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Attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 05913-22

AGENCY DKT. NO. 2021-1245

IN THE MATTER OF J [REDACTED] D [REDACTED]
ANN KLEIN FORENSIC CENTER,
DEPARTMENT OF HEALTH.

J [REDACTED] D [REDACTED] appellant, pro se

Charles Moore, Employee Relations Coordinator, for respondent, Ann Klein
Forensic Center, pursuant to N.J.A.C. 1:1-5.4(a)(2)

Record Closed: December 22, 2023

Decided: February 5, 2024

BEFORE KIMBERLEY M. WILSON, ALJ:

STATEMENT OF THE CASE

Appellant J [REDACTED] D [REDACTED], a senior repairer at respondent Ann Klein Forensic Center (AKFC), appeals disciplinary action imposing a fifteen-day suspension without pay for the following charges: (i) conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)6; (ii) discrimination that affects equal employment opportunity, as defined in N.J.A.C. 4A:7-1.1, including sexual harassment, pursuant to N.J.A.C. 4:2-2.3(a)9; and (iii) other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)12, which includes violations of (a) the New Jersey State Policy Prohibiting Discrimination in the Workplace (Policy); (b)

Administrative Order (A.O.) 4:08 C-4 for verbal abuse of a patient, client, resident or employee; (c) A.O. 4:08 C-8 for falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation, or other proceeding; (d) A.O. 4:08 C-11 for any improper conduct which violates common decency; and (e) A.O. 4:08 E-1 for violation of a rule, regulation, policy, procedure, order, or Administrative Decision, specifically the Policy. D [REDACTED] generally denies these allegations.

PROCEDURAL HISTORY

On or around February 17, 2021, AKFC issued a Final Notice of Disciplinary Action (FNDA) against D [REDACTED], imposing a fifteen-day suspension against him, and D [REDACTED] appealed. The Civil Service Commission transmitted the matter to the Office of Administrative Law (OAL), where it was filed as a contested case on July 18, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing was held on June 19, 2023, and June 29, 2023. The parties were permitted to file post-hearing briefs, which were received by December 15, 2023. The record closed on December 22, 2023.

FACTUAL DISCUSSION AND FINDINGS

The following **FACTS** are not in dispute, and I so **FIND**:

1. On or around March 31, 2011, D [REDACTED] signed an Acknowledgement of Receipt, indicating that he was familiar with the Policy. (R-6.)
2. According to the Policy, the State is "committed to providing every State employee and prospective State employee with a work environment free from prohibited discrimination or harassment. Under this policy, forms of employment discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender, pregnancy,

affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability.” (R-7 at 1.)

3. Prohibited conduct under the Policy includes “us[ing] derogatory or demeaning references regarding a person’s race . . . affectional or sexual orientation.” (Id. at 2.) Examples of that behavior include, but are not limited to, “[c]alling an individual by an unwanted nickname that refers to one or more of the above protected categories, or telling jokes pertaining to one or more protected categories[.]” (Id. at 3.) Using derogatory references regarding any protected categories is also a violation of the Policy. (Ibid.) The Policy can be violated even if there was no intent to harass or demean another. (Id. at 2.)
4. D [REDACTED] was working as a senior repairer at AKFC when on or around February 17, 2021, AKFC served the FNDA on him. (R-1.) The charges in the FNDA were the following: (i) conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)6; (ii) discrimination that affects equal employment opportunity, as defined in N.J.A.C. 4A:7-1.1, including sexual harassment, pursuant to N.J.A.C. 4:2-2.3(a)9; and (iii) other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)1), which includes violations of (a) the Policy; (b) A.O. 4:08 C-4 for verbal abuse of a patient, client, resident, or employee; (c) A.O. 4:08 C-8 for falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation, or other proceeding; (d) A.O. 4:08 C-11 for any improper conduct which violates common decency; and (e) A.O. 4:08 E-1 for violation of a rule, regulation, policy, procedure, order, or Administrative Decision, specifically the Policy. (Ibid.)
5. The disciplinary charges in the FNDA were based on the findings in an Equal Employment Opportunity/Affirmative Action (EEO/AA) investigation (Investigation) determining that D [REDACTED] violated the Policy based on sexual orientation and race. (Ibid.) D [REDACTED] “made demeaning comments in a

conversation towards your co-workers' sexual orientation and specifically referring to your supervisor as a derogatory name referring to sexual orientation. Those comments were confirmed by three witnesses." (Ibid.) In addition, D [REDACTED] stated that "most of the time if you are molested you turn gay or have gay tendencies, that's why most of them are gay." (Ibid.) D [REDACTED] also made inappropriate comments based on race, including saying, "Why are you listening to that white music?" (Ibid.) Finally, D [REDACTED] provided a misstatement of fact during the investigation. (Ibid.)

