STATE OF NEW JERSEY

In the Matter of Laurice Hynson Essex County, Department of Citizen Services CSC DKT. NO. 2020-83 OAL DKT. NO. CSV 10136-19	**FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION**

ISSUED: SEPTEMBER 2, 2020 BW

The appeal of Laurice Hynson, Family Service Worker, Essex County, Department of Citizen Services, 60 working day suspension, on charges, was heard by Administrative Law Judge Thomas R. Bentancourt, who rendered his initial decision on August 5, 2020. No exceptions were filed.

Having considered the record and the Administrative Law Judge's initial decision, and having made an independent evaluation of the record, the Civil Service Commission, at its meeting on September 2, 2020, accepted and adopted the Findings of Fact and Conclusion as contained in the attached Administrative Law Judge's initial decision.

ORDER

The Civil Service Commission finds that the action of the appointing authority in suspending the appellant was justified. The Commission therefore affirms that action and dismisses the appeal of Laurice Hynson.

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

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 2nd DAY OF SEPTEMBER, 2020

Deirdre' L. Webster Cobb

Deirdre L. Webster Cobb
Acting Chairperson
Civil Service Commission

Inquiries
and
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Attachment

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECSION
OAL DKT. NO. CSV 10136-19

LAURICE HYNSON,
Appellant,
vs.
ESSEX COUNTY, DEPARTMENT OF CITIZEN SERVICES,
Respondent.

David Weiner, President, CWA Local 1081, appearing for Appellant pursuant to N.J.A.C. 1:1-5.4(a)(6)

Courtney Gaccione, Esq., Asst. Essex County Counsel, appearing for Respondent

Record Closed: June 25, 2020 Decided: August 5, 2020

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant, Laurice Hynson, appeals a Final Notice of Disciplinary Action (FNDA), dated June 17, 2019, imposing a penalty of sixty working days suspension for excessive absenteeism.

The Civil Service Commission transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on July 19, 2019.

A prehearing order, dated August 14, 2019 was entered by the undersigned. A hearing was held on January 3, 2020, February 3, 2020, February 20, 2020 and March 5, 2020.

The record remained open for counsel to submit written summations. Appellant submitted her written summation on June 24, 2020. Respondent submitted their written summation on June 25, 2020. The record closed on June 25, 2020.

ISSUES

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

SUMMARY OF RELEVANT TESTIMONY

Respondent's Case

Valentina Green testified as follows:

Ms. Green is a Confidential Assistant within the Essex County Division of Family Assistance & Benefits (DFAB). She has held this position since July 2019. Prior to July 2019 Ms. Green was the Administrative Supervisor of Family Services. She held that position for two years. Previously to that position she was the Assistant Administrative Supervisor of Family Services. Her total number of years with DFAB equal seventeen.

In her position she would review disciplinary actions. She would have access to employee personnel files. She is familiar with Appellant. She had supervisory authority over Ms. Hynson's direct supervisor, Lori Jaiyesimi.

Appellant had prior disciplinary history, as follows: a written reprimand dated January 6, 2017 for excessive Absenteeism; a written reprimand dated August 3, 2017 for failing to notify her supervisor when leaving her desk for an extended period of time; and, a twenty day suspension for time and attendance violations dated October 30, 2018.

Ms. Green was aware of Appellant's chronic time and attendance issues through memoranda and other documentation she had received from her direct supervisors Ms. Green stated Appellant and the County reached a settlement in connection with the PNDA dated October 13, 2018. She stated that Appellant agreed to the terms of this settlement but failed to execute the Stipulation of Settlement provided by the County or to serve the five (5) days suspension that was agreed upon by the parties.

Appellant's failure to input time and attendance in electronic system, known as LGS, was a violation of DFAB policy and procedure. LGS was implemented in 2016. All DFAB employees received training on how to use the LGS system when the system was first implemented.

In December 2018, Appellant claimed to have never received training on LGS. Ms. Green personally set up individualized training for Appellant on December 6, 2018. Appellant was advised to contact her if she had any additional questions after the training. Ms. Green received no inquiries from Appellant.

Several instructional memoranda were issued to all DFAB staff, including Appellant, throughout 2017 regarding the use of LGS. DFAB employees were able to access LGS through their personal computers and their cell phones. Ms. Green stated that since June 2019, Appellant continued to have time and attendance issues, which included attendance violations and failure to log her time into LGS.

