



DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 19<sup>TH</sup> DAY OF AUGUST, 2020



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Civil Service Commission

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Attachment



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

OAL DKT. NO. CSV 13865-18

AGENCY DKT. NO. N/A

**MARISHA PENN,**

Appellant,

v.

**HUDSON COUNTY DEPARTMENT OF  
FAMILY SERVICES,**

Respondent.

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**Merrick Limsky, Esq.,** for Appellant (Limsky, Mitolo, Esqs., attorneys)

**Daniel W. Sexton, Esq.,** for Respondent (Donato J. Battista, Hudson County  
Counsel, attorneys)

Record Closed: May 26, 2020

Decided: July 10, 2020

BEFORE: **JOHN P. SCOLLO., ALJ:**

**STATEMENT OF THE CASE**

Respondent, Hudson County Department of Family Services (hereinafter, HCDFS or the Department), brought a major disciplinary action against appellant,

Marisha Penn (Penn), a Supervisor and an HSS-4, removing her effective August 13, 2018.

The background event which gave rise to the charges brought against Penn occurred on Friday, February 9, 2018. On that date, Penn was not at work due to an illness and was at home. Because Penn was absent, Luca Rainisi, an HHS-4 in the Medicaid Redetermination Unit, was covering for her. During the course of his duties while covering for Penn, Rainisi reviewed a document called a Medicaid budget, found an error in it, and gave the document directly to the employee who was listed as the person responsible for the error, Minerva Martinez. Minerva Martinez, an HHS-1 working in the Medicaid Redetermination Unit in Penn's section, soon discovered that she had not written the subject budget and that it contained a forgery of her signature. She reported this to Rainisi, to an Administrator named Deborah Piccarello and to an HSS-3 named Prathima Rahman. A short time later, Alba Schwarz an HSS-1, who also worked in Medicaid Redetermination, allegedly admitted to Martinez that she signed Martinez's signature on the budget. Martinez decided to file a report so that Schwarz would face disciplinary action. It was later revealed that the document approved Medicaid benefits to an otherwise ineligible person named Ray Mendoza and that Mendoza was a neighbor of Schwarz. The writing and signing of the Mendoza budget will be referred to herein as the "incident" or the "forgery".

To be clear, from the outset there was never any allegation that Penn forged Martinez's signature. The HCDFS's charges against Penn allege that Penn, rather than reporting the forged document incident to her superiors, improperly tried to persuade Martinez from filing the report against Schwarz by playing upon Martinez's sympathies, by bribing her and, after Martinez filed her report, by harassing her.

### **PROCEDURAL HISTORY**

The HCDFS alleged in the Preliminary Notice of Disciplinary Action (PNDA) dated May 14, 2018, which was served on Penn on May 14, 2018 that Penn's conduct was actionable under four different sections of the New Jersey Administrative Code:

- (1) N.J.A.C. 4A:2-2.3 (a) (1) [Incompetency, Inefficiency, Failure to Perform Duties];
- (2) N.J.A.C. 4A:2.2.3 (a) (6) [Conduct Unbecoming a Public Employee];
- (3) N.J.A.C. 4A:2.2.3 (a) (7) [Neglect of Duty]; and
- (4) N.J.A.C. 4A:2-2.3(a)(12) [Other Sufficient Cause].

After a departmental hearing on July 25, 2018, the HCDFS issued a Final Notice of Disciplinary Action (FNDA) dated August 13, 2018, sustaining the charges brought under N.J.A.C. 4A:2-2.3 (a) (1); (a) (6); and (a) (7), but not under (a) (12) and removed Penn from her position, effective August 13, 2018. On August 22, 2018, Penn filed an appeal of the Final Notice of Disciplinary Action with the Civil Service Commission, which in turn transmitted the matter on September 12, 2018 to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 40A:14-200 et seq. This matter was filed with the OAL on September 24, 2018 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to John P. Scollo, ALJ on October 17, 2018. The Tribunal held an Initial Telephone Conference on October 17, 2018 and issued a Pre-Hearing Order on October 18, 2018 setting forth dates for conducting discovery and for filing motions. The Tribunal held several status conferences. The Tribunal heard the matter on July 15, 2019; July 19, 2019; October 2, 2019; October 4, 2019; November 20, 2019; November 25, 2019 and January 13, 2020. The parties were given time to secure the transcripts and to submit their written summations. The record closed on May 26, 2020, after receipt of written summations from both parties.

### **FACTUAL DISCUSSION**

The following is not intended to be a verbatim recitation of the testimony and documents presented; rather, it is a summary of testimony and documents, which I found important.

Testimony of Minerva Martinez

Minerva Martinez (Martinez) testified that on February 9, 2018 (the "incident" date) she was employed as an HHS-1 in the Medicaid Redetermination Unit of the Hudson County Department of Family Services. Her Unit Supervisor was Marisha Penn (Penn). Above Penn in the hierarchy was Administrator, Deborah Piccarello (Piccarello). Martinez testified that Penn was not at work on February 9, 2018. Martinez testified that sometime that morning Luca Rainisi, HHS-4, a Supervisor filling-in for Penn, brought her a document called a budget. He told her that this budget (R-3) contained an error and he wanted her to correct it. Upon looking at the budget, Martinez noticed that the document bore a forgery of her signature and a 0970 code number, which was a type of case that she did not handle. She told this to Rainisi and she started to become upset. She stated that Rainisi offered to take the budget back, but she wanted to investigate it further, so he left it with her. As Martinez continued to examine the budget she noticed that it did not have a redetermination date; that upon checking its case number she confirmed that it was not a case that she had worked on; and that, upon further research into the client's (Ray Mendoza's) income, he did not qualify for Medicaid benefits. Martinez testified that she brought the budget bearing the forged signature to Piccarello, who told her to tell Penn about it on Monday, February 12, 2018. Martinez then brought the budget to the attention of Pratima Rahman, an HSS-3, who routinely reviewed her work. Later on, Rainisi returned and they spoke further about what Martinez had learned about the budget in the interim. She stated to Rainisi that she wanted to file a report so that there would be an investigation into who forged her signature.

Martinez testified that after she spoke with Rainisi, she was approached at her desk by Alba Schwarz, an HHS-1, who wanted to talk about the Mendoza budget. Martinez stated that Schwarz told her that she (Schwarz) had done the budget, that she was sorry, and that she was correcting Martinez's work as "quality control". Martinez testified that she kept the budget and told Schwarz that she wanted to check it again. A short time later, Schwarz approached Martinez at her desk a second time and told her that she (Martinez) had not worked on this budget, that she (Schwarz) did the work and

signed Martinez's name because she (Schwarz) was in a hurry, and that she was sorry for doing so. Martinez stated that the two conversations between Schwarz and her were witnessed and heard by a co-worker named Julisa Garcia.

After her second conversation with Schwarz and Schwarz's admission that she had signed her name to the budget, Martinez stated she went to Piccarello and explained what had transpired. Piccarello told her again to speak with Penn upon her anticipated return on Monday, February 12, 2018.

A short time after speaking with Piccarello, Martinez learned from a fellow employee named Tashara Darby that Marisha Penn wanted her to call her on her cell phone. When Martinez called Penn, she told Penn about the forgery and that she intended to file a report. Penn suggested to Martinez that she give thought over the weekend to whether she should file the report and that they would talk about the filing of a report on Monday, February 12, 2018.

However, later in the day while Martinez was driving home in her car, Penn called Martinez to talk about the incident and to ask Martinez to refrain from filing a report, which would result in disciplinary charges against Schwarz.

