 12 calendar. Ibid. Having received no response to her request, Ross wrote a second memo to appellant on July 5, 2012, asking her to provide the requested information by July 6, 2012. (R-14.) Again, no response was forthcoming. Ross made a third request to appellant by memo dated July 9, 2012, with no action taken by appellant. (R-15.) She

sent a fourth memo to appellant dated July 10, 2012, reminding her that the homeowners must be notified ten days before the tax appeal hearing. She requested that the work be completed by the end of the day. (R-16.) Ryan Linder (Linder), the City's assistant corporation counsel, clarified that if a homeowner was noticed seven days before his or her appeal date that he or she owed municipal charges, the City could properly move to dismiss the appeal if the charges remained open on the hearing date. Thus, the work product requested of appellant was important to the City's ability to defend against the large number of appeals filed. In fact, Linder testified that as the attorney representing the City before the Essex County Board of Taxation during this time period, he was unable to raise non-payment of water charges as a defense in those cases where the letters were sent out late. He did not elaborate on the number of appeals affected. On July 12, 2012, Ross sent a fifth memo to appellant asking for the information no later than July 16, 2012 at noon. (R-17.) Appellant finally complied with the request on said date, delivering the work to Ross at 12:40 p.m.

Appellant testified that she could not perform the above tasks because she was busy working on deeds. Referring to the first memo Ross sent her, dated June 21, 2012, appellant stated:

[W]hat I didn't understand is that [Ross] also knew that our sampling period was coming to an end June 30th. So that means that the deed needed to be updated, and the records in the computer, the MOD4 and the Microsystem need to be updated and maintained. So this date here is coming close to the June 30th date, and now I'm swamped with deeds.

She asserted that her former supervisor, Barbara Williams (Williams), told her that working on the deeds was a priority. Williams left the Department almost one year prior to Small being appointed tax assessor. She acknowledged that neither Small nor Ross directed her to give priority to the deeds. Appellant knew that Ross needed the information requested in the five memos, but felt that Ross should have known that her workload was significant. Nevertheless, she made no effort to tell Ross that she was having issues completing the work. She simply did not do it until after receipt of Ross's fifth memo on July 12, 2012.

B. Incident as to the Water System Software

Ross testified that along with the above incident as to her neglect of the tax appeals, appellant blamed inoperable software for her inability to check on the status of the water bills. Rather than notify Ross or Small, she contacted the Information Technology (I.T.) Department for help. When Ross asked her how long the system had been inoperable, appellant could not answer. Ross told appellant that she should have notified her instead, as she would be able to contact the supervisor at the water department directly. As a result of the passage of time, many of the water bills were not sent to the taxpayers in a timely manner. Ross also stated that the delays occasioned by appellant in all aspects required her to step in and complete the work, since the appeals packets had to be ready for review by Linder and Small prior to each hearing date.

C. Incident as to Last-Minute Personal Leave

In Small's above-mentioned vacation memo dated June 19, 2012, he wrote that if someone had a personal emergency, he or she should notify Ross of their absence, and he would approve the time upon his return. (See R-10.) Ross testified that during the week that Small was on vacation, she saw appellant toss a paper into her basket and leave the office at approximately noontime. She did not know if appellant was going to lunch or elsewhere until she picked up the paper and saw that it was a request for a personal half day, effective as of the moment appellant walked out of the office. Small testified that the protocol was for the staff to tell him they needed personal time, and then submit the request to Ross. It was not protocol to submit the request and then walk out the door. Ross stated that appellant did not say anything to her before leaving.

Appellant explained that she had a dire emergency and had to leave work. She testified that she told Ross that there was an emergency, handed her the paper, and departed. When asked on cross-examination how Ross would know if she was returning that day, appellant replied: "The paper stated that I was taking the remainder of the day." As to how she knew the request was approved, she stated: "I didn't know it was approved. I was merely giving that paper to her to let her know that I was going to take. That was covering myself for my time not being in the office."

The emergency appellant referred to was that she had effected a lockout of her tenant, and the tenant was going to court to vacate it. Appellant wanted to ensure that the lockout took place.

Small approved the above time request on June 26, 2012, after he returned from vacation. (R-11.) He explained that she had already taken the time, and he did not want to get into a fight over how to handle the situation. He stated that she was extremely hostile, and that he did not want to engage her. He summarized his feelings as follows:

I knew what was going on and I was new in the job. I didn't want to come into a new position and then immediately start a conflagration with . . . an old employee. I was hoping it would take care of itself; time passed, but it didn't.