Ms. Green stated that employees are required to call in to their supervisor to advise of an unscheduled absence and to enter the absence into the LGS. In the time period leading to the memorandum dated December 4, 2018 (R-10) Appellant failed to

call in to her supervisor on several occasions. All DFAB employees have a County email address.

Ms. Green stated that despite technical issues with the LGS system, she personally has always been able to utilize the system for inputting her time and attendance. She also stated that any technical issues with the LGS system do not account for the number of instances that Appellant failed to use LGS.

Lori Jaiyesimi testified as follows:

Ms. Jaiyesimi currently serves as a Family Services Supervisor in the Office of Intake Services. She was Appellant's supervisor from 2017 through March 2019.

Ms. Jaiyesimi was not aware of any grievance filed regarding the written reprimand issued to Appellant dated August 3, 2017.

Ms. Jaiyesimi did a performance evaluation of Appellant in January 2019 covering the period between July 1, 2018 to December 30, 2018. Appellant did not meet standards in three of the five applicable categories that were evaluated. These three categories were: quality of work; quantity of work; and, personal relations. Ms. Jaiyesimi stated that Appellant's time and attendance issues during this time period were impacting her performance as a Family Service Worker.

Ms. Jaiyesimi said that chronic absenteeism has an adverse effect on the other employees. This includes reassignment of work and interviews. Appellant's chronic absenteeism negatively impacted the morale of the unit. The reassignment of Appellant's work resulted in three co-workers complaining about the additional work they were assigned. Ms. Jaiyesimi spoke to Appellant regarding performance related errors on multiple occasions including holding one on one meetings and sending emails. She stated that she found there to be a connection between Appellant's chronic absenteeism and her poor performance.

Ms. Jaiyesimi confirmed that LGS training was provided to all DFAB employees.

She also confirmed that Appellant never asked for assistance, or otherwise ask questions regarding LGS after receiving her individual training.

Ms. Jaiyesimi confirmed the call-in procedure to report absences and noted that Appellant did not use this procedure on multiple occasions between 2017-2019. All DFAB employees are told of the call in procedure.

Karlene Mullings testified as follows:

She is the Assistant Administrator of Family Services. Ms. Mullings has worked for DFAB for twenty-five years. Ms. Mullings has indirectly supervised Appellant since meeting in 2017. Ms. Mullings has had many discussions with Appellant regarding her failure to follow time and attendance procedures. Appellant had used all her sick days, and all but one vacation day, by August 2017. Appellant failed to enter days off from work in LGS. DFAB employees have two days to enter time off in LGS. There is also a call in procedure that must be followed. Appellant failed to do so.

Ms. Mullings issued a memo to Appellant, dated July 13, 2018, regarding an in person where Appellant was advised all time due her was exhausted, and that all future time off required a note from a physician. Appellant was also advised about FMLA (Family and Medical Leave Act)

Carlene Mullings testified as follows:

Ms. Mullngs is the Assistant Administrator of Family Services. She has been employed at DFAB for twenty-five years. Currently Ms. Mullins works in the Office of Intake Services.

She has had multiple conversations with Appellant regarding her time and attendance violations prior to issuing the April 26, 2017 memorandum to her.

Appellant had used all of her entitled sick days and all but one entitled vacation time by April 2017. Appellant failed to enter days off from work in the LGS system.

DFAB employees have two days to input time off from work into the LGS system. There is also a call-in procedure that must be followed when an employee is absent. Appellant also did not follow the call-in procedure.

Ms. Mullings issued a memorandum, dated July 13, 2018 (R-8) to Appellant. They had an in-person meeting where Petitioner was advised that she had again exhausted all of her accumulated time. Appellant was further advised that all future time off from work would have to be accompanied by a doctor's note. Appellant was informed that she could to apply for FMLA leave if needed. Between June 1, 2018 and July 13, 2018, Appellant was absent nineteen times. She failed to call in or enter this time off into the LGS system. Employees who have a home computer or a mobile phone can access LGS even when they are not at work.

Appellant continued to not abide by DFAB time and attendance policy. Ms. Mullings prepared a memorandum dated August 17, 2018 (R-9). This was done as Appellant did not adhere to policy despite prior memoranda.

