

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 15TH DAY OF APRIL, 2020

Deirdre' L. Webster Cobb

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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 13823-18

AGENCY DKT. NO. 2019-651

**IN THE MATTER OF DERRICK DIXON,
THE COLLEGE OF NEW JERSEY.**

Shiohban Royster, Esq., for appellant, Derrick Dixon (Law Offices of Shiohban, Esq., attorneys)

Erin I. Herlihy,¹ Deputy Attorney General, for respondent, The College of New Jersey (Gurbir S. Grewal, Attorney General of New Jersey, attorney)

Record Closed: November 27, 2019

Decided: February 27, 2020

BEFORE JUDITH LIEBERMAN, ALJ:

STATEMENT OF THE CASE

Appellant, Derrick Dixon (Dixon or appellant) appeals from disciplinary action taken by The College of New Jersey (College or appointing authority) removing him from his position with the College. The removal was based upon a determination that he violated

¹ Geoffrey N. Stark, Deputy Attorney General, presented the respondent's case at the hearing and wrote the post-hearing brief.

N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, when he was involved in an altercation on the grounds of the College.

PROCEDURAL HISTORY

On November 16, 2017, appellant was served with a Preliminary Notice of Disciplinary action. He was suspended without pay pending the outcome of an investigation and hearing. A hearing was conducted July 31, 2018. The hearing officer sustained the charge of conduct unbecoming a public employee, N.J.S.A. 4A:2-2.3(a)(6). On August 27, 2018, a Final Notice of Disciplinary Action was issued, terminating appellant's employment effective that day. Appellant filed a timely appeal and the matter was transmitted to the Office of Administrative Law on September 24, 2018, for hearing as a contested case. The case was heard on March 7, 2019, and July 17, 2019.² The record remained open for the receipt of transcripts, written briefs and replies. The record closed November 27, 2019. An extension of the deadline to issue the initial decision was sought due to a medical issue. On January 13, 2020, an extension of the initial decision deadline was granted.

FACTUAL DISCUSSION AND FINDINGS

Testimony

For respondent:

Officer Tiffany Reed was employed by The College of New Jersey Police Department. The College prohibited weapons, including knives, on campus. On October 24, 2017, she was working with Sergeant James Bruther when they were called to respond to a fight. They did not discover a fight in progress when they arrived at the scene, which was an outdoor area between the Education and Forcina buildings. They questioned people in the area. They encountered Arthur Stroman (hereinafter referred to as Arthur for ease of reference), the husband of an employee, Janine Stroman

² Earlier hearing dates were adjourned due to the unavailability of an American Sign Language interpreter.

(hereinafter referred to as Janine for ease of reference), and two supervisors. Appellant was not present when Reed and Bruther arrived at the scene.

The officers were told that Arthur came to the campus to deliver his wife's phone to her. Arthur and appellant engaged in a verbal fight that involved weapons and threats. They learned that Kennis Kirkpatrick, a College employee, used his cell phone to make a video recording of the incident. Reed viewed the video on Kirkpatrick's phone and downloaded it onto a computer.

Kirkpatrick's video recording was played during the hearing. Reed acknowledged that the recording did not capture the entire incident and that she and Bruther did not know how the incident started. Reed identified appellant and Arthur on the video. Appellant wore a tan Building Services sweatshirt, blue pants, black shoes and hat. Arthur wore a royal blue sweatshirt and holding a golf club. Appellant is seen holding a knife at the twelve second and the one minute, forty-six second marks on the video.³ Reed recognized appellant's voice on the video and testified he used language she considered to be threatening. She did not describe that language.

At approximately forty-five seconds, appellant is seen standing at the entrance of Forcina Hall. Reed observed that the incident occurred approximately thirty feet from Forcina Hall. Based upon her review of the video, there were "multiple times" when Arthur and appellant could have left. T1 44:6.⁴ Arthur could have gotten into his car and appellant could have gone into the building. However, they both continued to threaten each other.

Reed prepared an investigation report in which she recorded that, upon arriving at the scene, people there directed her and Bruther to Arthur and Janine and Building Services Supervisors Michael Salmon and Landon Jasmin. Janine told the officers she left her phone at home and asked Arthur to bring it to her at the College. Reed wrote,

³ The video included a minute and second counter.