Martinez, with the use of an audio recording made on her car's Bluetooth device and a transcription of same (hereinafter referred to as the "car conversation"), testified that Penn tried to persuade her not to file a report of the forgery incident, appealing for sympathy in that Schwarz could lose her job. In response, Martinez expressed that she had no sympathy for Schwarz because of what she had done. Martinez further testified that Penn then offered to have Schwarz do her (Martinez's) work (her "Administrative reviews") for two months, in exchange for Martinez not filing the report. Martinez also rejected this offer. Later, during Penn's testimony, she denied that her offer was serious and said that it was made in jest to calm Martinez. However, Martinez testified on cross-examination that she did not believe that Penn was joking or trying to calm her when she made the offer to have Schwarz do her work assignments for her; she believed that Penn was literally offering a bribe to her in the form of relief from certain work duties for

a period of time in exchange for her forbearance on filing the report. These conversations, including the sections quoted below, were recorded by the Bluetooth device in Martinez's automobile. Martinez testified that she was unaware that the device was recording her conversations with her husband and with Penn. Martinez, with the use of print-out text messages and instagrams and a print-out of telephone records, stated that Penn sent texts to her and others, which she believed were intended to intimidate her for deciding to file a report resulting in an investigation of the incident involving the forged budget. One of the texts stated, "Throw me to the wolves and I'll come back leading the pack." Martinez claimed that Penn walked by her desk muttering statements similar to the texts and instagrams in an effort to intimidate her. Martinez sought and obtained a cease and desist order (R-5).

During her testimony, Martinez referred to the following specific portions of the transcript (R-8) of the Bluetooth (phone) recordings (R-9) made during Penn's phone calls to Martinez on February 9, 2018. The relevant portions of the transcript of the car conversation are the following.

In R-8, on p.4 at Lns. 3-7 Penn states that Schwarz was crying and was sorry for what she did, but Martinez dismissed it as Penn's unwarranted appeal to her sympathies.

In R-8, starting on p.6 at Ln. 23 and continuing on p. 8 at Lns. 4-6, Penn asks Martinez if it is possible to "make it (the issue of Schwarz's forgery of Martinez's signature) go away" and Martinez responds that it cannot "go away". On the same page, at Lns. 13-14, Penn states her intention to continue her efforts to make the issue go away on Monday, February 12, 2018 and on p. 10 at Ln. 14 asks Martinez to think about letting the issue go away.

In R-8, on p. 11 at Lns.10-11, Penn states "I'm trying to make deals here."

In R-8, on p.13, at Lns. 17-18, Penn asks Martinez, "What if\* she do, your administrative reviews for two months?" (\*Note: In the text of the transcript the word



“did” appears instead of the word “if”; however, on page 102 of the November 20, 2019 Court Transcript, at Lns. 12-22, both counsel agreed that the word should be “if”, not “did”.) On the same page at Lns. 21-23 Martinez asks Penn to stop trying to make a deal.

In R-8, on p.15 at Lns. 2-7 and at Lns. 22-25, continuing the discussion about foregoing the filing of a report, Penn notes that Schwarz would face discipline and might be terminated. Martinez responds that she did not care what consequences Schwarz would face.

In R-8, on p.22 at Lns. 9-10 Penn states that she would inquire with Martinez on Monday, February 12, 2018 to find out if she had a “change of heart”.

On cross-examination Martinez denied that she and Penn were friends outside of work; only admitted driving with Penn on one occasion; denied ever exchanging birthday gifts and denied visiting each other’s homes. Although Martinez stated that she felt intimidated by Penn after she told her that she planned to file the report, she could not recall if Penn ever threatened the loss of her job; and she admitted to using profanity with Penn, her supervisor, during the car conversation.

#### Testimony of Robert Knapp

Robert Knapp (Knapp) currently serves as the Director of the Division of Welfare in the Hudson County Department of Family Services (hereinafter, the HCDFS). He has a background in investigative work, which includes being a Fraud Investigator for the Division with training sponsored by the Federal Bureau of Investigation, the U.S. Marshall’s Office and the N.J. Attorney General’s Office. Knapp outlined the chain-of-command or hierarchy of the HCDFS as follows: Internal Affairs Investigator James Fischer reported to him; he (Knapp) reported to Director of HCDFS Benjamin Lopez, who was succeeded by Deputy Director (and now Director) of the HCDFS Robert Martinovich. Knapp also interfaced with Assistant Department Director Frank Mazza,

HCDFS Personnel Director Roger Quintana, and with Assistant Director of the Legal Department, Chanima Odoms.

Knapp was familiar with the investigation of Alba Schwarz and of the charges against Marisha Penn. He testified that the Hudson County Prosecutor's Office investigated Schwarz, but the Prosecutor's Office decided to let the Penn matter be handled administratively by Knapp.

After reviewing Martinez's report with Martinovich and Odoms, he recommended that an investigation be undertaken, which his superiors approved. Knapp assigned Internal Affairs Investigator James Fisher (Fisher) of the HCDFS to conduct an investigation into Penn's alleged interference with Martinez's whistle-blowing in the matter of Schwarz's forging of Martinez's signature. Knapp testified that Fisher conducted interviews and sent him four reports (R-7) as follows: (1) Interview of Minerva Martinez dated 2/21/18; (2) Interview of Luca Rainisi dated 2/23/18; (3) Interview of Marisha Penn dated 3/5/18 and a Summary report dated 3/7/18. After Knapp forwarded Fisher's reports to Martinovich and Odoms, they decided to bring charges against Penn as set forth in the PNDA.

On direct testimony Knapp stated that he recommended to his superiors that Penn be charged with Conduct Unbecoming and with other misconduct, but on cross-examination he clarified this statement. He stated that he does not make recommendations about charges; he merely recommended that Martinovich and Odoms review Martinez's report and Fischer's reports (R-7).

Knapp testified that Martinez told him that she was afraid of Penn and that after she filed her report of Schwarz's forgery, Penn was trying to make her life miserable by criticizing her work and by encouraging other employees to be unkind to her. Knapp testified that because of this, he recommended to his superiors that Martinez be moved to a different location.

On cross-examination Knapp stated that he received Martinez's report of the forgery from Deborah Piccarello.

In regard to transcripts of recorded telephone conversations or records of the dates and times of telephone conversations, Knapp testified that he did not read any such documents.

When he was called as a rebuttal witness, Knapp was asked about several subjects. He was asked if he disagreed with Penn about Mendoza's eligibility for Medicaid. He disagreed with Penn's statement that Mendoza was eligible because the Division of Welfare would not handle Affordable Care Act benefits. Knapp rebutted Penn's allegation that Martinez had engaged in welfare fraud (not related to the incident of February 9, 2018) because when Martinez was hired she underwent a background check which revealed nothing about welfare fraud. Knapp stated that Penn or any supervisor had the duty to report any facts or allegations that suggested welfare fraud. Knapp stated that phone calls made outside the office related to office business could still be considered within the scope of a supervisor's duties. Knapp stated that Penn or any supervisor learning about the type of allegations (about forgery) would have a duty to report same to her superiors. He also said that a supervisor would not have the authority to refrain from reporting the information to her supervisors nor would she have the authority to decide to investigate the allegations internally by herself.

On cross-examination, Knapp stated that he had no discussion with the Hudson County Prosecutor's Office about any criminal prosecution of Penn. He stated that in regard to Penn, the Prosecutor's Office told him to handle Penn administratively. Also on cross-examination, Knapp agreed that Martinez testified that she reported the forgery allegation to Picarello before Penn spoke with Martinez about the incident. When asked by Attorney Limsky how Penn could hide the incident from superiors (i.e., "brush this under the rug") when one of those superiors (Picarello) already knew about the allegations, Knapp responded "I wouldn't know."