Ms. Mullings stated that Appellant neither served the five (5) day suspension nor signed the Stipulation of Settlement regarding the PNDA issued on October 30, 2018. Ms. Mullings also stated that since April of 2019 there has been no improvement in Appellant's attendance. Appellant has not worked a full work week, nor has she been on an approved leave of absence since January 2020. Since the implementation of the LGS system at the end of 2016, Appellant never requested assistance with the LGS system or to advise Ms. Mullings that she had not been trained on LGS. Ms. Mullings personally scheduled Appellant to attend LGS training between 2016-2017.

When Appellant and Ms. Mullings met on July 11, 2018 to discuss her time and attendance issues Appellant did not tell Ms. Mullings she was have difficulty with LGS or that she didn't have access to the system from home.

All DFAB employees have access to the help desk if having any issues with LGS. The LGS system is a requirement for all DFAB employees.

Ms. Mullings further noted that Appellant never advised her of any sexual harassment or discrimination complaints. She was also not aware of any sexual harassment or discrimination complaint by Appellant.

Ms. Mullings also stated that between 2017-2018 there were approximately ten in-person trainings on the LGS system. There were also many informal trainings. Appellant never advised Mullings that she had not received training. Ms. Mullings began taping memos to Hynson's computer that were issued to staff when Hynson was absent to ensure that she received them.

Patricia Simpson testified as follows:

She is Senior Personnel Technician and has been for twenty-five years. Ms. Simpson is responsible for all personnel actions, preparing paperwork, new hires, CAMPS forms, leaves and transfers. Employees were trained on LGS throughout 2017 and they also had access to the Help Desk. Instruction was also sent to employees on how to use the LGS system several times. All employees could access the LGS program on their work computer, home computer and on their phones. DFAB employees have contacted her to request that Ms. Simpson input their time into the LGS system when they have been out of work and she has accommodated those requests. During 2017, 2018 and 2019 Appellant never requested assistance from her with inputting time and attendance. Appellant also never requested assistance with punching in and punching out during those years.

Ms. Simpson was advised that Appellant refused to accept service of the Stipulation of Settlement that reduced her discipline from a twenty day suspension to a five day suspension regarding the PNDA dated October 13, 2018.

Ms. Simpson advised that she was available to accept phone calls from employee who were calling out from work if they were unable to reach their supervisor. Ms. Simpson never received any phone calls from Appellant in this regard during 2018 or 2019.

Ms. Simpson stated that Appellant was denied FMLA leave in June 2018 because she had not worked the requisite 1,250 hours needed to qualify for such leave. At that time Appellant had worked 834 hours in the year prior to June 2018.

Appellant was sent a five day letter on July 25, 2018 (R-20) and October 25, 2018 (R-21) as a result of being a "no call no show" for in excess of five days. Ms. Simpson was in receipt of a memorandum dated April 5, 2019 (R-22) regarding Appellant's failure to request time off in the LGS system. Ms. Simpson was aware that Appellant had also failed to input her time into LGS during 2018.

Ms. Simpson identified multiple days during this time period where Appellant was absent from work but had failed to input any time off into the LGS system (R-23). Ms. Simpson identified a significant number of additional days for the period of June 2019-December 2019 and January 1, 2020-January 31, 2020 that Appellant again failed to log into the LGS system for time off from work (R-24 and R-25). Ms. Simpson stated that Appellant's failure to utilize the LGS time and attendance system was one of the worst in the department out of almost 500 employees.

Employees are required to enter time and attendance in LGS even if they have used all of their accumulated time.

Appellant did not work a single complete work week for the period of 1/1/18-11/28/18 (R-23). Appellant, for the period of 6/19-12/19, did not work a complete five day work week (R-24).

Appellant never made a complaint of discrimination to Ms. Simpson. Appellant received the County Zero Tolerance Policy in 2019 as evidenced by the sign off sheet (R-28) for the same. Appellant would also have been required to attend yearly sexual harassment training along with all other DFAB employees. From 2015 Ms. Simpson never saw a discrimination complaint filed by Appellant.

Ms. Simpson remains in the room when an employee reviews a personnel file. She did not impose any restrictions or requirements on Appellant that were different

than any other employee.

The only time that Ms. Simpson entered time for Appellant was at the request of Administrative Supervisor Aaron Crawley as Appellant failed to do it herself.