⁴ T1 refers to the transcript of the March 7, 2019, hearing date; T2 refers to the transcript of the July 17, 2019, hearing date. The referenced page and line number(s) follow each citation.

When A. Stroman arrived, J. Stroman stated that another worker, who she was unfamiliar with, identified as [appellant], was parked behind her, had heard her husband ask her if that was the man harassing her. The two started to argue and A. Stroman advised that [appellant] brandished knife and threatened him which caused him to grab his golf club out of his car as a defense. I asked A. Stroman if he also had threatened the individuals with a knife and he stated that he did not. Sgt. Bruther patted A. Stroman down for weapons and advised that he was clear.

R-2.

Appellant was in the Building Services Office in Forcina Hall when Reed and Bruther arrived. They spoke with appellant in the office. Reed wrote that appellant:

advised that A. Stroman had started arguing with him over something about his wife, who [appellant] stated he did not know, and that is when A. Stroman pulled out a golf club from the trunk of his vehicle and threatened him with it. [Appellant] stated that he pulled out his folding knife for protection, and at some point during the dispute A. Stroman had also acquired his own knife and also threatened to shoot [appellant]. Sgt. Bruther patted down [appellant] for weapons and seized the knife as evidence.

R-2.

Redd wrote that the video recorded by Kirkpatrick:

showed the middle of the argument where A. Stroman has a golf club in his hand and is waving it in the air at [appellant]. [Appellant] is also seen to be holding a knife. At one point in the video, A. Stroman returns to his vehicle, which is pulled upon on to the sidewalk, and came out of it holding a knife and walked back to [appellant.] Throughout the video, J. Stroman is seen standing in front of A. Stroman pushing him back towards his vehicle. Both parties are threatening each other. The video ends as A. Stroman walked back to his car, after yelling that he would shoot them.

R-2.

The blade of appellant's knife was approximately six or seven inches long, based upon Reed's personal observation. She took a photograph of the knife.⁵ R-4. Appellant

⁵ The photograph did not capture the full length of the knife.

was arrested and charged with possession of a weapon. R-3. Arthur was also charged with possession of a weapon and was barred from visiting the College campus.

On cross-examination, Reed clarified that she did not speak with Kilpatrick, who is deaf, and she was unable to communicate with him using American Sign Language. Reed assumed Kilpatrick could read lips and she communicated with the assistance of supervisors who knew Kilpatrick. The supervisors told Reed what Kilpatrick previously told them. Reed believed Kilpatrick understood her when she asked him to show her his phone and asked other questions. She viewed the video after Kilpatrick reported to headquarters and gave her his phone. She asked him, "Is this the video?" and he nodded his head. T1 50:17-18. She did not ask him any questions about the video, including whether it was the complete video; if he edited the video; or if he was the person who actually recorded the video. She believed it was the complete video, given what she saw when she viewed it.

Also on cross-examination, Reed noted the video showed that approximately four or five other people were in the area of the incident. She acknowledged she did not recall whether she spoke with anyone other than Arthur, Janine and appellant. She could not say whether she spoke with everyone who was visible on the video. She was aware that, by the time she arrived, some people had left the area to report to work. She did not seek out the people on the video after she viewed it. The accounts provided by the people with whom she and Bruther spoke were similar and the investigation was concluded after they viewed the video. Reed also acknowledged that there is a ten to fifteen second portion of the video during which only a license plate was visible. It is possible that she may not have spoken with the people who could be heard yelling during that portion of the video.

Janine Stroman has worked as a senior building maintenance worker for the College for thirteen years. She knew the appellant was also employed as a maintenance worker at the College but she had not worked with him and did not have a personal relationship with him.

On October 24, 2017, Janine asked Arthur, who is not a College employee, to bring her phone to the College, as she had left it at home. After Arthur met her at the College,

they spoke while Arthur remained in his car and she stood outside it. Appellant pulled up in his car and then "cussed" at them. Janine testified the two men exchanged words:

Like, he was talking to me. He's like, "Who the [f...] you talking to?" And my husband's looking at him, "Who you talking to? Who the [f...] you talking to?" And my husband said, "You don't know me." He said "You don't know me neither. I'll [f...] you up." And he started going off into a rage.
T1 92:11-16.