6. On or around March 3, 2020, A [REDACTED] C [REDACTED] (C [REDACTED]), who was crew supervisor building maintenance programs at AKFC at the time and the complainant, provided a statement for the Investigation. (R-2.) According to C [REDACTED]'s Investigation statement, C [REDACTED] was advised of the obligation to be candid and truthful in providing all relevant information about a particular EEO issue in the workplace. (Id. at 1.)
7. In the statement, C [REDACTED] indicated that his daughter is gay and married to another woman, facts that D [REDACTED] knew because C [REDACTED] told him. (Id. at 3.) According to C [REDACTED], D [REDACTED] refers to gay people in the workplace as "queer" and "homo," comments C [REDACTED] described as ongoing. (Ibid.) C [REDACTED] stated that D [REDACTED] would make these comments at the maintenance department break table, not directly to the employees he was discussing. (Ibid.)
8. During C [REDACTED]'s interview, C [REDACTED] said that about eight months before the Investigation interview, there was a conversation at the maintenance department break table where D [REDACTED] said that children whose parents sexually molest them grow up to be gay. (Ibid.) C [REDACTED] interpreted D [REDACTED]'s comments to say that he and his wife sexually molested their daughter, which is why she is gay. (Ibid.)
9. Four AKFC employees, W [REDACTED] L [REDACTED] (L [REDACTED]), Terence S [REDACTED] (S [REDACTED]), R [REDACTED] J [REDACTED], and R [REDACTED] F [REDACTED], sit at the maintenance department break table and could have heard those comments. (Id. at 4.)

10. In the statement, C [REDACTED] indicated that D [REDACTED] made the statement, "Did you see that faggot skipping down the hallway," referring to an employee who worked in housekeeping. (Id. at 3.) D [REDACTED] also referred to their supervisor as gay, speculating that the supervisor was gay and making gay jokes about him. (Ibid.)
11. C [REDACTED] also said that about nine months before providing his statement, he was working in the AKFC gym converting the lights to LEDs¹ with L [REDACTED] and D [REDACTED] and listening to music, and D [REDACTED] asked L [REDACTED] why L [REDACTED] was listening to that type of music. (Id. at 4.) In response, L [REDACTED] questioned why D [REDACTED] had to be like that, meaning racist towards white people. (Ibid.)
12. At the end of his Investigation statement, C [REDACTED] confirmed that he was given the opportunity to read and review his statement that senior legal specialist F [REDACTED] M [REDACTED] (M [REDACTED]) prepared and agreed that it was an accurate rendering of his answers to the questions within the statement. (Id. at 5.)
13. On or around March 10, 2020, S [REDACTED], mechanic non-automotive at AKFC, provided a statement for the Investigation. (R-3.) According to S [REDACTED]'s Investigation statement, S [REDACTED] was advised of the obligation to be candid and truthful in providing all relevant information about a particular EEO issue in the workplace. (Id. at 1.)
14. In his statement, S [REDACTED] stated that while at the maintenance department break table, he heard D [REDACTED] referring to an AKFC housekeeper as a "faggot" and "gay." (Id. at 3.) When D [REDACTED] makes these comments, S [REDACTED] indicated that he leaves the break table. (Ibid.)
15. In the statement, S [REDACTED] indicated that he did not hear D [REDACTED] specifically say that children who are molested by their parents grow up to be gay. (Ibid.) S [REDACTED] also did not hear D [REDACTED] make a comment about C [REDACTED]'s daughter. (Id. at 4.)

¹ "LED" stands for light emitting diode, and here, it is a particular type of energy-efficiency light.

16. According to S ■■■, D ■■■ called their supervisor "gay" and other names at the maintenance department break table. (Ibid.) L ■■■, who S ■■■ described as D ■■■'s buddy, and another AKFC employee heard this comment. (Ibid.)
17. At the end of his Investigation statement, S ■■■ confirmed that he was given the opportunity to read and review the statement M ■■■ prepared and agreed that it was an accurate rendering of his answers to the questions within the statement. (Ibid.)
18. On or around March 11, 2020, L ■■■, senior repairer at AKFC, provided a statement for the Investigation. (R-4.) According to L ■■■' Investigation statement, L ■■■ was advised of the obligation to be candid and truthful in providing all relevant information about a particular EEO issue in the workplace. (Id. at 1.)
19. In the statement, L ■■■ described the maintenance department break table as about ten feet long and the place where everyone in the maintenance shop sits for breaks and lunch. (Id. at 3.)
20. L ■■■ indicated in his statement that D ■■■ referred to his co-workers as "homo" and "gay," including two AKFC employees who work in housekeeping. (Ibid.) L ■■■ also stated that D ■■■ made comments at the maintenance department break table that someone is a "fag." (Ibid.) L ■■■ heard D ■■■ say at the maintenance department break table that kids who were molested by their parents grow up to be gay. (Id. at 4.) He did not hear D ■■■ make a comment about C ■■■'s daughter. (Ibid.)
21. L ■■■ also stated in his interview that when he was working with D ■■■ and C ■■■ changing the lights in the AKFC gymnasium, D ■■■ asked him, "why are you listening to that white music." (Ibid.) L ■■■ was singing along with the song, and after D ■■■ made the comment, L ■■■ told D ■■■ that

he liked the song. (Ibid.) D [REDACTED] then asked who put the radio on that particular station, and L [REDACTED] responded that C [REDACTED] did. (Ibid.)