Appellant's Case

Laurice Hynson, Appellant, testified as follows:

Ms. Hynson has been a DFAB employee since 2006. She works in the Office of Intake Services.

Ms. Hynson stated that the Counseling Session or Oral Warning or Written Reprimand, (R-1) dated January 6, 2017, that she received is inaccurate. She stated she had doctors' notes.

Ms. Hynson stated that the Counseling Session or Oral or Written Reprimand (R-2), dated August 3, 2017, that received was never completed.

Ms. Hynson stated that both forms she found when she reviewed her personnel file and that she was never aware of either.

Ms. Hynson then reviewed the PNDA (R-3). She was served the PNDA on November 1, 2019 by Ms. Green. There was a hearing on the matter at the Hall of Records. She was unsure of the outcome.

Ms. Hynson then reviewed a Stipulation of Settlement (R-4) that was prepared regarding the PNDA (R-3) after the hearing held thereon. She did not sign the settlement. She did not agree with its terms.

She then reviewed an Amended PNDA (R-5) and a Final Notice of Disciplinary Action (FNDA) (R-6).

Ms. Hynson then reviewed the memorandum from Ms. Mullings to her, dated April 26, 2017 (R-7), regarding missing time and attendance information. Ms. Hynson blamed other people for not entering time and attendance for. She also stated Ms. Simpson entered time for her.

Ms. Hynson then reviewed a memorandum from Ms. Mullings to her, dated July 11, 2018 (R-8), regarding absenteeism. Ms. Hynson was unsure if the dates stated therein are accurate. Ms. Hynson blames the harassment by management and stress it caused resulting her absences from work.

A memorandum from Ms. Guarini to Ms. Mullings (R-9) regarding Ms. Hynson's time and attendance time lines was reviewed by Ms. Hynson. She had used all sick, vacation and personal days as of August 17, 2018.

A memorandum from Ms. Green to Ms. Hynson (R-10) regarding time and attendance training was next reviewed. Ms. Hynson stated management has made allegations on many occasions and that they are completely false. She stated she has documentation, phone records, and witnesses that she has never been a no call, no show.

The memorandum (R-10) was concerning training and Ms. Hynson did attend the training. She further stated that this training had never been offered to her before.

Ms. Hynson indicated that she was providing Ms. Simpson doctor's notes for Ms. Simpson to input.

She could not say whether or not she received emails regarding time and attendance training and the new system being used (LGS). She stated "there's probably a lot emails and memos that I did not get." Ms. Hynson does have an employee email address. She stated at some point her work email address changed.

Ms. Hynson blamed management for not being informed.

Ms. Hynson then reviewed an Annual Performance Appraisal Form (R-17) for the period from July 1, 2018 to December 30, 2018. She recalled being provided this document. She stated that it is inaccurate. She did not sign it.

A time and attendance record, known as a PD20, was reviewed (R-18). This was used prior to the new system. She believes this is accurate.

Ms. Hynson received two five day letters, dated July 25, 2018 and October 25, 2018, respectively (R-20 and R-21). She stated she complied with both letters.

Ms. Hynson then reviewed several grievances filed on her behalf by her union (A-3 through A-8)

A-3 is about an outside employment form being placed on her desk. Ms. Hynson stated that this reflects a pattern of discrimination.

A-4 is about a performance evaluation.

A-5 is about a performance evaluation.

A-6 is about a performance evaluation.

A-7 is about a disciplinary action. Ms. Hynson did not recall this grievance.

A-8 is about a performance evaluation. The Respondent deleted a comment relating to time and attendance in the performance evaluation.

Ms. Hynson stated she did not bring documents, doctors' notes, to the hearing because she is not a lawyer and is not familiar with the procedure.

Ms. Hynson testified that she went to the DFAB Administration at various times after July 2018 to complain about feeling harassed and bullied.

Ms. Hynson stated that she was on FMLA leave from May 2017-May 2018 for stress and anxiety. Ms. Hynson acknowledged that she was denied a subsequent FMLA leave in May 2018 because she had not worked the requisite 1250 hours in the previous twelve months.