Ross echoed Small's sentiments, characterizing appellant as very hostile and non-communicative.

She refused to communicate with me and as far as work it was hard to ask or to get – to get [appellant] to do anything that I needed in a timely fashion. So she was very hostile to me.

In general, appellant was hostile and non-communicative with Small and Ross during all relevant time periods. I further **FIND** that Small and Ross were disinclined to address the above issues with appellant, taking a passive stance while appellant ran amok in the Department, rejecting their authority.

LEGAL DISCUSSION AND CONCLUSIONS

The Civil Service Act and the regulations promulgated pursuant thereto govern the rights and duties of a civil service employee. N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1, et seq. A civil service employee who commits a wrongful act related to his or her duties, or gives other just cause, may be subject to major discipline. See N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; N.J.A.C. 4A:2-2.3. The issues to be determined at the de

novo hearing are whether the employee is guilty of the charges brought against him and, if so, the appropriate penalty, if any, that should be imposed. Henry v. Rahway State Prison, 81 N.J. 571 (1980); W. New York v. Bock, 38 N.J. 500 (1962).

In this matter, the Department bears the burden of proving the charges against appellant by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R. Co., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

An appointing authority may discipline an employee for various causes as set forth in N.J.A.C. 4A:2-2.3. With regard to the FNDA dated September 5, 2012, the Department charged appellant with insubordination, conduct unbecoming a public employee, and neglect of duty. N.J.A.C. 4A:2-2.3(a)(2), (6) and (7). As to the FNDA dated May 23, 2013, the Department charged appellant with insubordination and neglect of duty. N.J.A.C. 4A:2-2.3(a)(2) and (7).

Insubordination encompasses an employee's failure or refusal to follow a directive, order or instruction of a supervisor. Eaddy v. Dep't of Transp., 208 N.J. Super. 156, 158–59 (App. Div.), certif. granted, 104 N.J. 392, order vacated, appeal dismissed, 105 N.J. 569 (1986); City of Newark v. Massey, 93 N.J. Super. 317, 322 (App. Div. 1967). Neglect of duty is predicated on an employee's omission to perform, or failure to perform or discharge, a duty required by the employee's position and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit System Board (December 27, 2001), <<http://njlaw.rutgers.edu/collections/oal/>>; see Steinel v. Jersey City, 193 N.J. Super. 629 (App. Div.), certif. granted, 97 N.J. 588 (1984), aff'd on other grounds, 99 N.J. 1 (1985).

Conduct unbecoming a public employee has been described as an “elastic” phrase that includes “conduct which adversely affects the morale or efficiency” of the public entity or “which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services.” In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). It is generally understood that chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531.

Based upon the aforesaid **FINDINGS of FACT**, I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant’s actions in intervening with the business of the tax collector’s office on two occasions, non-complying with her supervisor’s directives, unilaterally contacting the NJHMFA to report alleged over-assessments by the City, and exhibiting a pattern of being disrespectful and uncommunicative with her supervisors constitute insubordination, conduct unbecoming a public employee, and neglect of duty. The record clearly demonstrates that appellant’s actions disrupted the Department for an extended period of time. Although there is no evidence that appellant was obligated to notify Small of her FMLA leave, the incident is another example of her repeated failure to communicate with her supervisors. Aside from the credible testimony of the Department’s witnesses, appellant’s own testimony leads to the unmistakable inference that she simply did not believe that she owed a duty to the Department.

Based upon the aforesaid **FINDINGS of FACT** with regard to appellant’s failure to prepare the tax appeal calendars, obtain the water bills, along with her taking personal leave time without permission, and continuing to foment a hostile work environment by virtue of her disrespectful conduct, I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, that appellant’s dereliction amounts to insubordination and neglect of duty.

The only remaining issue concerns the penalty that should be imposed. In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee’s 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. Pursuant to West New York v. Bock, 38 N.J. 500, 523–24 (1962), concepts of progressive discipline involving penalties of increasing severity are used where appropriate. See also In re Parlo, 192 N.J. Super. 247 (App. Div. 1983).