On re-direct, Knapp re-iterated that during the in-car phone conversation it was clear to him that Penn tried to persuade Martinez not to file the report.

On re-cross, Knapp stated that even if a complaint about misconduct was reported verbally, at some point either the person making the allegation or his / her supervisor would be obligated to reduce it to writing and submit it to his / her superiors for investigation.

### Testimony of Luca Rainisi

On February 9, 2018 Luca Rainisi (Rainisi) was employed by the HCDFS as an HHS-4, Supervisor, having worked his way up from various other positions since the start of his employment in 2007. Knowing that Penn was absent on February 9, 2018, Rainisi sought to bring a budget containing an error to an Assistant Administrator named Debbie Piccarello. Learning that Piccarello was in a meeting and wishing not to risk delay in the delivery of benefits to the client, Rainisi brought the budget directly to Martinez to have her correct the error. The error was a missing redetermination date. Rainisi stated that a budget is a form that institutes any kind of change on a Medicaid case.

Rainisi testified that within seconds of handing the budget to Martinez, she seemed confused, stated that the signature on the budget was not hers and stated that she did not work on the document in question because it had a prefix of "0970", a type of matter that was not assigned to her. Rainisi asked Martinez what she would prefer to do: have him bring the budget upstairs, file a statement, or talk with Penn on Monday. Martinez told Rainisi that she would speak with Penn on Monday.

Rainisi testified that later he saw Martinez at the desk of HHS-3 Pratima Rahman and they were discussing the budget. He described Martinez as "a little flustered" and "agitated". The three of them analyzed the handwriting on the document and Rainisi commented that the signature of Penn looked as though it was rubber-stamped. They also looked-up the case on the computer and found that it had a source code of 523K,

which told them that the case was one that should not have been handled by the HCDFS, but by an outside vendor called Conduent. When Martinez stated that the signature was a forgery, Rainisi advised her to report it to Deborah Piccarello, the Assistant Administrator. However, Martinez stated that she would discuss the matter with Penn on Monday.

Rainisi testified that later in the day, around 3:30 p.m., Martinez came to his office and was agitated, that is, speaking very rapidly as she told him that she indeed spoke with Piccarello. She told him that someone (she did not know who) had phoned Penn about the incident. She told him that Alba Schwarz had approached her at her desk saying that she had signed Martinez's signature on the budget. Rainisi testified that upon hearing this, he told Martinez that he would write a report and he advised her to also write a report. Rainisi directed his report (R-2 dated 2/13/2018) to his Administrator, Lawrence Goodhart.

When asked if he knew if Martinez experienced any harassment issues with Penn after she wrote her report, Rainisi stated that he knew nothing about it.

On cross-examination, Rainisi was questioned about several different areas of his direct testimony. In answer to a question of the timeframe of the events, Rainisi stated that his first contact with Martinez lasted about five minutes. He also said that about 30 to 45 minutes passed between his first contact with Martinez and his second contact with her at Rahman's desk.

Rainisi was also asked whether he, as a supervisor, had a duty to report an incident of an alleged forgery. He responded that he would definitely have a duty to report an incident regarding sexual harassment or racial discrimination and that, even if the forgery was unconfirmed he would make sure that it was reported either by the person alleging it; and if the person alleging it did not report it, then he would do so.

Rainisi confirmed that Martinez spoke with Piccarello. Rainisi also stated that on Monday, February 12, 2018, Goodhart directed him to write a report about the incident.

He started writing it on February 12<sup>th</sup> and gave it to Goodhart on February 13<sup>th</sup>. Rainisi was asked if he spoke with Penn about the incident. He responded that on Monday, February 12<sup>th</sup>, Penn showed up at his office. Rather than standing in front of his desk, Penn approached him by coming around his desk and was close to his shoulder when she asked what he knew about Martinez's reporting of the incident of February 9<sup>th</sup>. He responded by telling Penn that he was not at liberty to speak about it and that he was in the middle of writing his report.

Rainisi was also asked about being interviewed by Fisher. He stated that Fisher interviewed him (R-7) and told Fisher that Martinez told him on Friday, February 9<sup>th</sup> that she intended to write a report.

On re-direct examination, Rainisi was asked if Penn's coming to his office was an attempt to intimidate him. His response was that he believed she may have been attempting to intimidate him, but he did not feel intimidated by her. He stated that he had had unpleasant interactions with Penn on prior occasions and was thus familiar with her.

On re-cross examination, Rainisi was asked about the prior unpleasant interactions with Penn and he explained them. They had nothing to do with the case at bar.

#### Testimony of James Fisher

After a 23-year career, James Fisher (Fisher) retired as a lieutenant from the Union City Police Department in 1995. Beginning in 1996, he spent six years as Union City's Deputy Director of Public Safety. In 2003 he became employed as a fraud investigator for the County of Hudson. In 2006 and continuing to the present, Fisher has been an Investigator for the HCDFS, a position which reports directly to Robert Knapp, the HCDFS's Director of the Division of Welfare.

Fisher became involved in this matter when Knapp received Martinez's report and the subject budget. Knapp ordered Fisher to start an investigation. Fisher decided to interview various people and he read reports as they became available. Later on, he learned that Martinez had recordings of her February 9, 2018 conversation, which had been made while Martinez was in her car. Altogether Fisher wrote four reports, which together are marked as R-7. The names of the interviewees and dates of the reports are as follows: (1) Minerva Martinez, dated February 21, 2018; (2) Luca Rainisi, dated February 23, 2018; (3) Marisha Penn, dated March 5, 2018; and (4) a Summary of Fisher's investigation dated March 7, 2018. Fisher submitted all four reports to Knapp.

Fisher began his investigation by attempting to contact Raymond Mendoza, the Medicaid client for whom the subject budget was written, by telephone and by registered letter. Having received no return contact from Mendoza, Fisher went to his residence. Mendoza was not home. Although there were two entrances to the house, Fisher found only one mailbox and it bore the name "Schwarz" as well as other names. Fisher knew that the name "Schwarz" was the name of a person involved in the February 9, 2018 incident reported by Martinez. Fisher left a written message for Mendoza in the "Schwarz" mailbox. Mendoza phoned Fisher the next day and they arranged for Mendoza to be interviewed. Fisher verified with the HCDFS Human Resources Department that Alba Schwarz lived at the same building as Mendoza. Fisher checked the HCDFS records and learned that Mendoza had a "closed" Medicaid file with the Department.

When Fisher interviewed Mendoza, he saw that Mendoza had been injured and was using crutches. Fisher learned that Mendoza knew Schwarz and that she lived in the same building as him. Mendoza recognized the budget document and confirmed that Schwarz had filled it out at his home and he stated that Schwarz told him that she would take care of his benefits. During his testimony, Fisher stated that Mendoza said that he did not recognize the signatures at the bottom of the budget form. However, in the March 7, 2018 Summary Report, which is part of R-7, Fisher states that Mendoza could not recall if there were signatures on the budget form when he met with Schwarz.

Fisher did not write a separate report about the Mendoza interview, but he did report on his interview with Mendoza in his Summary report dated March 7, 2018.