Since 2017, Ms. Hynson feels that she has been discriminated by Karlene Mullings and her subordinates. Specifically, Hynson named Lori Jaiyesimi, Heather Wicks, Valentina Green, Patricia Simpson, and Yvonne Cooper. Ms. Hynson claims she was discriminated against on the basis of her sexual orientation and gender. Ms. Hynson confirmed she never heard Mullings or Jaiyesimi make discriminatory remarks based on her sexual identity. Ms. Hynson stated that use of the word "aggressive" was "possibly" discriminatory. The word "aggressive" was used in a performance evaluation by Ms. Jaiyesimi.

Ms. Hynson drew a conclusion that the Administration was discriminating her based on her sexual orientation and gender based on conversations with Heather Wicks. Ms. Hynson was not able to provide any direct statements supporting same.

Similarly, Ms. Hynson was unable to point to any action, statement or language used by Patricia Simpson to support her assertion of discrimination.

Ms. Hynson confirmed that County Policy requires that employees provided documentation related to outside employment. She also confirmed that Yvonne Cooper's request for this information was not discriminatory based on her sexual orientation or gender.

Ms. Hynson has treated with two medical professionals since 2017, one in Maryland and a second in New Jersey whom she saw one time per week from 2018 through the summer of 2019.

Ms. Hynson confirmed that she was familiar with the DFAB call-out procedure to report an absence. She stated that since 2012 she has had a cell phone with internet access and a home computer. She was also aware, since at least December 2018,

that she could access the LGS system via website using a home computer or cell phone. Ms. Hynson claims that in April 2017 DFAB was not using email for the purposes of communicating internally or with clients and therefore she would not regularly check email.

In connection with the two five (5) days letter received sent to Ms. Hynson (R-20 and R-21), she stated that she may have been at work or called in on the days she was identified as being AWOL in those letters but she was unsure if she had documentation to support same.

Ms. Hynson stated that she had no documentation to dispute that she had utilized all of her accumulated time by March 2015 or that she had thirty-six absent without pay (AWOP) days between March and June 2015.

CREDIBILITY

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

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App.

Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

I find the testimony of Valentina Green, Lori Jaiyesimi, Carlene Mullings and Patricia Simpson credible. Each testified in a straightforward and businesslike manner. They were professional in their respective demeanors and answered questions without hesitation.

Ms. Hynson's testimony is problematic. She blamed others for not abiding by Respondent's time and attendance policy. She routinely claimed she did not receive emails or memoranda regarding the policy. She blamed this again on others. She insisted she is the subject of discrimination by her employer, but offered not one concrete instance of any discrimination. She also claimed on numerous occasions that she had documents and records, mostly doctors' notes, that she could introduce. She produced nothing. This she blamed on not being a lawyer and therefore unfamiliar with procedure. It is important to note that Ms. Hynson was represented by her union president pursuant to N.J.A.C. 1:1-5.4(a)(6). I cannot determine with any degree of confidence that anything Ms. Hynson said during her testimony was at all accurate. I find her not credible.

FINDINGS OF FACT

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

Appellant, Laurice Hynson, is employed by Essex County DFAB and has been since 2006.

Essex County instituted an electronic time and attendance system, known as LGS, at the end of 2016. Employees were to enter their time and attendance information electronically. This could be done from employees' work computers, from their home computers or via their cell phones. Training in LGS was provided in several ways: in person; and, via emails with training information. Appellant had access to the training information by simply opening her work emails. (R-11, R-12, R-13, R-14, R-15

and R-16). Additionally, Appellant received in person training on LGS on December 6, 2018. (R-10)

Appellant received a Written Reprimand, dated January 6, 2017, for not providing documentation regarding her excessive absences. (R-1)

Appellant received a Written Reprimand, dated August 3, 2017, for leaving her desk for twenty-eight minutes without advising a supervisor or administrator. (R-2)

Appellant received a PNDA, dated November 1, 2018, alleging failure to perform duties; chronic and excessive absenteeism and tardiness; other sufficient cause; and, violation of time and attendance policies and procedures. (R-3)

A Stipulation of Settlement was reached regarding the PNDA noted above reducing the suspension to five days. (R-4) Said stipulation was signed by Appellant's union representative, but not by Appellant. Appellant refused to sign and the settlement was not finalized.