22. During the interview, L [REDACTED] stated that D [REDACTED] referred to their supervisor as gay. (Id. at 4–5.) When their supervisor was speaking to someone else and was physically close to that person, D [REDACTED] made a comment to L [REDACTED] similar to, “Look at him, he is gay,” referring to the supervisor. (Ibid.) L [REDACTED] said that D [REDACTED] has made this comment more than once. (Id. at 5.)
23. At the end of his statement, L [REDACTED] confirmed that he was given the opportunity to read and review the statement that M [REDACTED] prepared and agreed that it was an accurate rendering of his answers to the questions within the statement. (Ibid.)
24. On or around July 29, 2020, A [REDACTED] M [REDACTED]-M [REDACTED] (M [REDACTED]-M [REDACTED]), chief of staff for the New Jersey Department of Health, sent D [REDACTED] a letter regarding the outcome of the Office of Diversity and Equity Services’ (ODES) Investigation. (R-5.) M [REDACTED]-M [REDACTED] reviewed the ODES investigation report and adopted its findings and recommendations. (Id. at 1.)
25. C [REDACTED]’s ODES complaint was dated September 26, 2019. (Ibid.)
26. The ODES Investigation substantiated that D [REDACTED] made a comment that children who were sexually molested by their parents grow up to be gay. (Id. at 2.) The ODES investigation also substantiated that D [REDACTED] asked a co-worker why he was listening to white music. (Ibid.)
27. In the ODES investigation, D [REDACTED] denied making inappropriate comments regarding sexual orientation. (Ibid.)
28. In the July 29, 2020, letter, M [REDACTED]-M [REDACTED] advised D [REDACTED] that corrective action would be taken for his violations of the Policy, including one-on-one counseling to review the Policy and a referral to Employee Relations at AKFC for review and further action. (Ibid.) This letter also contains

information about D [REDACTED]'s right to appeal the Department's determination.
(Ibid.)

29. On or around November 23, 2020, S [REDACTED] signed a statement dated September 26, 2019, addressed to "To whom it may concern" indicating that he did not "hear J [REDACTED] D [REDACTED] [sic] speak anything to . . . C [REDACTED] with regard to racism, homosexual people or anything in poor taste while working with D [REDACTED] [sic]." (P-13 at b.)
30. On or around November 23, 2020, D [REDACTED] C [REDACTED] (C [REDACTED]) signed a statement dated September 26, 2019, addressed to "To whom it may concern" indicating that he "did not hear D [REDACTED] say anything racist towards C [REDACTED] or anything about gay/lesbian people since he began working with D [REDACTED]" (P-13 at c.)
31. On or around November 20, 2020, L [REDACTED] signed a statement dated September 26, 2019, for the defense of D [REDACTED], indicating that he "never heard [D [REDACTED]] say anything bad or disrespecting to gay, lesbian people." (P-13 at d.) The statement indicated that L [REDACTED] "never heard [D [REDACTED]] say anything racism [sic]." (Ibid.)
32. According to D [REDACTED]'s Employee Disciplinary History dated October 11, 2022, D [REDACTED]'s only disciplinary history includes the fifteen-day suspension at issue here. (R-8.) The incident date for this suspension is September 26, 2019. (Ibid.)

Testimony

The following witnesses testified for AKFC:

1. S [REDACTED] B [REDACTED] (B [REDACTED]), personnel assistant for AKFC.
2. S [REDACTED], non-auto mechanic for AKFC.
3. L [REDACTED], senior repairer for AKFC.
4. M [REDACTED]

5. C [REDACTED] assistant engineer of maintenance for AKFC²

The following witnesses testified for D [REDACTED]:

1. C [REDACTED] senior repairer for AKFC.
2. S [REDACTED] B [REDACTED] (B [REDACTED]), housekeeper for AKFC.
3. S [REDACTED]
4. L [REDACTED]
5. J [REDACTED] R [REDACTED] G [REDACTED] (G [REDACTED]), D [REDACTED]'s nephew.

D [REDACTED] did not testify.

The following is not a summary of all testimony but an encapsulation of the testimony relevant to the disciplinary charges against D [REDACTED].

For respondent:

B [REDACTED] testified that the Acknowledgement of Receipt that D [REDACTED] signed on or around March 31, 2011, was part of the new hire packet to onboard new employees and confirmed that employees received and reviewed the Policy. (R-6, R-7.)

S [REDACTED] has worked at AKFC for the past eleven years and works with D [REDACTED]. He described his relationship with D [REDACTED] as a working relationship rather than a social one. In AKFC's maintenance shop, S [REDACTED] and the other shop employees would sit around a break table and eat.

When asked to review his statement for the Investigation, S [REDACTED] advised that he could not read the document.³ (R-3.) He was not familiar with the statement he provided for the Investigation.

² C [REDACTED] was promoted to this position after making his complaint regarding D [REDACTED]'s comments.

³ Immediately after taking the oath, S [REDACTED] stated that his glasses were recently crushed, and the parties agreed to read the substance of any documents into the record to accommodate S [REDACTED].

S ■■■ denied that he ever heard D ■■■ make comments on someone's sexual orientation. When presented with his Investigation statement, where S ■■■ indicated that he heard D ■■■ call a new AKFC housekeeper a "faggot" and "gay," S ■■■ testified, "And --- and it could have been we all --- we all make remarks. I could have heard him. I could have not heard him." (T1 22:19-21 (emphasis added).) S ■■■ indicated that there were many people talking during then and he may have assumed that D ■■■ made the statement, but he did not know. S ■■■ said that it was a long time ago.

S ■■■ did not know whether D ■■■ made comments about sexual orientation, specifically using the words "faggot" and "gay," on more than one occasion. In his confidential statement, S ■■■ indicated that D ■■■ had made these comments on more than one occasion. (R-3 at 3.)

S ■■■ did not recall telling M ■■■ that S ■■■ heard D ■■■ refer to his supervisor as gay. S ■■■ testified that he did not recall what he told M ■■■ and did not recall presently whether that was an accurate answer. S ■■■ was unable to read the question independently and did not recall his answer.

S ■■■ acknowledged that the initials at the bottom of each page of his Investigation statement were his, but he did not recall signing it. He could not say whether it was his signature on the last page of the Investigation statement.

