COMMONWEALTH OF PENNSYLVANIA

William S. Todaro	:	State Civil Service Commission
	:	
v.	:	
	:	
Allegheny County Department of Health	:	Appeal No. 30430

Henry Miller, III	Jake S. Lifson
Attorney for Appellant	Attorney for Appointing Authority

ADJUDICATION

This is an appeal by William S. Todaro challenging his suspension pending investigation and subsequent removal[1] from regular Public Health Entomologist employment with the Allegheny County Department of Health. A hearing was held February 3, 2021, via video, before Commissioner Bryan R. Lentz.

The Commissioners have reviewed the Notes of Testimony, the exhibits introduced at the hearing, and the Briefs submitted by the parties. The issue before the Commission is whether the appointing authority had just cause to remove appellant from his employment.

[1] When an appointing authority suspends an employee pending investigation and subsequently removes the employee based upon information obtained through that investigation, the period of suspension will be deemed part of the removal action. *Woods v. State Civil Service Commission (New Castle Youth Development Center, Department of Public Welfare)*, 865 A.2d 272, 274 n. 3 (Pa. Commw. Ct. 2004); 4 Pa. Code §§ 101.21(b)(2), 605.2(b)(2). Appellant having been suspended pending investigation, effective October 30, 2019, and having remained on suspension until his removal effective November 26, 2019, we consider the removal, effective as of the date of suspension, the sole personnel action to be reviewed through this appeal.

FINDINGS OF FACT

1. By letter dated October 29, 2019, appellant was suspended pending investigation from his Public Health Entomologist, regular status position, effective October 30, 2019. The Allegheny County Health Department (hereinafter "appointing authority") charged appellant with violating its Anti-Discrimination, Harassment, and Retaliation Policy and Use of County Computers Policy based on unwelcome sexual comments that appellant made to another employee on July 23, 2019, as well as sexually explicit and racially discriminatory computer files, to include images, videos, documents, and PowerPoint presentations, which were discovered on his workplace computer. Comm. Ex. A.

2. By letter dated November 8, 2019, appellant was removed from his Public Health Entomologist, regular status position, effective November 26, 2019. The appointing authority charged appellant as follows:

> Your actions on July 23, 2019 and explicit materials found on your computer are violations of the

> [appointing authority's] policies, including but not limited to those policies prohibiting sexual harassment and abusive language; Allegheny County's Anti-Discrimination, Harassment, and Retaliation policy; Allegheny County's policies prohibiting unprofessional conduct directed toward a co-worker; Use of County Computers policies; and Allegheny County Health Department Article 1, Merit System, Section 111B (Immoral behavior).

Comm. Ex. B.

3. The appeal was properly raised before this Commission and was heard under Section 3003(7)(i) of Act 71 of 2018.[2] Comm. Ex. F.

4. Appellant was employed by the appointing authority as a Public Health Entomologist from April 1977 until his termination in November 2019. N.T. pp. 392-393.

[2] Appellant's request for a hearing on the removal under Section 3003(7)(ii) of Act 71 of 2018 was denied due to an insufficient allegation of discrimination.

5. Appellant was responsible for identifying insects, implementing a grant to control the mosquito population, addressing issues with rat control, and providing assistance to the public regarding questions about insects. Appellant also operated the Vector Control Program, among other duties. N.T. pp. 181-182, 398-400.

6. On July 23, 2019, appellant was working with Program Manager Lori Horowitz in the back part of the office, which is referred to as the warehouse. N.T. pp. 49, 406-407.

7. On July 23, 2019, Horowitz was wearing a sleeveless, work-appropriate blouse, and the tattoos on her shoulder were visible. N.T. p. 49.

8. On July 23, 2019, appellant made a comment to Horowitz about her tattoos and asked if she had "documented" herself. Horowitz asked appellant what he meant, and he clarified:

> Have you ever taken naked pictures? You know everything goes downhill after a certain age, and you're going to want to document that.

Horowitz responded she was not planning on doing that, and if she did, it would only be for her

husband's eyes. Horowitz then walked away because she felt very uncomfortable. N.T. pp. 50, 71, 111, 120.

9. Horowitz did not confront appellant at the time he made the comments because she felt very uncomfortable and did not know what to say. N.T. p. 71.

10. On July 23, 2019, Horowitz reported the incident to her supervisor, David Namey. Horowitz also informed Namey that appellant had nude photographs on his work computer, which other employees had seen and brought to her attention. N.T. pp. 50-51, 69, 169, 199.

11. Horowitz provided Namey with a link to the photographs. This link was a pathway from appellant's directory on the appointing authority's server. N.T. p. 169.