During his testimony, Fisher stated that the next person he interviewed after Mendoza was Minerva Martinez. However, this cannot be correct because Fisher's March 7, 2018 Summary Report indicates that he interviewed Alba Schwarz immediately after he interviewed Mendoza, without letting her know that he had just interviewed Mendoza. Fisher's direct testimony about the Schwarz interview was simply that she "denied everything". However, during cross-examination he elaborated upon his interview of Schwarz and he produced a copy of his report of that interview, which was admitted into evidence as A-3. In his March 7, 2018 Summary Report, Fisher made several statements about the information obtained during the Schwarz interview. Among the statements are that Schwarz confirmed her address (which was the same building where Mendoza resided; that Schwarz submitted her own report (which was not among those marked in evidence or even identified in court); that she did not recognize the subject budget form; that she did not know Mendoza; that she did not speak with Penn to obtain help; that she did not go to Martinez to apologize to her or to speak with her about the budget; and that she denied her charges against her.

Fisher testified that he interviewed Martinez on February 21, 2018. He testified that during his interview of Martinez she stated that Rainisi came to her with a budget containing an error asking her to fix it. She told Rainisi that she had not worked on that budget and that the signature on it was a forgery of her signature. Fisher testified that on February 21<sup>st</sup> Martinez went on to tell him that she had audio recordings of her February 9<sup>th</sup> phone conversation with Penn made while she was driving. Fisher stated that Martinez told him that in that February 21<sup>st</sup> conversation Penn tried to convince her not to file a report against Schwarz. However, on cross-examination Fisher corrected himself. (See below.) Also, Fisher testified that Martinez showed him text messages sent by Penn, which Martinez claimed were attempts to pressure her not to file a report and to harass her.



Fisher testified that he interviewed Julissa Garcia, who sat next to Martinez. She stated that Darby brought a cell phone to Martinez and requested her to call Penn.

Fisher testified that he interviewed Penn on March 4<sup>th</sup> or 5<sup>th</sup> and that he wrote the report of that interview on March 5, 2018. Fisher testified that throughout the interview Penn was defensive and uncooperative and actually walked out of the interview several times. She asked Fisher why he was asking her so many questions since he had recordings and texts. Observing what he discerned to be inconsistencies between facts as reported in Penn's statement dated 2/13/2018 and facts as reported by others he had interviewed, Fisher asked Penn if she stood by her report. He testified that Penn responded that she stood by what she wrote. Fisher also testified that Penn told him that Martinez and Schwarz had both written the budget in question and that she recognized each of their handwritings.

On cross-examination, Fisher was asked whether he and Knapp were friends outside of work and he responded that they were.

During cross-examination, Fisher produced an unsigned copy of his report dated February 26, 2018 to Knapp regarding the interview of Alba Schwarz. He authenticated the report as his own. Over objection, it was admitted into evidence as A-3. A memo from Robert Martinovich to Marisha Penn dated March 5, 2018, was also admitted into evidence as A-4 during the cross-examination of Fisher.

Attorney Linsky cross-examined Fisher about his interview of Martinez. Fisher corrected his earlier, direct testimony and stated that he did not learn about the existence of the audio recordings on February 21st. He testified on cross-examination that he learned about the audio recordings after the March 5th interview of Penn. (Penn mentioned "tapes and texts" during her interview.) Fisher stated that he saw Martinez on March 6th and asked her about recordings. She then told him that she had recordings of Penn made during her car ride. Fisher then testified that he obtained the car conversation from Attorney Odoms and he listened to it multiple times. Fisher

commented that the recording confirmed what Martinez told him about Penn trying to influence her decision regarding the filing of a report about the forgery incident.

Fisher basically agreed that the recording of the car conversation reveals that the language Martinez employed while talking to Penn, her supervisor, was not appropriate, but he added that they were not on duty in the office. Fisher also re-affirmed that Martinez complained to him that she was receiving multiple calls from Penn that she considered harassing.

Fisher also stated that he did not interview Piccarello and did not interview Darby.

When Fisher was called as a rebuttal witness he stated that he did not know Martinez prior to interviewing her and that he only met with her two or three times total.

#### Testimony of Marisha Penn

Marisha Penn testified that on February 9, 2018, she was employed by the HCDFS as an HSS-4 (Supervisor) in the Medicaid Recertification Unit. On that particular date she had called in sick and was at home recuperating from an illness. Penn produced a prescription (A-2) for a narcotic medication, which she took and which made her drowsy. She pointed out that her normal manner of speech is animated, but R-9 demonstrates that her affect and speech were subdued. Penn testified that she intended to resume her work activities on Monday, February 12, 2018. While at home, she received several telephone calls from her workers including Sonya Coleman and Tashara Darby regarding an ongoing incident wherein Alba Schwarz and Minerva Martinez were at Martinez's desk arguing. The argument was regarding Martinez's allegation that Schwarz had forged her signature on an agency document.

From her courtroom testimony and from the car conversation (R-8 and R-9), it is clear that Penn learned on February 9, 2018 that Martinez was alleging that Schwarz forged her name on a budget which authorized the payment of Medicaid benefits to

Ray Mendoza. Penn testified that she asked Darby to have Martinez call her at home. Martinez called her twice. During their second conversation Martinez told Penn that Schwarz had admitted that she forged Martinez's signature on a document. Penn testified that Martinez told her that she wanted Schwarz to be written-up for this incident. Penn responded to Martinez that they would discuss the matter on Monday, February 12, 2018, upon her return to work.

Penn testified that she called Martinez on the afternoon of Friday, February 9, 2018 while Martinez was driving home. Penn testified that she was unaware that the conversation was being recorded. The transcript (R-8) and the audio (R-9) of the car conversation were referenced during Penn's testimony.

A review of the audio transcript shows that during the phone conversation, Penn indicated to Martinez that Schwarz was sorry about forging Martinez's name and was hysterically crying. On p. 8 of R-8 at Lns. 4-5 Penn asked Martinez:

"Can we just make it go away?"

The conversation went back and forth. Several times Penn urged Martinez to reconsider her decision to file a report (which would subject Schwarz to possible discipline). Martinez took the position that something must be done about Schwarz's conduct (the forgery) and that Penn should not cover up Schwarz's misdeed. On p.11 of R-8 at Lns. 10-11 Penn stated to Martinez:

"I'm trying to make deals here."

Penn's testimony was that Martinez was very upset about the forging of her signature (to the point of using profanity) and that she (Penn) was simply trying to defuse the situation, calm down Martinez, and consider addressing the incident without filing a report which could cost Schwarz her job.

In her direct testimony, Penn was not asked about the two above-stated quotes from R-8. However, she was questioned about what was stated in R-8 on p. 13 at Ln. 17. In R-8 (the transcript) on p. 13 at Ln. 17, there was a question about what Penn actually said and about what she meant. That question was resolved when both attorneys agreed (See, Penn transcript dated November 20, 2019 on p. 102 at Ln. 12 - p. 103, Ln. 10) that the transcript (R-8) of the audio (R-9) quotes Penn as saying to Martinez:

“What if she do your A.R. for three months?”

Furthermore, both attorneys agreed that “she” refers to Schwarz and “A.R.” refers to “administrative reviews”, a type of work assignment, which according to Penn, Martinez did not like to do. During her direct testimony, Penn explained that the question “What if she do you're A.R. for three months?” was not, as the HCDFS argues, an attempt to buy Martinez’s silence (i.e., Martinez’s agreement not to file a report against Schwarz), but rather was just a joke meant to de-fuse Martinez’s tension. Penn explained that she had no authority to re-assign Martinez’s A.R.’s to Alba Schwarz because Schwarz was not part of her unit. Therefore, no one could have considered it as a literal offer. Moreover, because Martinez never brought up the re-assigning of the A.R.’s, Penn said she believed that Martinez understood that the question was a joke.