S ■■■ stated that he did not believe that D ■■■ was racist or homophobic.

L ■■■ has worked at AKFC for about six years with D ■■■. L ■■■ does not socialize with D ■■■ outside of work. Employees in the maintenance department take their breaks at the break table, where they talk.

L ■■■ testified that he did not hear D ■■■ make comments regarding sexual orientation during those discussions. In L ■■■' Investigation statement, he said that he heard D ■■■ call people "gay" or a "fag." (R-4 at 3.) In response, L ■■■ said the following:

[W]hen I made these statements I was - - I expressed to him why I made these statements, but it's - - that - - all that's not in here. That's what I'm telling you. All that's not in here.

[T1 41:2-5.]

L█████ acknowledged that he signed the Investigation statement and did not make any corrections to it. In response to the question whether L█████ did not make any changes to the statement because it was accurate, L█████ stated the following:

We have discussions at the table. That's shop talk and sometimes some certain questions come up and we just all talk and say things, but like right now you got me up here testifying against - - for the state against him. We all say these things.

That's what I'm trying to bring to you. We all say these things. It was just shop talk. That's it.

[T1 41:15-42:1 (emphasis added).]

L█████ said the incident in the gymnasium and the music played on the radio was not racial. L█████ did not remember D█████ asking him why he was listening to that white music, and he said that his Investigation statement indicating the same was not accurate. (R-4 at 4.)

L█████ acknowledged that D█████ made a comment similar to the allegation that kids who are molested by their parents grow up to be gay, even though D█████ did not use those exact words. According to L█████, D█████ said that some kids who are molested turn out to be gay, and C█████ was present when D█████ made this comment. L█████ knew that C█████'s daughter was gay and indicated C█████ did not seem to be offended when D█████ made the comment. When asked whether D█████'s comment violated the Policy, L█████ responded, "A lot of things we say at the shop go against that." (T1 49:3-6 (emphasis added).) He said that whether D█████'s comment violated the Policy depended on how the person hearing the comment interpreted it.

L [REDACTED] testified that he did not hear D [REDACTED] call D [REDACTED]'s supervisor gay in those exact terms. According to L [REDACTED], the supervisor acted in a way that makes people think he may be gay, such as touching people.

L [REDACTED] stated that he did not think that D [REDACTED] was racist or homophobic.

M [REDACTED] has worked for ODES since April 2019. As a legal specialist, he investigates complaints about the Policy. Before working for ODES, he was a state trooper for twenty-five years and a detective for thirteen of those years. He retired in 2014 as a lieutenant. He has conducted investigations since 1989.

Once he is assigned a case to investigate in ODES, he reviews it and conducts interviews. He typically interviews the complainant first. He allows the witness to review the statement, initialing each page twice and signing the last page. Witnesses are permitted to change any information that is incorrect on the statement. When the statement is completed, he prints it out and files it. He does not give the witness a copy of the statement. Once the interviews are completed, he prepares a report for his director. His director and the chief of staff then determine whether the Policy is violated based on the information provided.

Miri confirmed that S [REDACTED] and L [REDACTED] initialed the internal pages and signed their respective Investigation statements.

C [REDACTED] has worked at AKFC for five years. He served as an electrician and supervisor of maintenance workers before being promoted to Assistant Engineer of Maintenance. C [REDACTED] does not socialize with D [REDACTED] off-duty but testified that they had a good working relationship, which included visits to each other's homes, when C [REDACTED] first started working at AKFC.

C [REDACTED] filed an ODES complaint regarding D [REDACTED]'s comments. M [REDACTED] interviewed C [REDACTED] regarding that complaint and prepared an Investigation statement. (R-2.) C [REDACTED] initialed each page of his statement and signed the final page.

C■■■■'s daughter is married to another woman, and at the maintenance department break table, D■■■■ made a comment that gay people were sexually molested by their parents when they were young. D■■■■ also said that if they play with dolls, they grow up to be gay. C■■■■ said these comments broke his heart and hurt him badly. D■■■■ knew that C■■■■'s daughter was gay because C■■■■ spoke about it at the break table often and showed everyone pictures of her wedding before D■■■■ made the comments.

D■■■■'s comments changed the working relationship that C■■■■ had with D■■■■ and C■■■■ because it became difficult to work with them. C■■■■ said that there is friction in the air, and that D■■■■ and C■■■■ do not like him. C■■■■ had not been promoted to supervisor when D■■■■ made these comments about gay people, sexual molestation, and dolls. C■■■■ did not know whether D■■■■'s comments were directed at him, but he called the comments upsetting and a slap in the face.

According to C■■■■, D■■■■ called a housekeeper at AKFC a "faggot" and "queer" because of certain on-the-job conduct.⁴ D■■■■ called his supervisor a "homo" and a "queer." Finally, when he was working with D■■■■ and L■■■■ in the gym, D■■■■ asked L■■■■ why he was listening to this type of music. C■■■■ and L■■■■ discussed the incident later.

For appellant:

C■■■■ has worked at AKFC for six years. He said that he did not know D■■■■ to show any racism or homophobia. C■■■■ did not hear D■■■■ or anyone make inappropriate comments regarding race or sexual orientation at the break table.

C■■■■ was not asked to provide an Investigation statement regarding C■■■■'s complaint.

⁴ To maintain the individual's privacy rights, a specific description of the conduct will be intentionally omitted.