An Amended PNDA, dated April 2, 2019, was entered and alleged the same charges as in R-3, and added the charge of violation of the Stipulation of Settlement. The Amended PNDA sought a sixty day suspension. (R-5)

On April 29, 2019, a hearing was held before a hearing officer, Gary J. Cucchiara, regarding the Amended PNDA, who issued a Recommendation of the Hearing Officer. The recommendation was for a thirty day suspension. (A-1)

The County issued its FNDA dated June 17, 2019, which suspended Appellant for sixty days. (R-6)

By memorandum dated April 16, 2017, Appellant was advised that she had exhausted all sick time, and that she must provide a doctor's note for any additional sick day. Said memorandum also advised Appellant of missing time and attendance in LGS. (R-7)

By Memorandum dated July 13, 2018, Appellant was advised, again, that she exhausted all sick, personal and vacation time. She must provide a doctor's note. She was missing time and attendance in LGS. (R-8)

A Memorandum dated August 17, 2018, from Laura Guarini, Deputy Department Director, to Ms. Green and copied to Ms. Mullings, advised that Appellant continued to not adhere to time and attendance guidelines. (R-9)

Essex County Human Resources issued policies and procedures as follows:

Attendance and Punctuality dated Sept. 1, 2004 (J-1); Sick Leave dated September 1, 2004 (J-2); Vacation dated September 1, 2004 (J-3); and, Family Leave dated September 1, 2004 (J-4). All the above noted memorandum were provided to Appellant during the course of her employment with Essex County DFAB.

Appellant failed on numerous occasions to enter her time and attendance into LGS. This was due to her action, or inaction, and not caused by any other person. Appellant had access to LGS from her work computer, her home computer and her cell phone. Appellant failed to provide required doctors' notes to substantiate her many absences.

Appellant's claims of discrimination and harassment by management are completely unsubstantiated.

LEGAL ANALYSIS AND CONCLUSION

The Civil Service Act, N.J.S.A. 11A:1-1 to -12.6, governs a civil service employee's rights and duties. The Act is an important inducement to attract qualified personnel to public service and is to be liberally construed toward attainment of merit appointments and broad tenure protection. See Essex Council No. 1, N.J. Civil Serv. Ass'n v. Gibson, 114 N.J. Super. 576 (Law Div. 1971), rev'd on other grounds, 118 N.J. Super. 583 (App. Div. 1972); Mastrobattista v. Essex County Park Comm'n,

46 N.J. 138, 147 (1965). The Act also recognizes that the public policy of this state is to provide appropriate appointment, supervisory and other personnel authority to public officials in order that they may execute properly their constitutional and statutory responsibilities. N.J.S.A. 11A:1-2(b). In order to carry out this policy, the Act also includes provisions authorizing the discipline of public employees.

A public employee who is protected by the provisions of the Civil Service Act may be subject to major discipline for a wide variety of offenses connected to his or her employment. The general causes for such discipline are set forth in N.J.A.C. 4A:2 2.3(a). In an appeal from such discipline, the appointing authority bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the judge must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). This burden of proof falls on the agency in enforcement proceedings to prove violations of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987).

Appellant is charged in the Final Notice of Disciplinary Action with failure to perform duties in violation of N.J.A.C. 4A:2-2.3(a)(1); Chronic and Excessive Absenteeism and Lateness in violation of N.J.A.C. 4A:2-2.3(a)(4); Other Sufficient Cause in violation of 4A:2-2.3(a)(12)[1]. Appellant is also charged in the FNDA with violation of Essex County time and attendance policies and procedures, and the stipulation of settlement.

This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, in accordance with a reasonable probability of truth. Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Preponderance may also be described as the greater weight of credible evidence

[1] Incorrectly cited as N.J.A.C. 4A:2-2.3(a)(11) in the Amended PNDA which is referenced in the FNDA.

in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). The burden of proof falls on the appointing authority in enforcement proceedings to prove a violation of administrative regulations. Cumberland Farms v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The respondent must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson, supra, 37 N.J. 143. The evidence needed to satisfy the standard must be decided on a case-by-case basis.

The clear preponderance of the credible, relevant and competent evidence establishes that Appellant is guilty of all the charges in the FNDA, except the charge of violation of the stipulation of settlement.

As to N.J.A.C. 4A:2-2.3(a)(1), failure to perform duties, Appellant was so often absent without excuse it would be impossible for her to perform her duties accurately and timely. This caused her employer to use other employees to do her work. See Sotomayer v. Plainfield Police Department CSV 9921-98, Initial Decision, (December 6, 1999), adopted, Merit Sys. Bd. (January 24, 2000) http://njlaw.rutgers.edu/collections/oal/final/csv09921-98.pdf (citing Steinel v. City of Jersey City, 7 N.J.A.R. 91 (1983), Clark v. New Jersey Dept. of Agriculture, 1 N.J.A.R. 315 (1980).)