Penn had been present throughout Martinez’s testimony. In contrast to Martinez’s testimony that she and Penn were not personal friends, and that they were not close, Penn testified that they knew each other for years because Martinez used to date her cousin. Penn stated that Martinez drove to work early and that she saw Martinez sleeping in her truck. Penn recounted that she thereupon invited Martinez to take early morning naps at her house and that Martinez did so on many occasions. Penn testified that on Tuesday, February 13, 2018 Martinez drove her to work as she does on most mornings. Penn testified that they purchased breakfast together in the workplace’s cafeteria, as they do most mornings.

Penn testified that Martinez was determined to file a report about the incident wherein Schwarz forged her name on an agency document. They did not discuss the incident itself in the car or in the cafeteria except that Martinez said that she was going to file her report. Martinez declined Penn's offer of a meeting with Administrator Deborah Piccarello. Instead of having the meeting, Martinez went to file a report, which she had written over the weekend. According to Penn, Piccarello instructed Penn to write a statement about what she knew about the incident. Penn therefore wrote a short statement which has been marked as R-5.

During her testimony, Penn emphasized that when she was interviewed by Investigator James Fisher on March 5, 2018, she told him that she received phone calls on Friday, February 9<sup>th</sup> during which she "unofficially" learned about the incident, but that she only became "officially" aware of the incident when she returned to work on February 12, 2018. The contents of Penn's interview with Fischer is one of the four documents marked as R-7. Fisher's report of his interview of Penn does not set forth much substantive information about the events of February 9, 2018. Several of Fischer's questions about whether Penn tried to influence Martinez's decision to file a report were met with "I cannot recall" or "I cannot remember". According to Fisher's report, Penn told him that she recognized the handwriting of Schwarz and of Martinez on the budget form and she concluded that Schwarz and Martinez collaborated on the subject budget.

During her testimony, Penn stated that because the budget involved Mendoza, who is a neighbor of Schwarz, Schwarz asked Martinez to sign the budget and Martinez agreed to do so, in order to enable Schwarz to help her friend, Mendoza. Penn further testified that after agreeing to work together on Mendoza's budget Schwarz and Martinez subsequently started to argue about the document and to make threats to expose each other's misdeeds (that Schwarz was helping Mendoza obtain benefits that he was not entitled to and that Martinez had illegally obtained welfare benefits in another county).

On cross-examination, Penn stated that Fisher's March 5, 2018 report of her interview states that Schwarz and Martinez collaborated on the Mendoza budget, but Fisher did not write everything Penn told him. Also, on cross-examination, Penn stated that, in her judgment, being familiar with Martinez's handwriting, Martinez signed her own name on the budget (not Schwarz), but tried to disguise it by altering how she normally writes certain letters.

### **FINDINGS OF FACT**

After carefully considering the testimony of the witnesses (by listening to them and by reading the transcripts of their testimony) and having read and examined the documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses, I make the following findings of **FACT**:

1. I **FIND** that on Friday, February 9, 2018 Marisha Penn, HSS-5 / Supervisor, Minerva Martinez, HSS-1 and Alba Schwarz, HSS-1 were employed by the Hudson County Department of Family Services (HCDFS) in a unit called Medicaid Redetermination.

2. I **FIND** that on the morning of February 9, 2018, Luca Rainisi HSS-4 / Supervisor, approached Martinez with a document called a budget (the Ray Mendoza Budget) to ask her to correct an error by filling-in the redetermination date. I **FIND** that at that time and date Martinez told Rainisi that she had not worked on Mendoza's case, that she did not work on cases bearing a 0907 code, and that the signature reading "Minerva Martinez" was actually a forgery.

3. I **FIND** that on Friday, February 9, 2018 during the workday, at Penn's request, Martinez phoned Penn at her home and they discussed the Mendoza budget and the fact that Martinez was upset to find that the budget contained a signature - purportedly of Martinez - which Martinez claimed was a forgery.

4. Using Exhibit R-8, during the car conversation, Penn and Martinez made several statements to each other, which include the following:

(i) At p. 4, Lns. 3-4, Penn says: "Listen, she's (referring to Schwarz) bawling her eyes out, yo." And Martinez replies: "Marisha, stop giving me this sympathy card. Stop playing that card, that's the card you been giving people."

(ii) At p.6, Ln. 23 to p.7, Ln. 4, Penn says: "I'm not defending her (referring to Schwarz). But I'm asking, I'm asking for us to have a meeting on Monday with Debbie (Piccarello)", to this Martinez responded: "I don't even know why you're defending her. She was about to send you to jail last week. To which Penn says: "I'm not defending – no, I'm not defending her, but I think this can be resolved."

(iii) At p. 8, Lns. 4-5, Penn says: "I ask –this is me you're talking [to]. Can we just make it go away?" To this, Martinez responded at p.8, Ln.6: "We cannot make this go away."

(iv) At p. 11, Lns. 10-11, Penn says: "Okay, no. Let me ask you. I'm trying to make deals here." To this, Martinez replied on Lns. 12-13: "You can't make a deal because she's a pathological liar."

(v) At p. 12, Lns. 20-21 Penn says: "You know, look, you know you don't like doing A.R." and at p. 13, Lns. 17-18, Penn says: "So what if she do you're A – What if she do you're A.R. for two months?" To this, Martinez responded on Lns. 21-23: "Marisha, she ain't going to – Stop. Stop trying to make a deal. She ain't right."

(vi) At p.15, Lns. 2-7 and 22-24 Penn and Martinez discuss the possibility that Schwarz will face discipline because of the incident. On Lns. 2-5, Penn says: "I just don't –okay, I'm just asking you. I don't know what the deal with [unintelligible] is. I don't know what the discipline will be." To this, Martinez responded: "Me neither, but I guess we'll find out together." A few lines later Penn asks Martinez about the possibility that Schwarz could be terminated. Penn asks on Ln.22: "What about termination?" To this,

Martinez responded on Lns. 23-24: "She won't – I don't know if she gets terminated. I really don't care."

(vii) On p. 16, Lns. 13-14, Penn returns to the subject of meeting on Monday, February 12, 2018 with Deborah Piccarello. Penn says: "So even if we have a meeting, we're still going to do it—do that?" To this, Martinez responded: "Oh yeah. The meeting's not going to help, if that's what you're asking. It's not going to help."

I **FIND**, that the combined testimonies of the witnesses adequately filled-in the gaps in the places marked "[unintelligible]" in R-8. I **FIND** that the words spoken by Penn and by Martinez in the above-cited passages of R-8 have been accurately determined as set forth above.

5. I **FIND** that Penn and Martinez made six phone calls to each other while Martinez was still in the office on February 9, 2018, and Penn made one more phone call to Martinez in her car (the "car conversation"), and which was recorded on the car's Bluetooth device, while Martinez was driving to her home after work. During that car conversation, Penn and Martinez discussed the forgery incident. From the content of that phone call, I **FIND** that this phone call establishes that Penn and Mendoza were in agreement that Schwarz forged Martinez's signature on the Mendoza budget.

6. I **FIND** that all the content of the February 9, 2018 conversations between Martinez and Penn were related to office business, particularly the incident involving Schwarz signing Martinez's name to the Mendoza budget. I **FIND** that the characterization of those phone conversations as "unofficial" due to Penn being at home on a sick day or due to Martinez driving in her personal automobile after work hours, is a distinction without a difference. I **FIND** that Penn and Martinez discussed important office business during said conversations and therefore, I **FIND** that all said conversations were "official" in nature.