C█ wrote the September 26, 2019, statement that he never heard D█ say anything racist towards C█ or say anything about gay/lesbian people willingly and on his own. (P-13 at c.)

When asked whether he knew C█, C█ testified as follows:

- Q. . . .Do you know [] C█?
- A. I know of him at work
- Q. And who is [] C█?
- A. He's an electrician for [AKFC].
- Q. And is he currently a supervisor?
- A. We - - they - - they - - yeah, that's what they say. Yes, he's a supervisor for the maintenance shop.

C█ testified that he was not friendly with C█ because C█ has written him up about four to five times. C█ did not know the basis for those writeups, and he has never received a preliminary notice of disciplinary action or final notice of disciplinary action based on C█'s writeups. C█ has told C█ that he was writing him up, but C█ never saw the actual writeup. C█'s union representative told C█ that he was being written up. C█ indicated that those discussions with his union representative could have been the union's intervention to correct his workplace behavior in lieu of discipline.

B█ has worked as a housekeeper at AKFC since 2017. She testified that D█ had not shown her any racism or homophobia. She acknowledged that comments and remarks based on sexual orientation or race violate the Policy.

S█ indicated that he did not recall writing the September 26, 2019, statement that he signed on November 23, 2020. (P-13 at b.)

L█ wrote and signed his statement dated September 26, 2019. (P-13 at d.) He acknowledged that he signed the statement on November 20, 2020. I█ stated that no one asked him to write the statement and that he was present⁵ and just wrote the statement. In response to a question on the reason for the delay, I█ said the following:

⁵ In his testimony, I█ did not provide detail as to where he was and other circumstances when he wrote the statement.

Well, we had a lot going on and I was – it –everybody had to – not everybody, most people had to write a statement and so I wrote a statement.

I wrote the statement September 26, 2019, and I signed it – I – I know what I did. I didn't sign it. I didn't sign it. I signed it on 11/20/20. That's when I signed it.

[T1 52:15–21.]

Once he signed the statement on November 20, 2020, Lewis gave the statement to D [REDACTED] because L [REDACTED] wrote the statement in D [REDACTED]'s defense.

G [REDACTED], who identified as gay, indicated that D [REDACTED] always treated him with respect. G [REDACTED] acknowledged that he is not an AKFC employee and did not have knowledge of conversations at AKFC or in its maintenance shop. G [REDACTED] said that D [REDACTED] hired him as a party coordinator and party decorator, and D [REDACTED] never made him or his colleagues, who are gay, feel disrespected.

Factual findings:

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

In addition to considering each witness' interest in the outcome of the matter, I observed their demeanor, tone, and physical actions. I also considered the accuracy of their recollection; their ability to know and recall relevant facts and information; the

reasonableness of their testimony; their demeanor, willingness, or reluctance to testify; their candor or evasiveness; any inconsistent or contradictory statements; and the inherent believability of their testimony.

Having had the opportunity to view the witnesses and review the documentation presented by both parties, I accept the testimony of B [REDACTED], M [REDACTED] and C [REDACTED] as credible. Each of them testified consistently and forthrightly, specifically B [REDACTED] regarding the Policy, M [REDACTED] regarding the Investigation, and C [REDACTED] regarding D [REDACTED]'s statements in the workplace.

I find S [REDACTED]'s testimony largely not credible, primarily for the inconsistencies among his testimony, his September 26, 2019, statement, and his Investigation statement. S [REDACTED] did not recall writing the September 26, 2019, statement, which was made before he provided a statement for the Investigation. In the Investigation statement, S [REDACTED] acknowledged that D [REDACTED] called an AKFC housekeeper "gay" and a "faggot," and S [REDACTED] indicated that D [REDACTED] called his supervisor "gay." It is important to note that when providing his Investigation statement, S [REDACTED] was advised that he needed to be candid and truthful in providing information, and he agreed that the Investigation statement was an accurate reflection of his answers to M [REDACTED]'s questions. S [REDACTED]'s testimony that he never heard D [REDACTED] make comments regarding sexual orientation directly contradicts his Investigation statement and is not believable, and for the series of inconsistent statements regarding D [REDACTED]'s comments in the workplace, I will not consider any part of S [REDACTED]'s testimony.

I find the same regarding the majority of L [REDACTED]'s testimony. On September 26, 2019, L [REDACTED] wrote a statement indicating that he never heard D [REDACTED] say anything bad or disrespectful to gay people, a statement signed on November 20, 2020, over a year later. In the interim, L [REDACTED] provided an Investigation statement that D [REDACTED] had called AKFC housekeeping employees "gay," "homo," and "fag." L [REDACTED] was also advised that he needed to be candid and truthful in providing information, and he agreed that the Investigation statement was an accurate reflection of his answers to M [REDACTED]'s questions. L [REDACTED]' testimony that he never heard D [REDACTED] make comments regarding sexual orientation directly contradicts his responses in the Investigation statement.

L [REDACTED], however, acknowledged that D [REDACTED] made a comment similar to the allegation that kids who are molested by their parents grow up to be gay, even though D [REDACTED] did not use those exact words. L [REDACTED] said that D [REDACTED] said that some kids who are molested turn out to be gay. I will consider this portion of L [REDACTED] testimony; the remainder, however, will be disregarded in its entirety, also because of L [REDACTED]' inconsistent statements.