12. The pathway to the nude photographs was accessible to all Housing Division employees because the files were on the appointing authority's server. N.T. pp. 170-171, 199.

13. Following the pathway provided by Horowitz, Namey verified the files contained nude photographs. N.T. p. 170.

14. Namey contacted Human Resources Manager Vladimir Golondrina regarding Horowitz's complaint and the nude photographs. N.T. pp. 168-169, 170, 192, 236.

15. All complaints of harassment, retaliation, or discrimination are to be referred to Human Resources. N.T. p. 209.

16. By email dated July 26, 2019, Golondrina asked Horowitz to write a report of the incident. AA Ex. 10.

17. By email dated July 31, 2019, Horowitz provided details of the incident to Golondrina, and asked him if he could delay addressing the matter until after raccoon baiting season because she feared that it would make things around the office very unpleasant and she was nervous about moving forward. N.T. pp. 53-54, 238; AA Ex. 10.

18. After racoon baiting season, which occurs during the last week of July and first week of August, Horowitz called Golondrina about the status of her complaint. N.T. pp. 54-55, 244.

19. After speaking with Horowitz, Golondrina contacted Ellen Buannic, who is the liaison for the Allegheny County Human Resources Department. N.T. pp. 244, 271.

20. Golondrina provided Buannic with a copy of Horowitz's July 31, 2019 email and notified her of the inappropriate images on appellant's work computer. N.T. pp. 239, 311-312.

21. Based on the file names, Golondrina deduced there were hundreds of inappropriate images downloaded by appellant to his work computer. N.T. pp. 262-263; AA Exs. 18-25.

22. Golondrina, Namey, and Buannic conducted a random sampling of the files. N.T. pp. 240, 263-264, 312; AA Exs. 18-25.

23. Most of the photographs, which were viewed as part of the random sampling, were Playboy centerfold pictures and photographs of scantily clad or naked women. Also, there was a video, in which a comedian used a racial slur as part of a skit. N.T. pp. 240, 263-264, 313.

24. On October 23, 2019, Namey, Buannic, and Golondrina met with appellant. N.T. pp. 175, 245.

25. During the October 23, 2019 meeting, appellant was asked about the July 23, 2019 incident, as well as the nude photographs on his work computer. N.T. pp. 175-176, 196, 245-246.

26. In response to questions about the July 23, 2019 incident, appellant admitted he told Horowitz she should take naked photographs of herself. N.T. pp. 175, 245-246, 315.

27. At the October 23, 2019 meeting appellant was asked to recount the July 23, 2019 conversation with Horowitz. Appellant responded that "he had complimented her tattoos and recommended that she take some naked photos to show her husband

and whomever else she wanted to of how good she looked and what good shape she was in at this point in her life." Appellant also admitted saying to Horowitz that "if [she] decided to take naked photos of herself, that he would like to see them." N.T. pp. 315, 331-332.

28. At the October 23, 2019 meeting, appellant claimed he forgot the photographs were on his computer and asserted they were not pornographic or offensive. Appellant also said he did not think there was a work policy against "boobs." N.T. pp. 176, 246, 315-316.

29. On October 25, 2019, a *Loudermill* Hearing Notice was provided to appellant. This Notice informed appellant that a *Loudermill* hearing had been scheduled for October 28, 2019, at which he would be provided an opportunity to provide information and mitigating evidence regarding the sexual harassment complaint that was discussed at the October 23, 2019 meeting, as well as the inappropriate pictures and videos located in his computer folders. AA Ex. 5.

30. On October 28, 2019, the *Loudermill* hearing was held as scheduled and in attendance were Buannic, Golondrina, Namey, Deputy Director of Environmental Health Jim Kelly, appellant, and a co-worker, who appellant brought with him for support and as a character witness. N.T. pp. 177, 249, 316.

31. During the October 28, 2019 *Loudermill* hearing, the comments appellant made to Horowitz, as well as the nude photographs and the video were discussed. N.T. pp. 178, 249-250, 252, 317; AA Ex. 9.

32. During the October 28, 2019 *Loudermill* hearing, the only charge appellant denied was the video. N.T. pp. 317-318.

33. During the October 28, 2019 *Loudermill* hearing, appellant commented, "200 photos over 45 years I've been here, that equates to 4 pictures a year, no big deal." N.T. p. 319; AA Ex. 9 (p. 2).

34. By letter dated October 29, 2019, appellant was suspended pending further investigation. This letter also reiterated the charges which were discussed at the October 28, 2019 *Loudermill* hearing. N.T. pp. 251-252; AA Ex. 7.