7. Penn presented a prescription for a medicine containing Codeine, which she was using on February 9, 2018, and which she claimed made her drowsy and



subdued. However, I **FIND** that Penn failed to prove that she was less capable than usual about carrying-on conversations about office business and about handling the incident. I **FIND**, from the content of the car conversation (R-8 and R-9) that Penn exhibited a full understanding of the incident, that she was fully capable of addressing the incident, and that she was fully capable of engaging in negotiations with Martinez in an attempt to achieve her goal, which was to stop Martinez from her filing report of the incident. I **FIND** that Penn failed to prove that her use of the medicine affected the content of the statements she made.

8. In reference to the quoted statements set forth in numbered paragraph four, above, Penn alleged that she was attempting to calm Martinez and was making a joke when she said, "What if she do you're A.R. (Administrative reviews) for two months?" Penn explained that Martinez was very excited and angry during the car conversation and that she thought it necessary, by means of humor, to attempt to make Martinez calm down. Penn went on to explain that Martinez should not have taken her words literally because she knew that Schwarz did not work under Penn and that Penn had no authority to transfer any of Martinez's responsibilities to Schwarz. I **FIND** that, when taken in their actual context, the statements quoted in numbered paragraph four, above, demonstrate that Penn clearly wanted Martinez not to file a report about Schwarz's actions (i.e., the incident). I **FIND** that, when taken in their actual context, the statements quoted in numbered paragraph four, above, demonstrate that Penn initially and later continued, to appeal to Martinez's sense of sympathy in order to dissuade her from filing a report about the incident. I **FIND** that, when taken in their actual context, the statements quoted above in numbered paragraph four, above, demonstrate that Penn explicitly wanted to "make this (the incident) go away" and wanted to "make a deal" whereby Martinez would not file a report about the incident. I **FIND** that, when taken in their actual context, the statements quoted above in numbered paragraph four, above, demonstrate that Penn made a specific offer whereby Martinez would refrain from filing a report about the incident in exchange for specific and identifiable consideration: (1) that Martinez would be exempt from doing a certain type of work ("Administrative Reviews" or "A.R.'s"), which Penn knew was a task which Martinez did not like to do; (2) that someone else (Alba Schwarz) would do the A.R.'s for Martinez;

(3) that the duration of the exemption would last for two months. I **FIND** that, when taken in their actual context, the statements quoted above in numbered paragraph four, above, demonstrate that there was actually no lighthearted element or emphasis in her question. Rather it was a straight and to-the-point proposition, a *quid pro quo*. I **FIND** that, when taken in their actual context, the statements quoted above in numbered paragraph four, above, demonstrate that humor was completely absent from Penn's content, delivery, or in any follow-up remarks that would have indicated that her question was asked in jest. I **FIND** Penn's explanations that she was just trying to calm down Martinez and that she was just making a joke to be incredible. I **FIND** that when Penn asked Martinez the question, "What if she do you're A.R. for two months?" Penn was making a literal and serious offer to exempt Martinez from certain work duties for two months, in exchange for Martinez agreeing not to file a report about the incident. That is to say, I **FIND** that Penn offered a bribe to Martinez to entice her to ignore her duties as a conscientious employee.

9. I **FIND** that Martinez filed several copies of her report of the incident on February 13, 2018, one of which she gave to Chanima Odoms, the assistant to the Director of the Legal Department.

10. I **FIND** that after Martinez filed her report about the incident, she received texts and instagrams (R-7) from Penn. I **FIND** that the texts and instagrams that Martinez received from Penn contained content that was harassing. In regard to the claim that it was mere happenstance that Martinez was included on list of multiple recipients of communications about non-office-related subjects, I **FIND** that there was no sufficient reason presented under the circumstances for Penn to include Martinez on her multiple-recipient list of these particular texts and instagrams. I **FIND** that the texts and instagrams were sent by Penn to harass Martinez and to retaliate or to threaten retaliation for Martinez's filing of her report of the incident.

11. I **FIND** that Penn's conduct, including attempts to dissuade an employee from reporting allegations of wrongdoing and bribery and a course of harassment and

retaliation, is conduct that is detrimental to the morale, efficiency and financial integrity of the HCDFS.

12. I **FIND** that Penn had a duty to immediately bring Martinez's allegations and any evidence of the incident directly to her superiors. Rather than follow established procedures, I **FIND** that Penn attempted to channel the investigation of the incident to herself, rather than to the proper authorities (her superiors). I **FIND** that Penn, by her words and deeds, took affirmative steps to interfere with and stop the reporting of the incident to the proper authorities. I **FIND** that Penn specifically attempted (first by appeals to sympathy and then by bribery) to stop Martinez from conscientiously performing her duty to report wrongdoing. I **FIND** that after Martinez filed her report about the incident, Penn undertook harassing actions against Martinez and retaliatory actions against Martinez for performing her duty as a conscientious employee.

13. From reading Fisher's report of his March 5, 2018 interview of Penn, wherein she exited the interview several times and said that she could not remember if she tried to influence Martinez's decision to file a report, I **FIND** that Penn was evasive and generally uncooperative with the HCDFS's investigation of the incident.

14. From my listening to and reading of the text of the recorded car conversation, it was clear from Penn's statements that Schwarz had admitted to Penn that Schwarz had forged Martinez's name on the Mendoza budget; and, it was clear that Penn did not indicate any wrongdoing on the part of Martinez in regard to the budget. However, during her March 5, 2018 interview with Fisher and during her testimony, Penn accused Schwarz and Martinez of collaborating on the specious Mendoza budget. From the evidence presented, I **FIND** no reason to believe Penn's allegation that Martinez and Schwarz were in collaboration on the Mendoza budget.

#### **APPLICABLE LAW**

#### **Employee Discipline**

The Civil Service Act and the implementing regulations govern the rights and duties of public employees. N.J.S.A. 11A:1-1 to 12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The Act is an important inducement to attract qualified personnel to public service. It is to be liberally constructed toward attainment of merit appointments and broad tenure protection. See Essex Council No.1 N.J. Civil Serv. Ass'n. v. Gibson, 114 N.J.Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n, 46 N.J. 138, 147 (1965). The Act also recognizes that that the public policy of New Jersey is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2 (b). To carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

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. N.J.S.A. 11A:2-6; N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2; and N.J.A.C. 4A:2-2.3. Major discipline involves removal, suspension, or fine for more than five working days.

An appointing authority may discipline an employee on various grounds, including inability to perform duties, conduct unbecoming a public employee, insubordination, and other sufficient cause. N.J.A.C. 4A:2-2.3(a). After the departmental hearing, such action is subject to review by the Civil Service Commission, which after a *de novo* hearing makes an independent determination as to both guilt and the "propriety of the penalty imposed below." W. New York v. Bock, 38 N.J. 500, 519 (1962); In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987); Ennslyn v. Twsp. of N. Bergen, 275 N.J. Super. 352 (App. Div. 1994) certif. den., 142 N.J. 446 (1995).

### **Burden of Proof in Disciplinary Matters**

In a civil-service disciplinary case, the employer bears the burden of providing sufficient, competent and credible evidence of facts essential to the charge. N.J.S.A. 4A:2-1.4. In an appeal from such discipline, the appointing authority bears the burden of

proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). Put another way, in an administrative proceeding concerning a major disciplinary action, the appointing authority must prove its case by a "fair preponderance of the believable evidence." N.J.A.C. 4A:2-1.4(a); Polk, supra, 90 N.J. at 560; Atkinson, supra, 37 N.J. at 149. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Greater weight of credible evidence in the case - a preponderance - depends not only on the number of witnesses, but "greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975) (citation omitted). Similarly, credible testimony "must not only proceed from the mouth of a credible witness, but it must be credible in itself." In re Estate of Perrone, 5 N.J. 514, 522 (1950). The judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Delaware, Lackawanna and Western Railroad, 111 N.J.L. 487, 490 (E.&A. 1933).