I find that C [REDACTED]'s testimony is also not credible, primarily due to bias. While C [REDACTED] testified that he never heard D [REDACTED] make any inappropriate comments regarding sexual orientation at the maintenance department break table, C [REDACTED] made it very clear that he had animus against C [REDACTED] for perceived workplace writeups, despite the fact that C [REDACTED] has never been formally disciplined for any workplace misconduct. C [REDACTED] had difficulty acknowledging that C [REDACTED] is his supervisor, which can be construed as a sign of disrespect. For the apparent bias that C [REDACTED] had for C [REDACTED], I will also disregard his testimony in its entirety.

I find the remaining two witnesses, B [REDACTED] and G [REDACTED], as credible; however, their ability to provide relevant information regarding the allegations in the FNDA affects the extent to which their testimony will considered. B [REDACTED], a housekeeper at AKFC, did not provide any testimony regarding D [REDACTED]'s alleged comments. She does not work in the same department as D [REDACTED]. The same follows for G [REDACTED], who does not even work for the State, let alone AKFC. Neither B [REDACTED] nor G [REDACTED] could provide any insight on D [REDACTED]'s comments made at the maintenance department break table, and for that reason, I will not consider their testimony.

Accordingly, I **FIND** the following additional **FACTS**:

1. D [REDACTED] received a copy of the Policy when he was hired at AKFC.
2. S [REDACTED] and L [REDACTED] initialed the internal pages and signed their respective Investigation statements.

3. At the maintenance department break table, D ██████ stated that children who are sexually molested when they were young turn out to be gay.
4. C ██████ had not been promoted to supervisor when D ██████ made the comment that children who are sexually molested when they were young turn out to be gay.
5. D ██████ called an AKFC housekeeper a "faggot" and "queer."
6. D ██████ called his supervisor a "faggot" and a "homo."
7. When working in AKFC's gym with L ██████ and C ██████, D ██████ asked L ██████ why he was listening to white music.

LEGAL ANALYSIS AND CONCLUSIONS

A civil service employee's rights and duties are governed by the Civil Service Act (Act) and regulations promulgated pursuant thereto. See N.J.S.A. 11A:1-1 to 11A:12-6; N.J.A.C. 4A:1-1.1 to 4A:10-3.2. The purpose of the Act is to "ensure efficient public service for state, county, and municipal government." In re Johnson, 215 N.J. 366, 375 (2013) (citing Comm'n's Workers of Am. v. N.J. Dep't. of Personnel., 154 N.J. 121, 126 (1988)). The Act should be construed liberally toward attainment of merit appointments and broad tenure protections. See Mastrobattista v. Essex Cnty. Park Comm'n, 46 N.J. 138, 147 (1965). However, "[t]here is no constitutional or statutory right to a government job." State-Operated Sch. Dist. of Newark v. Gaines, 309 N.J. Super. 327, 334 (App. Div. 1998).

A civil service employee who commits a wrongful act related to their employment may be subject to discipline, which could range from a reprimand to a suspension or removal from employment. See N.J.S.A. 11A:1-2(c); N.J.S.A. 11A:2-20; N.J.A.C. 4A:2-2.2(a); N.J.A.C. 4A:2-2.9. Consistent with public policy and the Act, public entities should not be burdened with an employee who fails to perform their duties satisfactorily or engages in misconduct related to their duties. See N.J.S.A. 11A:1-2(a). Thus, a public

entity may impose major discipline upon a civil service employee, including removal from their position. See N.J.S.A. 11A:1-2(c); N.J.A.C. 4A:2-2.2(a).

For appeals concerning major disciplinary action, the appointing authority bears the burden to prove the charges by a preponderance of the competent, credible evidence. See N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Evidence is said to preponderate "if it establishes the reasonable probability of the fact." Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). OAL hearings on civil service removal appeals are de novo, both as to guilt and the penalty to be imposed. See Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980); W. New York v. Bock, 38 N.J. 500, 507 n.1, 512 n.3 (1962).

Here, AKFC charged D [REDACTED] with conduct unbecoming a public employee in violation of N.J.A.C. 4A:2-2.3(a)6; discrimination that affects equal employment opportunity, including sexual harassment in violation of N.J.A.C. 4A:2-2.3(a)9; and other sufficient cause in violation of N.J.A.C. 4A:2-2.3(a)12. Each of the charges will be addressed.

1. Conduct unbecoming a public employee.

D [REDACTED] is charged with a violation of N.J.A.C. 4A:2-2.3(a)6, conduct unbecoming a public employee. Conduct unbecoming is an elastic phrase which encompasses "any conduct which adversely affects the morale or efficiency of [a governmental unit] . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." Karins v. Atl. City, 152 N.J. 532, 554 (1998) (quoting In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960)). "[I]t is sufficient that the complained of conduct and its attending circumstances be such as to offend publicly accepted standards of decency." Id. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (Pa. 1959)).

Such misconduct 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) (citing Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). "It is well settled that public employees are expected to exhibit appropriate behavior, both on and off the job, in order to project a positive image to the public that they serve and the taxpayers who fund their positions. Any conduct that serves to diminish the public's trust in the integrity of its employees is intolerable." In re Green, Dep't of Human Servs., 2006 N.J. AGEN LEXIS 632, *5 (June 7, 2006).

The New Jersey Supreme Court has clearly recognized the harm caused by racial epithets and related language used in the workplace. In Karins, the Court observed, "There are certain words and phrases 'that in the context of history carry a clear message of . . . hatred, persecution, and degradation of certain groups.'" 152 N.J. at 562 (citation omitted). "Hate conduct or speech 'harms the individual who is the target[;] . . . it perpetuates negative stereotypes [and] promotes discrimination . . . by creating an atmosphere of fear, intimidation, harassment and discrimination.'" Ibid. (citation omitted). Such speech or conduct "is not purely private when made in connection with the performance of public service. Under those circumstances, a public employee is not immune from disciplinary proceedings." Id. at 563.