As to N.J.A.C. 4A:2-2.3(a)(2), chronic and excessive absenteeism and tardiness, the record is repleat with instances too numerous to list where she failed to report to work or was tardy to work. Further, she failed to properly enter her time and attendance, or non attendance in LGS.

As to N.J.A.C. 4A:2-2.3(a)(12), other sufficient cause, Essex County has carried its burden by a clear preponderance of the credible, relevant and competent evidence.

There is no definition in the New Jersey Administrative Code for other sufficient cause. Other sufficient cause is generally defined in the charges against petitioner. The

charge of other sufficient cause has been dismissed when "respondent has not given any substance to the allegation." Simmons v. City of Newark, CSV 9122-99, Initial Decision (February 22, 2006), adopted, Comm'r (April 26, 2006), http://njlaw.rutgers.edu/collections/oal/final/. Other sufficient cause is an offense for conduct that violates the implicit standard of good behavior that devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.

Herein, Appellant maintained that Essex County was engaged in discrimination and harassment against her. All without any evidence, other that her not credible testimony. Further, she blamed others on her failures to do a rather simple function, enter her time and attendance into LGS. She continually maintained she did not receive any memorandum or emails. This all against the competent evidence.

Clearly, Appellant is also guilty of failure to follow Essex County time and attendance policies and procedures. She was well aware of what those policies and procedures were. She received them in writing. She was trained on LGS. She received emails on how to use LGS. Yet, inexplicably, she chose not to.

I cannot conclude that Appellant is guilty of violation of the Stipulation of Settlement. Although she agreed verbally to the settlement, she took issue with the language of the agreement and refused to sign. Accordingly, there was no meeting of the minds, and no settlement.

An appeal to the Merit System Board[2] requires the Office of Administrative Law to conduct a de novo hearing and to determine appellant's guilt or innocence as well as the appropriate penalty. In the Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987). In determining the reasonableness of a sanction, the employee's past record and any mitigating circumstances should be reviewed for guidance. West New York v. Bock, 38 N.J. 500 (1962). Although the concept of progressive discipline is often cited by appellants as a mandate for lesser penalties for first time offences,

[2] Now the Civil Service Commission.

> that is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when reviewing an agency head's choice of penalty when the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hernmann, 192 N.J. 19, 33-4 (2007) (citing Henry, supra, 81 N.J. 571).]

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

In West New York v. Bock, 38 N.J. 500, 522 (1962), which was decided more than fifty years ago, our Supreme Court first recognized the concept of progressive discipline, under which "past misconduct can be a factor in the determination of the appropriate penalty for present misconduct." In re Herrmann, 192 N.J. 19, 29 (2007) (citing Bock, supra, 38 N.J. at 522). The Court therein concluded that "consideration of past record is inherently relevant" in a disciplinary proceeding, and held that an employee's "past record" includes "an employee's reasonably recent history of promotions, commendations and the like on the one hand and, on the other, formally adjudicated disciplinary actions as well as instances of misconduct informally adjudicated, so to speak, by having been previously brought to the attention of and admitted by the employee." Bock, supra, 38 N.J. 523–24.

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

> . . . First, principles of progressive discipline can support the imposition of a more severe penalty for a public employee who engages in habitual misconduct. . . .
>
> The second use to which the principle of progressive discipline has been put is to mitigate the penalty for a current offense . . . for an employee who has a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions. . . .
>
> . . . [T]hat is not to say that incremental discipline is a principle that must be applied in every disciplinary setting. To the contrary, judicial decisions have recognized that progressive discipline is not a necessary consideration when . . . the misconduct is severe, when it is unbecoming to the employee's position or renders the employee unsuitable for continuation in the position, or when application of the principle would be contrary to the public interest.
>
> [In re Hermann, supra, 192 N.J. at 30–33 (citations omitted).]