Here, appellant has no prior disciplinary history. Nonetheless, I am persuaded that the pattern of conduct that she engaged in with regard to CSV 13300-12 merits a major discipline. In determining if the one hundred eighty-day suspension imposed is warranted, I am guided by the testimony of Small, wherein he candidly stated that he knew what was going on with appellant, and he hoped the situation would take care of itself over time, but it did not. Unfortunately, Small and Ross remained passive, failing to take meaningful steps to alter appellant's conduct. While one can appreciate the discomfort in reprimanding a hostile employee, in this matter appellant was simply emboldened to continue her pattern of dereliction and insubordination. Therefore, I **CONCLUDE** that a ninety-day suspension is reasonable and appropriate under the circumstances presented.

With regard to the one hundred eighty-day suspension imposed with regard to CSV 09602-13, I **CONCLUDE** that such discipline is reasonable and appropriate under the circumstances, and comports with the concept of progressive discipline. It is clear that appellant returned from her first suspension determined to continue to make her own rules. During this time period, the Department was in the midst of tax appeal season. Appellant was well aware that in order for the City to be successful, all Department employees had to perform their jobs in a timely manner. Appellant's excuses for not being able to do her job are plainly without merit. At this point, appellant had ample notice and warning of the deficiencies in her performance. Yet, she continued the pattern of insubordination and neglect of duty, to the detriment of the Department and her co-workers.

ORDER

I **ORDER** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated September 5, 2012, the charges of insubordination, conduct unbecoming a public employee, and neglect of duty be and hereby are **SUSTAINED**. I further **ORDER**

that, based upon the aforesaid sustained charges, appellant be and hereby is suspended for ninety days.

I **ORDER** that with regard to appellant's appeal from the Final Notice of Disciplinary Action dated May 23, 2013, the charges of insubordination and neglect of duty be and hereby are **SUSTAINED**. I further **ORDER** that, based upon the aforesaid sustained charges, appellant be and hereby is suspended for one hundred eighty-days.

I further **ORDER** that back pay and other benefits be issued to appellant as may be dictated by 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.

February 3, 2017
DATE

Joan Bedrin Murray
JOAN BEDRIN MURRAY, ALJ

Date Received at Agency:

2-3-17

Date Mailed to Parties:

2-3-17

dr

APPENDIX

List of Witnesses

For Appellant:

Esther Tyndall

For Respondent:

(As to CSV 13300-12)

Thomas Small

Diane Ross

Annmarie Corbitt

(As to CSV 04692-14)

Thomas Small

Diane Ross

Ryan Linder

List of Exhibits in Evidence

For Petitioner:

- P-1 Memorandum from Jillian Barrick, City Administrator to Claude Craig Sr., Director-HRS dated June 25-2012
- P-2 Final Notice of Disciplinary Action dated September 5, 2012
- P-3 Final Notice of Disciplinary Action dated May 23, 2013
- P-4 Attachment to Final Notice of Disciplinary Action dated May 23, 2012
- P-5 Memo to Appellant from Ross dated July 16, 2012
- P-6 Sample - Book of Property Sales
- P-7 Letter from Beth Wood to Tracy Hackett, Esq. dated June 18, 2013
- P-8 Letter from Tracey Hackett, Esq., to Beth Wood and Henry Maurer dated May 25, 2013
- P-9 Certificate dated October 29, 2008

- P-10 Certificate dated April 22, 2009
- P-11 Certificate dated September 2007
- P-12 Certificate dated October 2007

For Respondent:

- R-1 07/10/12 Email from Anne Marie Corbitt to Tom Small
- R-2 07/10/12 Email from Anne Marie Corbitt to Tom Small
- R-3 Job Specification for Assessing Clerk
- R-4 05/28/08 Letter from Esther Tyndall
- R-5 Tax Assessor's Office Organizational Chart
- R-6 05/23/12 Preliminary Notice of Disciplinary Action
- R-7 10/27/11 Emails with NJHMFA
- R-8 10/27/11 Letter from Linda Garguilo
- R-9 08/07/12 Preliminary Notice of Disciplinary Action
- R-10 06/19/12 Email from Thomas Small
- R-11 06/26/12 Time Request
- R-12 08/29/12 Memo re: Office Protocols
- R-13 06/21/12 Memo from Diane Ross to Esther Tyndall
- R-14 07/05/12 Memo from Diane Ross to Esther Tyndall
- R-15 07/09/12 Memo from Diane Ross to Esther Tyndall
- R-16 07/10/12 Memo from Diane Ross to Esther Tyndall
- R-17 07/12/12 Memo from Diane Ross to Esther Tyndall