### **Applicable Regulations, Rules and Orders**

The list of General Causes of action for Civil Service employee discipline are set forth in N.J.A.C. 4A:2-2.3 (a), which provides:

- (a) An employee may be subject to discipline for:
  - 1. Incompetency, inefficiency or failure to perform duties;
  - 2. Insubordination;
  - 3. Inability to perform duties;
  - 4. Chronic or excessive absenteeism or lateness;
  - 5. Conviction of a crime;
  - 6. Conduct unbecoming a public employee;
  - 7. Neglect of duty;
  - 8. Misuse of public property, including motor vehicles;

9. Discrimination that affects equal employment opportunity  
(as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder;
11. Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and
12. Other sufficient cause.

Incompetency, Inefficiency and Failure to Perform Duties; Conduct Unbecoming a Public Employee; Neglect of Duty; and Other Sufficient Cause are four of the above-listed types of charges that are frequently litigated. A brief analysis of each of these four charges follows.

#### **N.J.A.C. 4A:2-2.3 (a) (1) Incompetence, Inefficiency or Failure to Perform Duties**

This section covers an employee's breach of duty by simple non-performance of assigned duties.

This section also covers instances where the employee attempts to perform his or her duties, but in a manner that exhibits insufficient quality of performance, inefficiency in the results produced, or untimeliness of performance, such that his or her performance is sub-standard. See Lynda Clark v. New Jersey Dept. of Agriculture, 1 N.J.A.R. 315. Incompetence means that an individual lacks the ability or the qualifications to perform the duties required of him or her. John Steinel v. City of Jersey City, 7 N.J.A.R. 91, modified at 193 N.J. Super.629 (App. Div. 1984), aff'd. at 99 N.J. 2 (1985).

#### **N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee**

Under N.J.A.C. 4A:2-2.3(a)(6), an employee may be subject to major discipline for conduct unbecoming a public employee. Although not strictly defined by the Administrative Code, “conduct unbecoming” has been described as that conduct “which affects the morale or efficiency of the [governmental unit] [or] which adversely affects the morale or efficiency” of the public entity or tends “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); see Karins v. City of Atl. City, 152 N.J. 532, 554 (1998) (citation omitted).

The unbecoming conduct need not be “predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.” Hartmann v. Police Dep’t. of Ridgewood, 258 N.J. Super 32, 40 (App. Div. 1992); In Re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (both cases quoting Asbury Park v. Dep’t of Civil Serv., 17 N.J. 419, 429 (1955)).

Unbecoming conduct may include excessive, violent, or other intemperate behavior, behavior which is not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous or improper under the circumstances; it may be less serious than a violation of the law, but it is inappropriate on the part of the public employee because it is disruptive of governmental operations. In the Matter of Angela Jones, Atlantic City, Department of Administration, CSV 16286-2013, Initial Decision (May 9, 2016), affirmed, Civil Service Commission (October 19, 2016). The Angela Jones case lists several cases containing examples of unbecoming conduct including: a jail guard's intoxication in Maguire v. Van Meter, 121 N.J.L. 150 (E & A 1938); a teacher's misrepresentation in a loan transaction in Smith v. Carty, 120 N.J.L. 335 (E. & A. 1938); a teacher making annoying or molesting telephone calls in Matter of Tanelli, 194 N.J. Super. 492 (App. Div. 1984); a teacher's long-term verbal and physical abuse of students in Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988).

### **N.J.A.C. 4A:2-2.3(a)(7), Neglect of Duty**

The term “neglect” means a deviation from the normal standards of conduct. In re Kerlin, 151 N.J. Super. 179, 186 (App. Div. 1977). “Duty” means conformance to “the legal standard of reasonable conduct in light of the apparent risk.” Wytupeck v. Camden, 25 N.J. 450, 461 (1957) (citation omitted). Neglect of duty has been interpreted to mean that “an employee . . . neglected to perform an act required by his or her job title or was negligent in its discharge.” In re Glenn, CSV 5072-07, Initial Decision (February 5, 2009) (citation omitted), adopted, Civil Service Commission (March 27, 2009), < <http://njlaw.rutgers.edu/collections/oal/>>. Neglect of duty can arise from omitting to perform a required duty as well as from misconduct or misdoing, Cf. State v. Dunphy, 19 N.J. 531, 534 (1955). Neglect of duty does not require an intentional or willful act; however, there must be some evidence that the employee somehow breached a duty owed to the performance of the job.

### **N.J.A.C. 4A:2-2.3 (a) (12), Other Sufficient Cause**

In the matter at bar, this charge was set forth in the PNDA, but was not included in the FNDA’s list of sustained charges. Charges of Other Sufficient Cause pertain to violations of the appointing authority’s regulations, rules, general orders or policies. Any such violations enumerated in the FNDA, are subjects of inquiry on appeal.

### **Penalties and Progressive Discipline**

In determining the appropriateness of a penalty, several factors must be considered including, but not limited to: the nature of the offense, the previous use of progressive discipline, the employee’s prior record, and the seriousness or severity of the offense under consideration.

The theory of progressive discipline is based on the following principles:



(1) that discipline should be designed to be corrective and to further the development of the employee; (2) that the penalty should be proportionate to the severity of the offense; and (3) that where there is a pattern of violations, progressively more severe penalties should be imposed for each occurrence. The disciplinary process in New Jersey's Civil Service incorporates the concept of progressive discipline. It is well-settled that an employee's past disciplinary record may be used as guidance in determining what an appropriate penalty should be in a given case. See West New York v. Bock, 38 N.J. 523 (1962). However, the theory of progressive discipline is not a fixed and immutable rule to be followed without question. Some disciplinary infractions are so serious that removal is appropriate notwithstanding an unblemished prior record. In re Carter, 191 N.J. 474, 484 (2007).

### **LEGAL ISSUES PRESENTED**

The two types of questions to be answered by this Tribunal are the following:

- (1) Has the HCDFS proven, by a preponderance of the credible evidence, that each of the four disciplinary charges set forth in the FNDA should be sustained?
- (2) If so, was the removal of Penn from her position the appropriate disciplinary penalty?

### **LEGAL ANALYSIS AND CONCLUSIONS**

#### **The FNDA's Sustained Charges**

In regard to the first legal issue, in the definition of "Incompetence, Inefficiency or Failure to Perform Duties" the emphasis is on the employee's failure to produce the necessary quantity or quality of results which a person in his position should be expected to produce. Emphasis is also put on the employee's knowledge or skill level (i.e. competence) or requisite effort needed to perform the types of work for which he was hired. The definition also encompasses the non-performance of required duties and tasks. In the case at bar, there is no evidence that Penn lacked the requisite skills

needed for the performance of a Supervisor's / HHS-4's duties. Nor is there any evidence that her output of work product was insufficient due to a lack of effort. The evidence presented went to the issue of whether Penn's efforts to dissuade Martinez from filing a report of the forgery that Schwarz was a dereliction of duty, (i.e., a failure to perform her duty to report suspected wrongdoing and to assist others to report suspected wrongdoing).