The word "faggot" is defined as "a contemptuous term used to refer to a gay person, especially a gay man," with a note that the word is extremely disparaging and offensive. www.dictionary.com. The word "queer," when used as a noun is defined either as a gay or lesbian person or a person whose sexual orientation or gender identity falls outside the heterosexual mainstream of the gender binary, with a note that the word is often disparaging and offensive. (Ibid.) Finally, the word "homo" is a contemptuous term used to refer to a gay person, especially a gay man, with a note that the word is extremely disparaging and offensive. (Ibid.) In sum, all three of these words are hateful, reprehensible slurs based on affectional or sexual orientation.

The use of any of these words, let alone all three of them, in the workplace offends publicly accepted standards of decency, and their use does not evince appropriate behavior that projects a positive image to the public. D█████'s use of these words in the workplace was neither good nor morally correct.

D█████'s comment that children who are sexually molested when they were young turn out to be gay is equally as offensive and reprehensible. The underlying implication of D█████'s statement is that C█████'s daughter was molested, a speculative comment. The statement is destructive talk that absolutely cannot be countenanced in a work environment anywhere, including the State. The statement is beyond the pale, and C█████'s offense at D█████'s statement, considering his family composition, is completely understandable. Accordingly, the statement does not represent appropriate behavior that projects a positive image to the public.

Finally, D█████'s question to L█████, inquiring why L█████ was listening to "white music" is also objectionable and offensive. Because all of D█████'s comments and statements tend to destroy public respect for municipal employees and confidence, I **CONCLUDE** that AKFC has satisfied its burden of proving by a preponderance of the credible evidence that D█████ engaged in conduct unbecoming a public employee pursuant to N.J.A.C. 4A:2-2.3(a)6.

2. Discrimination that affects equal employment opportunity.

D█████ is charged with a violation of N.J.A.C. 4A:2-2.3(a)9, which is discrimination that affects equal employment opportunity. Equal opportunity employment is generally defined as providing the ability for anyone, regardless of race, religion, affectional or sexual orientation, marital status, or disability, to apply for and be hired for positions of employment. N.J.A.C. 4A:7-1.1(a),(b). In addition, "all forms of discriminatory conduct against any State employee by any other State employee" is prohibited. N.J.A.C. 4A:7-1.1(f).

All of D█████'s comments in the workplace, whether his statements or the slurs that he used, constitute discriminatory conduct that violates N.J.A.C. 4A:2-2.3(a)9. As

previously noted, D█████'s comments in the workplace that certain AKFC employees were "faggot[s]", "homo[s]," and "gay" are disparaging, offensive slurs. D█████'s statement that children who are sexually molested when they were young turn out to be gay is offensive, and C█████'s umbrage at this statement, considering his family composition, is understandable. Finally, D█████'s question to L█████, inquiring why L█████ was listening to "white music," was similarly offensive.

Accordingly, I **CONCLUDE** that AKFC has satisfied its burden of proving by a preponderance of the credible evidence that D█████'s conduct constituted discrimination that affects equal employment opportunity pursuant to N.J.A.C. 4A:2-2.3(a)9.

3. Other sufficient cause.

The charge against D█████ for other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)12, includes the following violations: (a) the Policy; (b) A.O. 4:08 C-4 for verbal abuse of a patient, client, resident or employee; (c) A.O. 4:08 C-8 for falsification: intentional misstatement of material fact in connection with work, employment, application, attendance, or in any record, report, investigation, or other proceeding; (d) A.O. 4:08 C-11 for any improper conduct which violates common decency; and (e) A.O. 4:08 E-1 for violation of a rule, regulation, policy, procedure, order, or Administrative Decision, specifically the Policy.

N.J.A.C. 4A:2-2.3(a)12 defines other sufficient cause as other conduct not specifically delineated in the regulation which would violate "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." In re Boyd, Cumberland Cnty. Dep't of Corrs., 2019 N.J. CSC LEXIS 621, *115 (July 3, 2019), adopted Comm'r, id. at 1-2 (Aug. 14, 2019). N.J.A.C. 4A:2-2.3(a)(12) is essentially a catchall provision for why an employee may be subject to major discipline. "An appointing authority may discipline an employee for sufficient cause, including failure to obey laws, rules and regulations of the appointing authority." In re Mumford, 2014 N.J. CSC LEXIS 478, *33 (April 17, 2014), adopted Comm'r, id. at 1-13 (June 5, 2014).

AKFC did not present any evidence regarding the various internal policies giving rise to the charge against D [REDACTED] for other sufficient cause, including A.O. 4:08 C-4, A.O. 4:08 C-8, A.O. 4:08 C-11 and A.O. 4:08 E-1; therefore, none of these charges against D [REDACTED] can be sustained. AKFC did present evidence regarding the Policy and D [REDACTED]'s acknowledgement that he received the Policy.

The Policy states that using derogatory or demeaning references regarding a person's color, national origin or affectional or sexual orientation, including calling an individual by an unwanted nickname that refers to that person's color, national origin or affectional or sexual orientation, constitutes prohibited conduct. The Policy also prohibits using derogatory references regarding any protected categories, which includes color, national origin and affectional or sexual orientation.