35. After appellant was suspended pending further investigation, the appointing authority continued to investigate whether there were any other inappropriate files on appellant's work computer. Additional discussions were also held between Human Resources and then Acting Director Ronald Sugar. N.T. p. 253.

36. As Acting Director, Sugar was responsible for determining the level of discipline in the present matter. N.T. pp. 276, 302.

37. On November 4, 2019, a second *Loudermill* Hearing Notice was provided to appellant. This Notice informed appellant that a *Loudermill* hearing had been scheduled for November 7, 2019, at which he would be provided an opportunity to provide information and mitigating evidence regarding the

sexual harassment complaint and the inappropriate pictures and videos located in his computer folders. AA Ex. 6.

38. On November 7, 2019, the second *Loudermill* hearing was held as scheduled, and appellant was represented by counsel at this hearing. N.T. p. 179.

39. At the November 7, 2019 *Loudermill* hearing, appellant did not make any statements, other than through counsel. N.T. pp. 179-180, 245, 256, 347, 451-453.

40. At no time during either *Loudermill* hearing or the October 23, 2019 meeting did appellant indicate he did not understand the allegations. N.T. p. 303.

41. At the hearing on the present matter, appellant admitted he had Playboy centerfold photographs on his work computer. N.T. p. 419.

42. Appellant was previously counseled and reprimanded for inappropriate behavior and failing to follow his supervisor's instructions. N.T. pp. 146, 164-165, 181-182; AA Exs. 12-15.

43. In or around 2012, appellant was disciplined for not reporting that he backed into a resident's fence, while he was working. When confronted by Namey about the incident, appellant said, "The fence was old. It wasn't a big deal. So, I left it." N.T. p. 164.

44. On October 18, 2016, appellant received a verbal reprimand for failing to attend mandatory training pertaining harassment, discrimination, and retaliation, after twice being directed by his supervisor to attend. N.T. p. 146; AA Ex. 15.

45. In 2018, appellant was disciplined for mishandling the processing of vector control complaints. Appellant was responsible for operating the appointing authority authority's Vector Control Program. N.T. pp. 165, 181-182.

46. On October 30, 2018, appellant was orally reprimanded for unprofessional behavior in that he made inappropriate comments to an elderly woman, who called the appointing authority for advice. N.T. pp. 151-153; AA Ex. 13.

47. On April 19, 2019, appellant was verbally reprimanded for repeatedly failing to follow his supervisor's instructions regarding a space heater. N.T. p. 156; AA Ex. 12.

48. On October 15, 2019, appellant received a written reprimand for failing to comply with the appointing authority's Media Policy, in that he sent information directly to a reporter without having the information vetted as required under the Policy. N.T. pp. 160, 222-223, 225, 433-434; AA Ex. 14.

49. Section A(1) of the appointing authority's "Anti-Discrimination-Harassment-Retaliation Policy and Complaint and Report Procedure" (hereinafter "Anti-Discrimination Policy") states:

> All personnel must behave in a non-discriminatory and business-like manner in all dealings with co-workers and all non-employees of Allegheny County contacted in the course of employment.

AA Ex. 2 (p. 1).

50. Section A(2) of the Anti-Discrimination Policy prohibits sexual harassment in the workplace. AA Ex. 2 (p. 2).

51. Under Section A(2) of the Anti-Discrimination Policy, "[a]ny unwelcome and/or offensive conduct, whether deemed illegal or not, by anyone towards another, including someone of the same gender, is prohibited." AA Ex. 2 (p. 2).

52. Section B of the Anti-Discrimination Policy provides violations of the Anti-Discrimination Policy or any equal opportunity law will result in "disciplinary action, up to and including discharge, without warning." AA Ex. 2 (p. 3).

53. Section G of the Anti-Discrimination Policy provides remedial action may vary depending on the circumstances. AA Ex. 2 (p. 5).

54. All employees are required to comply with the Anti-Discrimination Policy. AA Ex. 2 (p. 4).

55. The Computer Usage Policy provides employees shall not use county computer systems for personal or non-county business related purposes. Employees are also prohibited from using county computer systems for purposes of harassment or discrimination. N.T. p. 88; Ap. Ex. 3 (p. 4).

56. Failure to observe the guidelines set forth in the Computer Usage Policy may result in disciplinary action "depending upon the type and severity of the violation." Ap. Ex. 3 (p. 6).

57. The appointing authority's Work Rules are set forth in the Allegheny County Employee Handbook and apply to all employees of the appointing authority. N.T. pp. 147-148, 150; AA Ex. 3 (pp. 21-22).