Arthur exited his car and the men continued to exchange words. Janine attempted to calm Arthur. As she faced Arthur, she could not see appellant, who was behind her. She did not see appellant wield a knife because her back was turned to him.

During the exchange between Arthur and appellant, Dennis Marshall exited Forcina Hall and began to yell that Janine had called her husband to the College in order to fight appellant. She believed Marshall and appellant were friends. Janine testified that this was incorrect. She did not want her husband to fight appellant and she did not want such activity to occur at her workplace. She did not know Marshall and did not speak with him.

On cross-examination, Janine explained that, she and her husband were speaking with each other when appellant drove into the area. Janine told her husband that she could not move her car because it was blocked by a car that had been driven by Dennis Marshall. Appellant exited his car and yelled at them. Appellant said, "Who the f are you talking to?" Arthur responded, "Who are you talking to?" The men continued to exchange words and appellant moved around Arthur's car. Appellant continued to argue with and threaten Arthur, who exited his car as appellant moved further in front of his car. Janine did not know if appellant intended to walk toward the nearby building, Forcina Hall, or move closer to Arthur.

Janine later testified that appellant walked in front of the car and not towards the building, prior to Arthur exiting the car. After Arthur exited the car, he stood adjacent to it. Appellant then "pulled a knife" on Arthur. T1 133:16. She also testified that appellant threatened to kill her. This caused her anxiety for which she sought treatment.

Janine told her husband to not worry about appellant and to get back into his car. She told him to leave the area but he would not leave her while appellant was acting in that manner. She did not leave the area with Arthur because she was at her workplace and her car was there.

Also on cross-examination, Janine testified that Arthur and appellant were approximately a few feet apart⁶ when Arthur retrieved a golf club from the trunk of his car. Janine attempted to prevent him from doing this. She stood in front of Arthur, adjacent to the driver's side of the car, in an effort to get him to stop. Arthur and appellant continued to yell at each other. Arthur did not advance further toward appellant because she held him. Dennis Marshall exited the nearby building, yelling that she had called her husband to the scene with an intention that he fight appellant. She did not respond to him. The incident ended when campus police officers arrived.

Kennis Kilpatrick is an employee of the College of New Jersey. He is deaf and testified with the aid of an American Sign Language interpreter. Kilpatrick saw appellant and a man he did not know when he arrived for his shift on October 24, 2017. He saw the incident as it started. After approximately two minutes, he started to record the incident with his cellphone. Kilpatrick confirmed that the video that was played during the hearing is the one he made. He did not edit or otherwise alter it. Kilpatrick stood a distance from the incident, approximately twenty-five feet, and it was difficult for him to see. He could not hear the exchange between the men.

Kilpatrick testified he was able to discern that there was a verbal altercation and that he did not see physical fighting and did not observe that either man had a weapon. He saw one man retrieve a golf club from the trunk of a car. That man lunged forward while holding the club and it appeared that he tried to physically fight the other man. A woman tried to block him from getting closer. Kilpatrick clarified that he did not intend to say that the man with the golf club wanted to hit the other man with the golf club. It appeared to Kilpatrick that the man with the golf club was the aggressor, as he was more

⁶ She estimated the distance was similar to that from the counsel table in the hearing room to the witness stand. T1 142:11.

active and Kilpatrick could discern his voice was higher and he moved around more during the argument. While recording, Kilpatrick zoomed in on a car's license plate. He believed it was a new car on the campus and campus security might need to identify it.

Kilpatrick showed the recording to a supervisor and campus police also viewed it. The officers did not ask him questions about it and downloaded it to their equipment.