The New Jersey Supreme Court provided guidance regarding the Policy in In re Hendrickson, 235 N.J. 145 (2018). The Court recognized that a public employee's use of a "highly offensive gender slur in a public place and overheard by co-workers must be firmly condemned, even if Hendrickson [the employee] was just 'muttering' to himself in a loud voice about his female supervisor." Id. at 161. "A belittling gender insult uttered in the workplace by a state employee is a violation of New Jersey's policy against discrimination and Hendrickson's conduct was unbecoming a public employee." Ibid. This guidance logically follows for slurs and comments regarding affectional or sexual orientation and comments regarding color or national origin.

In the workplace, D [REDACTED] used offensive slurs to refer to other State employees, and those words, namely, "faggot," "queer," and "homo," are all derogatory, demeaning references to a person's affectional or sexual orientation. Each time that D [REDACTED] used these words in the workplace, he violated the Policy.

D [REDACTED]'s comment that children who are sexually molested when they were young turn out to be gay is a derogatory, demeaning reference regarding affectional or sexual orientation that violates the Policy. Finally, D [REDACTED]'s question to L [REDACTED] why L [REDACTED] was listening to "white music" is a derogatory, demeaning reference to color and national origin.

For D [REDACTED]'s four violations of the Policy, I **CONCLUDE** that AKFC has satisfied its burden of proving by a preponderance of the credible evidence that D [REDACTED] engaged in conduct constituting other sufficient cause pursuant to N.J.A.C. 4A:2-2.3(a)12.

PENALTY

Once a determination has been made that an employee violated a statute, rule, or regulation concerning their employment, the concept of progressive discipline guides the determination of a penalty. See In re Carter, 191 N.J. 474, 483–84 (2007). In determining the appropriateness of a penalty, several factors must be considered, including the nature of the employee's offense, the concept of progressive discipline, and the employee's prior disciplinary record. George v. N. Princeton Developmental Ctr., 96 N.J.A.R.2d (CSV) 463, 1996 N.J. AGEN LEXIS 467, *11 (1996). The concept of progressive discipline, namely imposing increasingly severe disciplinary penalties, is used where appropriate. See In re Parlow, 192 N.J. Super. 247, 249 (App. Div. 1983). Depending upon the incident complained of and the employee's past record, major discipline may include suspension for more than five working days at any one time, removal, or demotion. N.J.A.C. 4A:2-2.2(a); Bock, 38 N.J. at 523–24.

Here, AKFC has imposed a fifteen-day suspension on D [REDACTED] for the series of offensive slurs and statements he made in the workplace. The mitigating factor here is that D [REDACTED] has no other discipline in his record; the aggravating factors, however, are the offensive slurs and statements on their face, along with the quantity of offensive slurs and statements. These slurs and statements were repetitive and pervasive, and as noted previously, D [REDACTED]'s comment that children who are sexually molested when they were young turn out to be gay is disparaging, disrespectful talk that cannot be condoned in the workplace, particularly when it infers that C [REDACTED]'s daughter was molested. The aggravating factors outweigh the mitigating factors. Major discipline is appropriate here, and for these reasons, I **CONCLUDE** that AKFC did not err when it imposed a fifteen-day suspension on D [REDACTED] for his workplace conduct.

ORDER

It is **ORDERED** that D [REDACTED]'s appeal is **DENIED**. It is further **ORDERED** that AKFC's imposition of the discipline of a fifteen-day suspension is hereby **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.

February 5, 2024

DATE


KIMBERLEY M. WILSON, ALJ

Date Received at Agency:

February 5, 2024

Date Mailed to Parties:

February 5, 2024

KMW/dw

APPENDIX

WITNESSES

For appellant

D [REDACTED] C [REDACTED]
S [REDACTED] E [REDACTED]
T [REDACTED] S [REDACTED]
W [REDACTED] L [REDACTED]
J [REDACTED] R [REDACTED] G [REDACTED]

For respondent

S [REDACTED] B [REDACTED]
T [REDACTED] S [REDACTED]
W [REDACTED] L [REDACTED]
F [REDACTED] M [REDACTED]
A [REDACTED] C [REDACTED]

EXHIBITS

For appellant

- P-1 Not entered into evidence
- P-2 Not entered into evidence
- P-3 Not entered into evidence
- P-4 Not entered into evidence
- P-5 Not entered into evidence
- P-6 Not entered into evidence
- P-7 Not entered into evidence
- P-8 Not entered into evidence
- P-9 Not entered into evidence

- P-10 Not entered into evidence
- P-11 Not entered into evidence
- P-12 Not entered into evidence
- P-13 Witness statements from T [REDACTED] S [REDACTED], D [REDACTED] C [REDACTED], W [REDACTED] L [REDACTED] and S [REDACTED] B [REDACTED]

For respondent

- R-1 Final Notice of Disciplinary Action dated February 17, 2021
- R-2 Statement of A [REDACTED] C [REDACTED] (EEO/AA Document)
- R-3 Statement of T [REDACTED] S [REDACTED] (EEO/AA Document)
- R-4 Statement of W [REDACTED] L [REDACTED] (EEO/AA Document)
- R-5 EEO Notification Letter to J [REDACTED] D [REDACTED] dated July 29, 2020
- R-6 Acknowledgement of Receipt for J [REDACTED] D [REDACTED] dated March 31, 2011
- R-7 N.J. Policy Prohibiting Discrimination in the Workplace
- R-8 Employee Disciplinary History for J [REDACTED] D [REDACTED]