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

While concept of progressive discipline in determining the level and propriety of penalties imposed requires a review of an individuals prior disciplinary history a "clean" record may be out-weighed if the infraction had issued a serious in nature. Henry v. Rahway State Prison, 81 N.J. 571 (1980); Carter v. Bordentown, 191 N.J. 474 (2007). Further some disciplinary infractions are so serious that removal is appropriate. Destruction of public property is such an infraction. Kindervatter v. Dep't of Envt'l Protection, CSV 3380-98, Initial Decision (June 7, 1999), http://lawlibrary.rutgers.edu/collections/oal/search.html.

In determining the penalty to be imposed, the court noted that none of the factors justifying mitigation of removal were present. Namely mistake, negligence, or remorse. The Court was compelled to hold that whatever the employee's motive, and regardless of the worth of the computer, she had to be subject to major discipline. While the goal of discipline is to either remove an employee unsuitable for public service or to impose some lesser sanction when the employee may be rehabilitated, the Court held that the extraordinary serious offense in this case could not be mitigated by a prior good-service record as that mitigation is reserved only for lesser offenses.

In deciding what penalty is appropriate, the courts have looked toward the concept of progressive discipline. In Bock, supra, 38 N.J. at 523-524, The New Jersey Supreme Court held that evidence of a past disciplinary record, including the nature, number, and proximity of prior instances of misconduct, can be considered in determining the appropriate penalty. Also, where an employee's misconduct is sufficiently egregious, removal may be warranted and need not be preceded by progressive penalties. In re Hall, 335 N.J. Super. 45 (App. Div. 2000), certif. denied, 167 N.J. 629 (2001); Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979). The penalty imposed must not be so disproportionate to the offense and the mitigating circumstances that the decision is arbitrary and unreasonable.

In the instant matter, Appellant has two written reprimands. Appellant has received generally poor evaluations during her years of employment. However, Appellant's actions were egregious. This was not a simple failure from time to time

where she forgot to enter her time and attendance. This was not a missed day or two of work. This was a continuous act of not doing a simple task: entering time and attendance. Further, she failed to call in when not going to work. Further, she took off so much unexcused time other workers had to pick up the load. She was spoken to time and again about the time and attendance policy. Further, Appellant is unable to accept full responsibility for her actions. She blames others for her failure.

Based upon the above authorities, I **CONCLUDE** that progressive discipline should apply. Here, Appellant's actions were so egregious, coupled with her inability to accept full responsibility for actions, that a sixty day suspension is warranted.

ORDER

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

It is further **ORDERED** that the Final Notice of Disciplinary Action, dated June 17, 2019, providing for a penalty of a sixty day suspension, is **AFFIRMED**.

I hereby **FILE** my initial decision with the **CIVIL SERVICE COMMISSION** for consideration.

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

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

August 5, 2020

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Appellant:

Laurice Hynson, Appellant

For Respondent:

Valentina Green
Lori Jaiyesimi
Carline Mullings
Patricia Simpson

List of Exhibits

Joint Exhibits:

J-1 attendance and punctuality policy
J-2 sick leave policy
J-3 vacation policy
J-4 family leave policy

For Appellant:

A-1 Hearing Officer Recommendation
A-2 December 23, 2019 memo (Marked – Not in Evidence)
A-3 July 21, 2015 Grievance
A-4 October 21, 2015 Grievance
A-5 September 28, 2017 Grievance
A-6 April 16, 2018 Grievance
A-7 October 27, 2017 Grievance
A-8 letter from County
A-9 Policy

For Respondent:

R-1 January 16, 2017 written reprimand
R-2 August 3, 2017 reprimand
R-3 November 1, 2018 PNDA
R-4 Stipulation of Settlement
R-5 April 2, 2019 amended PNDA
R-6 June 17, 2018 FNDA
R-7 April 26, 2017 memo
R-8 July 13, 2018 memo
R-9 August 17, 2018 memo
R-10 December 14, 2018 memo
R-11 March 1, 2017 email
R-12 April 18, 2017 email chain
R-13 May 24, 2017 email
R-14 email from Jeanette Paige-Hawkins to all DFAB users
R-15 February 23, 2018 memo
R-16 February 23, 2018 email
R-17 performance appraisal
R-18 PD20
R-19 leave request
R-20 July 25, 2018 letter
R-21 October 2018 letter
R-22 April 5, 2019 letter
R-23 time card
R-24 time card
R-25 time card
R-26 outside employment form
R-27 SOPP
R-28 sign-on sheet
R-29 zero tolerance policy