For appellant:

Dennis Marshall worked for the College in its building maintenance department. He worked the same shift as appellant but they did not work together or in the same buildings. Marshall worked at the College on October 24, 2017. That day, he and other maintenance workers reported to a building in order to sign in to work at the start of their shifts. Janine was in the driveway by the building and speaking with a woman when he arrived in his car. Appellant was not there when he arrived. When he pulled his car into the area, Janine said, "Don't block me in." Marshall did not respond as did he not block her car and she was able to leave the area in her car. He walked into the building and signed in to work. As he left, he saw appellant and a man he did not know. The man said, "Which one of you ... messing with my wife?" Marshall observed the man and appellant arguing. Marshall said, "If somebody up here messing with your wife, she need to report it to the supervisor or she can go to H.R." T1 41:25 to 42:3. Marshall testified the man started yelling loudly. Marshall "tried to get in the middle" and get him to stop. T1 42:5. The man became "really aggressive," got his golf club and "came back arguing with [appellant.]" T1 42: 9-10. Marshall tried to separate the man and appellant. Appellant was not holding anything.

The incident lasted approximately five to ten minutes. Kilpatrick's recording did not capture the entire incident because Kilpatrick arrived at the scene after the incident began. Kilpatrick stood next to Marshall while he recorded the incident. The incident ended when Marshall told Dixon they needed to speak with a supervisor. They went into a campus building and spoke with a supervisor who called campus police.

Marshall and Janine had a prior exchange in which she grabbed him by the arm and told him he could not pass through a doorway before her. Marshall had not attempted to pass through the doorway before her and told her to not assault him.

Marshall testified that he and appellant are both Jamaican and look similar, "in a way." T1 44:18. He was not aware of any other Jamaican men in their vicinity that day.

Marshall testified that he sometimes needed to use a sharp object to perform his work duties on campus. A scraper or a tool for cutting is necessary for several of the maintenance workers' tasks. He has needed to use other tools when the proper tools are unavailable or cannot be found. For example, if he needed to break down boxes and was not provided with the necessary tools, he would use his own knife or another sharp object if he had one with him.

Derrick Dixon, appellant, was employed by the College approximately three years. He worked as a temporary employee for approximately one year prior to becoming a full time employee. He was not subject to any prior discipline before the incident at issue.

Dixon was responsible for building maintenance, including cleaning facilities, waxing and buffing. While performing his duties he would need to remove items stuck to surfaces, such as gum stuck to a floor. He was sometimes provided with a razor or scraper to remove gum. When he was not given a razor, scraper or other tool, he would use a box cutter or knife if he has one with him. His supervisor was aware that he would sometimes use his own knife or razor and did not tell him to not use it, as it was useful. Dixon brought his knife with him to work and used it "a lot of times" to scrape gum off the floor. T2 66:7. His supervisor observed Dixon use it. R-4 is a photo of Dixon's knife.

On the day of the incident, Dixon arrived at work, parked and exited his vehicle. Janine's vehicle was in the parking area; Marshall's vehicle was parked behind it. Arthur's vehicle was parked away from Janine and Marshall's vehicles. Dixon needed to walk past Arthur's vehicle to get to the building where he would sign in to begin his work shift. Dixon's driver side door was next to Arthur's passenger side door. Arthur was sitting in

his vehicle; its window was rolled down. As Dixon exited his vehicle, Arthur said "Yo, man." Dixon thought a coworker had spoken to him. He looked into the vehicle and realized he did not know the person who was speaking to him. Dixon asked, "You know me or something?" Arthur replied, "No, I don't know you but my [expletive] wife told me somebody up here messing with her." Dixon said, "Who is your wife, anyway? I don't know you. I don't know who is your wife." Arthur then pointed to Janine. Dixon said, "Why you come up here? Try to make trouble with people on the job, because your wife called and tell you something?" T2 85:8 to 87:21.

Arthur, still sitting in his vehicle, started to scream at Dixon. Dixon "fanned him off" and said, "Man, [expletive] you." T2 88:20-21. Dixon then started to walk toward the building where he intended to sign in to work. Arthur, now outside his vehicle, approached Dixon. Dixon perceived that Arthur was approaching him. He stopped and turned around and saw that Arthur was coming toward him and holding a golf club. Dixon felt threatened but felt comfortable leaving the scene and walking into the building because it was just a verbal argument. Dixon described it as "not physical." T2 91:5.