The HCDFS claims that Penn attempted to dissuade Martinez from reporting the incident by appealing to her sympathy; that Penn offered a bribe to Martinez to induce her not to file a report about the incident; and that Penn harassed Martinez after Martinez filed her report in order to retaliate against her for doing so. It is alleged that Penn's actions violated the Conscientious Employee Protection Policy, which is set forth in the County of Hudson Employee Handbook (May 1, 2013) on p. 64, which was marked in evidence as Exhibit A-1. The HCDFS presented testimony and documentary evidence which supported the allegation that Penn sought to persuade Martinez not to file a report about the wrongdoing she alleged (i.e., that Schwarz forged her name on a document in order to obtain benefits for a neighbor); that Penn made an offer to Martinez exempting her from doing part of her work in exchange for her silence (i.e., not filing the report); and that after Martinez filed her report, Penn harassed her with electronic and verbal messages in retaliation for filing the report.

I have found that Penn's words and actions demonstrate that she did indeed attempted to dissuade Martinez from carrying out her duty to report wrongdoing; offered consideration (i.e., a bribe) to Martinez to buy her silence; and made communications to Martinez that Martinez reasonably perceived as harassing and retaliatory and that these words and actions were done to retaliate against Martinez for performing her duties as a conscientious employee; and I therefore **CONCLUDE** that Penn, in so doing, violated the County's Conscientious Employee Protection Policy and simultaneously failed to perform her own duty to report suspected wrongdoing and failed to assist one of her subordinates in reporting suspected wrongdoing. I **CONCLUDE** that respondent has proven, by a preponderance of the competent, credible evidence, the charge of Incompetency, Inefficiency, or Failure to Perform Duties, N.J.A.C. 4A:2-2.3 (a) (1).

In regard to the second legal issue, in the definition of "Conduct Unbecoming a public employee" the emphasis is placed on the effect that the employee's alleged misconduct has on the morale or efficiency of the governmental entity involved. In the case at bar, Martinez, consistent with her obligation to report misconduct to her superiors, informed Penn that her name had been forged on the subject budget, informed Penn that Schwarz had admitted her misdeed, and informed Penn of her intention to file a report of the incident. Rather than act in accordance with established procedures and her duty to report misdeeds to the proper authorities (her superiors) Penn embarked on an effort to excuse and/or cover-up Schwarz's misdeed by focusing Martinez's attention on the possibility that Schwarz could lose her job and by playing upon Martinez's sympathies; by attempting to bribe Martinez by offering her a specific set of consideration (exempting her from doing A.R.'s for two months) in exchange for her silence about the incident; and eventually by seeking to intimidate and punish Martinez by sending electronic media messages and by verbally muttering as she walked by Martinez's desk. I have found that all these actions were attempts to stop Martinez from bringing Schwarz's misdeed to the Agency's proper authorities as per her duty as a conscientious employee and to harass her for doing so.

I have found that Penn's words and deeds constitute conduct that was detrimental to the morale, efficiency and financial integrity of the HCDFS, and therefore constitute conduct that was unbecoming for a public servant. Based on the foregoing facts and applicable law, I **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the competent, credible evidence, the charge of Conduct Unbecoming a Public Employee, N.J.A.C. 4A:2-2.3(a)(6).

In regard to the third legal issue, in the definition of "Neglect of Duty" the emphasis is placed on the negligent performance of one's duty or on the actor's neglect to perform an act required by his job duties. In the case at bar, Penn was told that Schwarz had allegedly forged Martinez's signature on documents which approved the payment of Medicaid benefits to an ineligible person (Mendoza). Moreover, there was an allegation that Schwarz admitted to signing Martinez's name on the subject budget in front of a witness (Julissa Garcia). I have found that Penn was neglectful of her duty to

collect the written and spoken evidence necessary to evaluate whether Schwarz had engaged in improper conduct and possibly criminal conduct in regard to the case of Raymond Mendoza's eligibility for and approval of Medicaid benefits; that Penn was neglectful of her duty to bring the allegations of forgery and welfare fraud to the Agency's proper authorities, and that Penn was neglectful of her duty not to influence a fellow employee's decision regarding her duty to report workplace misdeeds to the proper authorities.

I have found that instead of following established procedures for investigating whether Martinez's allegations were true or not, Penn demonstrated a lack of concern for the truth involving an incident that was related to the HCDFS's operations; demonstrated a lack of willingness to follow established procedures for the reporting of allegations of unethical and possibly illegal conduct to the proper authorities (her superiors); attempted to exert improper influence on Martinez by dissuading her from carrying out her duty to report the incident to their superiors; attempted to bribe Martinez not to carry out her duty to report the incident to their superiors (by offering to have someone else perform her work duties); and, once Martinez reported the incident, Penn attempted to harass Martinez by words and deeds. I **CONCLUDE** that respondent has met its burden of proving, by a preponderance of the competent, credible evidence, the charge of Neglect of Duty, N.J.A.C. 4A:2-2.3(a) (7). I **CONCLUDE** that Penn's words and deeds constitute conduct that was neglectful of her duties.

The Penalty of Removal and the Applicability of the Concept of Progressive Discipline

The following concerns the penalty of removal and the issue of whether progressive discipline is warranted under the circumstances of this matter. The charges here involve the failure to report allegations of welfare fraud. The charges involve an attempt to cover-up the wrongdoings of an employee who forged documents which would have resulted in the payment of county funds to an ineligible recipient, who was a neighbor of the forger. The charges involve a supervisor dissuading a conscientious employee from reporting allegations of fraud and of bribing that employee not to report

wrongdoing. The goal of progressive discipline is to correct infractions of rules and to correct the errors of judgment, which an errant employee may make. In the concept of progressive discipline, penalties are fashioned to be proportionate to the offense. The goal is to correct repeated offenses by gradually increasing penalties. In the case at bar, the offenses are very serious and they involve conduct that involved deliberation, not mere impulse. In re Carter, 191 N.J. 474, 484 (2007) stands for the proposition that some disciplinary infractions are so serious that removal is appropriate notwithstanding an unblemished prior record. In the case at bar, the issue of an unblemished record is absent. But the seriousness of the conduct has been established by a preponderance of evidence, including evidence supplied by Penn herself. I **CONCLUDE** that the deliberate plan to bypass established procedures for the reporting of wrongdoing, the attempt to unduly influence a conscientious employee from reporting allegations of wrongdoing, and the bribing of an employee in exchange for her silence are serious and sufficient, in and of themselves, to warrant the removal of Marisha Penn from her position without regard to progressive discipline.

### **ORDER**

It is **ORDERED** that the determination of guilt of the charge of Incompetency, Inefficiency or Failure to Perform Duties, specifically N.J.A.C. 4A:2-2.3 (a) (1), involving the violation of the aforesaid sections of the Regulations must be and hereby is **AFFIRMED**.

It is **ORDERED** that the determination of guilt of the charge of Conduct Unbecoming a public employee, specifically N.J.A.C. 4A:2-2.3(a) (6) involving the violation of the aforesaid sections of the Regulations must be and hereby is **AFFIRMED**.

It is further **ORDERED** that the determination of guilt of the charge of Neglect of Duty, specifically N.J.A.C. 4A:2-2.3(a) (7), involving the violation of the aforesaid sections of the Regulations must be and hereby is **AFFIRMED**.

It is further **ORDERED** that the imposition of the penalty of removal effective August 13, 2018 must be and hereby is **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 40A:14-204.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

*John P. Scollo*

July 10, 2020

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

R-8 Certified Transcript of 2/9/2018 phone conversation between Martinez and Penn

R-9 Copy of Audio Disc of 2/9/2018 phone conversation between Martinez and Penn