Dixon did not previously have any problems with Janine. He had not spoken with her previously. He heard Janine and Marshall argue about the door of the office where workers were attempting to clock out at the end of a work shift.

When Dixon spoke with campus police officers, he told them, "I pull up. The guy attacked me, and I pull out my pocketknife just to make him stop attacking me. That's the only reason why I pull the knife out." T2 93:13-16. Campus police determined Dixon was the subject of an outstanding warrant. Dixon was taken to a campus police area where he was detained. He gave police officers his knife, prior to his being patted down. He was released after approximately one and one-half hours. As he left, he was told by an officer that he was charged with a fourth degree criminal offense. He did not remember the specific charge; however, upon reviewing a document, he recalled that he was originally charged with unlawful possession of a weapon. The charge was later amended to simple assault.

Dixon understood he was released with the intention that he would return to work. He spoke with his supervisor and said he needed to go home and would discuss the matter with the human relations office the next day. His supervisor did not direct him to go home or to leave the campus.

Dixon reported to the Human Resources department at 9:00 or 10:00 a.m. the following day. He explained what happened the prior evening. The Human Resources Director told Dixon to go home and "wait for us to call you." T2 102:19. He told Dixon he would be paid for the time he missed work. He did not tell Dixon he was prohibited from returning to campus.

Dixon was home for approximately one week when he was told to go to counseling. He could return to work after the criminal charges were resolved. The charges were dismissed. He was not paid from approximately early November 2017, through the date the charges were dismissed, February 22, 2018.

On cross-examination, Dixon clarified that he was wearing a tan sweatshirt, white shirt, blue pants and a blue stocking cap during the evening of the incident. Fifty seconds into the video recording, he is seen near a door to the building where he signs in at the start of his work shifts. The door is located near the center of the side of the building. He had not yet signed in. At that time, and depicted on the recording, Arthur was not visible but was in Dixon's vicinity, approximately ten to twelve feet away, to his right. Arthur and Janine are visible toward the left at the fifty-five second mark. Arthur was visible on the recording at the fifty-eight second mark. At the one minute, twenty-second mark on the recording, Dixon had moved from the building's door toward the driveway

At the one-minute, twenty-seven second mark on the recording, someone can be heard saying, "I will kill your ass." Dixon could not discern from the recording whether he or Arthur made that statement. Dixon was asked if he said, "I will shoot you in your face," which was heard at the one-minute, thirty-six second mark on the recording. He replied that he and Arthur were speaking and that he did not know what he said at the time.

Dixon acknowledged that, at the one-minute, thirty-nine second mark on the recording, he could be seen taking out his knife and unfolding it. He noted that Arthur was nearby, holding a golf club. He testified that he “brandished the knife . . . because he was coming at me with a golf club. I brandished the knife for him to stop coming at me.” T2 137:22-24. He did so when Arthur “lunged toward [him] with the golf club.” T2 139:25 to 140:1. He held the knife close to his pants, “all the way down”, not in a stabbing or swinging motion. T2 140:7-8. His intention was to get Arthur to stop.

Factual Findings

It is the obligation of the fact finder to weigh the credibility of the witnesses before making a decision. “Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observations of mankind can approve as probable in the circumstances.” In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness’ interest in the outcome, motive, or bias. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

I had the ability to observe the demeanor, tone, and physical actions of appellant during the hearing. While appellant acknowledged his involvement in the incident and his possession of a knife, he claimed to be unable to determine whether he or Arthur made the threats heard on the recording. Appellant did not testify that he did not make the inflammatory statements. His assertion that he could not recognize his own voice or distinguish another person’s voice strains credulity, given the absence of evidence that the audio portion of the recording was altered or otherwise faulty. There was no such evidence nor a suggestion of such a problem. As such, I find appellant’s testimony to be lacking in credibility.

I also had the ability to observe the demeanor, tone and physical actions of Marshall, Kilpatrick and Janine during the hearing. While they may not have remembered every detail of the incident, their testimony was sufficiently consistent. Moreover, each

testified in a manner that demonstrated their intention to testify thoroughly. I, thus, found their testimony to be credible.

I viewed R-1, the video recording made by Kilpatrick with his cellphone. At the start of the recording, five people, including appellant, Arthur and Janine, are visible standing close to each other and near an entrance to a building. Arthur is holding a golf club. He proceeds to move away from the group and, thus, moves away from appellant. Appellant then moves toward Arthur, who turns and walks further away from him. Arthur next runs further away and is no longer visible. Appellant remains visible and is still in the proximity of the building.

Arthur is next seen as he approaches his car. He is then not visible until he walks away from his car, carrying a golf club and another item in his hands. Arthur starts to walk toward appellant but Janine stops him from progressing further. At that time, appellant is standing closer to the entrance to the building than to Arthur.

The video recording next shows only Arthur's car license plate. After that, Arthur and appellant are visible standing several feet apart and yelling back and forth is heard. Neither man advances toward the other until appellant walks toward Arthur. Appellant yells at Arthur, who did not advance toward appellant at that time. Both men then walked away in opposite directions.

Other people are visible passing by or standing near the area of the incident at various time on the video recording.

Having viewed the video recording and considered the testimony and documentary evidence and the credibility of the witnesses, I **FIND** the following as **FACT**: Appellant engaged in an altercation with Arthur at appellant's place of work, during work hours. Appellant had the opportunity to retreat into a building and was not consistently at risk of imminent assault by Arthur. While Arthur contributed to and participated in the altercation, he retreated from the area where appellant stood on more than one occasion. Despite this, appellant did not retreat into the building and instead approached Arthur, thus continuing the altercation. During the altercation, appellant held a knife in his hand in a

manner that could reasonably have been interpreted as threatening. While he held the knife somewhat close to his body, it was pointed forward, toward Arthur, in a threatening manner. Even if Arthur initiated the incident and behaved in a threatening manner, appellant contributed to the incident and caused it to continue.

LEGAL ANALYSIS AND CONCLUSION

The appellant's rights and duties are governed by laws including the Civil Service Act and the regulations promulgated there under. A civil service employee who commits a wrongful act related to his or her employment, or provides other just cause, may be subject to major discipline. N.J.S.A. 11A:2-6, -20; N.J.A.C. 4A2-2.2, -2.3. Major discipline includes removal, or fine or suspension for more than five working days. N.J.A.C. 4A:2-2.2. Employees may be disciplined for insubordination, neglect of duty, conduct unbecoming a public employee, failure or inability to perform duties, and other sufficient cause, among other things. N.J.A.C. 4A:2-2.3. An employee may be removed for egregious conduct without regard to progressive discipline. In re Carter, 191 N.J. 474 (2007). Otherwise, progressive discipline would be applied. W. New York v. Bock, 38 N.J. 500 (1962).

The Appointing Authority has the burden of establishing the truth of the allegations by preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). 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 a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958); see also Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959).

The appellant was charged with "conduct unbecoming a public employee" in violation of N.J.A.C. 4A:2-2.3(a)(6). "Conduct unbecoming a public employee" is an "elastic phrase" that encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl. City, 152 N.J. 532, 554 (1998)(quoting In re

Zeber, 156 A.2d 821, 825 (1959)); see also In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, 152 N.J. at 555 (quoting Zeber, 156 A.2d at 825). 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." Karins, 152 N.J. at 556 (quoting Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992)).

Here, appellant voluntarily participated in an altercation while on duty. The altercation involved the exchange of words and threats between appellant and Arthur. Appellant was plainly visible holding a knife in a manner that suggested he was prepared to use it. Appellant did not avail himself of opportunities to retreat from the altercation. Rather, he caused it to continue each time he approached Arthur or continued to yell at him. There is no evidence that appellant's actions were mandated by a need to engage in self-defense. Exacerbating this is the fact that the altercation occurred in a public area of the College.

The public and appellant's employer have a reasonable expectation that civil service employees will refrain from engaging in altercations involving confrontations and threats of violence at the workplace, particularly when self-defense is not an issue. Appellant provided no meaningful explanation why he engaged in the altercation or why he did not retreat from it prior to the time when he and Arthur simultaneously parted ways. Indeed, he caused the incident to continue. This is contrary to what the public reasonably expects from civil servants. Accordingly, I **CONCLUDE** the appellant's conduct constituted conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)(6).

PENALTY

A civil service employee who commits a wrongful act related to his duties may be subject to major discipline. N.J.S.A. 11A:1-2(b), 11A:2-6, 11A:2-20; N.J.A.C. 4A:2-2.2, -2.3(a). This requires a de novo review of appellant's disciplinary action. 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).

However, the concept of progressive discipline is not absolute. 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). 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). Further, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

Appellant contends a number of mitigating factors must be considered. First, he has no prior disciplinary history. Second, he argues he was permitted to carry a knife; he merely kept the knife to his side in an effort to protect himself from Arthur; and that he did not brandish it twice but, rather, "one continuous time." App. Br. At 3. Third, he argues Arthur was the aggressor and he refers to his "intent and purpose" to engage in a confrontation. App. Br. at 4. He suggests Arthur had no "legitimate reason" to be on campus when he encountered appellant given the timeline asserted by Janine. Ibid. In sum, appellant contends Arthur intended to cause an altercation and that, had he not confused Marshall with appellant, appellant would not have been involved. This is of no moment. Regardless of the genesis of the altercation, appellant need not have engaged and certainly did not need to continue it. He had an opportunity to retreat and did not need to brandish his knife as a weapon. He did not need to continue to yell at or otherwise interact with Arthur.

Appellant cites to two cases in which a civil service employee was terminated after using a knife during an altercation with a coworker. He contends these cases are

distinguishable from his case because the incidents involved coworkers who were permitted to be that the workplace and the coworkers did not provoke the incidents. IMO Isaac Williams, OAL DKT. NO. CSV 00755-16 (May 16, 2017), aff'd, Final Decision (June 23, 2017); IMO Paula Watkins, OAL DKT. NO. CSV 08309-11 (December 14, 2011). Appellant also argues that the cases are distinguishable because, in Williams, the other employee was disabled and, in Watkins, the incident occurred in the presence of elementary school students. Appellant emphasizes that, unlike in Williams and Watkins, Arthur was neither a coworker nor authorized to be on campus. He contends Arthur came to campus with the intention of provoking an incident. Appellant also contends the campus was not open to the public at the time of the incident; the incident occurred in an areas that was not clearly visible to members of the public; and that only employees witnessed or were involved in the incident.

These arguments are not persuasive. Appellant committed an act unbecoming a public employee because he engaged in an altercation while on duty. The employment status of the person with whom he fought is not relevant here. Also, the public or private nature of the area where the incident occurred was not established during the hearing. Moreover, numerous people other than appellant, Arthur, Janine, and Marshall were visible on the video. Their identities were not established during the hearing. Thus, there is no evidence demonstrating that the incident was not witnessed by members of the public or students.

Accordingly, given the nature of appellant's actions at issue, I **CONCLUDE** that the appointing authority's termination of appellant should be affirmed.

ORDER

I **ORDER** that the charge of N.J.A.C. 4A:2-2.3(a)(6), conduct unbecoming a public employee, be **SUSTAINED**. I **FURTHER ORDER** the appointing authority to terminate appellant from his employment.

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 27, 2020 _____

DATE



JUDITH LIEBERMAN, ALJ

Date Received at Agency:

2/27/20

Date Mailed to Parties:

2/27/20

/vj

APPENDIX
LIST OF WITNESSES

For the appellant

Dennis Marshall

Derrick Dixon

For the respondent

Ptl. Tiffany Reed

Janine Stroman

Kennis Kilpatrick

LIST OF EXHIBITS

For appellant:

- A-1 Ewing Township Municipal Court Certification of Disposition
- A-2 Dixon diagram

For respondent:

- R-1 Video (CD)
- R-2 Police Report
- R-3 Arrest Report
- R-4 Photograph of knife
- R-5 Complaint Summons
- R-6 Preliminary Notice of Disciplinary Action
- R-7 Final Notice of Disciplinary Action