58. The Work Rules prohibit unprofessional behavior in dealing with other employees and the public. N.T. p. 153; AA Ex. 3 (p. 21).

59. Violations of any Allegheny County or department policy, including the Anti-Discrimination Policy, also constitute a violation of the Work Rules. AA Ex. 3 (p. 21).

60. Disciplinary action up to and including termination is warranted where an employee violates the Work Rules. AA Ex. 3 (p. 21).

61. Appellant's years of service were not considered as a mitigating factor based on the severity of the offense. N.T. p. 299.

62. A disciplinary action in which a Health Department employee received a one-day suspension for having only one photograph of a naked woman on his computer was used as a gauge when determining the level of discipline for appellant. N.T. pp. 277-279, 282.

63. The appointing authority received a number of Right to Know Law requests from appellant's attorney, which included requests for all photographs on each employee's work computer. N.T. pp. 265-266.

64. No evidence was presented which would suggest management was aware of the information, which was provided in response to the Right to Know requests, prior to appellant's termination.

65. The parties stipulated that as a result of a Right to Know Law request, it was discovered that an employee by the name of Nicole Barnett had approximately 600 personal photographs on her work computer. N.T. p. 471.

66. The parties stipulated there were six non-work-related photographs on Horowitz's work computer—four wedding-related photographs, a photograph from an office social event, and a photograph from a Zoom video. N.T. pp. 93-99.

67. Horowitz did not know her wedding photographs were on her work computer and believed they accidentally downloaded when she attempted to save them somewhere else. N.T. pp. 91-92, 101.

68. Found on Sugar's work computer were documents pertaining to his law practice, papers he graded for the class he taught at University of Phoenix, photographs of his daughter, a picture of his daughter and her friends, and personal emails between himself and a co-worker regarding the sale of his boat. N.T. pp. 353, 362, 369-370.

69. Sugar admitted, on occasion, when he was working after hours or on a lunch break, he would grade a paper or complete other work for his law practice using OneDrive, which is a shared network. Sugar explained he used OneDrive because it allowed him

to access files from his laptop when he was not in the office. Sugar believed by using OneDrive the non-work-related documents inadvertently saved to his work computer. N.T. pp. 353, 362, 368.

70. Sugar did not use his work email for solicitation of selling his boat. N.T. p. 370.

71. Sugar did not use his work computer to download nude photographs. N.T. p. 357.

DISCUSSION

At issue before the Commission is whether the appointing authority had just cause to remove appellant. The appointing authority charged appellant with violating several policies which prohibit sexual harassment and inappropriate conduct, as well as the appointing authority's Computer Usage Policy.

In an appeal challenging the removal of a regular status employee, the appointing authority bears the burden of proving just cause for the removal and must prove the substance of the charges underlying the removal. *Long v. Commonwealth of Pennsylvania Liquor Control Board,* 112 Pa. Commw. 572, 535 A.2d 1233 (1988). Factors supporting the just cause removal of a civil service employee must be related to the employee's job performance and touch in some logical manner upon the employee's competency and ability to perform his job duties. *Woods v. State Civil Service Commission,* 590 Pa. Commw. 337, 912 A.2d 803 (2006).

In support of its charges, the appointing authority presented the testimony of Program Manager Lori Horowitz,[3] retired Program Chief David Namey,[4] Human Resources Manager Vladimir Golondrina,[5] Employee Relations Coordinator Ellen Buannic,[6] and former Acting Director Ronald Sugar.[7] Appellant testified on his own behalf.

Summary of Evidence

Appellant was employed by the appointing authority as a Public Health Entomologist from April 1977 until his termination in November 2019. N.T. pp. 392-393. Appellant was terminated because he sexually harassed a female co-

[3] Horowitz is the Program Manager of the appointing authority's Housing and Community Environment Program. N.T. p. 34. Horowitz has held this position for almost a year and has worked for the appointing authority since 2010. N.T. pp. 35, 36. Horowitz began her employment with the appointing authority as a Housing Inspector, and after a short break in service, was rehired as an Environmental Health Administrator 1, after which she was promoted to Environmental Health Administrator 2, Operations Manager. N.T. pp. 35, 37. Horowitz served as the Operations Manager for two years before becoming the Program Manager. N.T. p. 35.

[4] Namey served as the Program Chief of the appointing authority's Housing and Community Environment Program from 2011 until his retirement in December 2019. N.T. pp. 140-142. In that capacity, he was responsible for completing annual performance evaluations, counseling subordinate employees, and issuing disciplinary actions below the level of a suspension, which included written and verbal reprimands. N.T. pp. 142-145, 211, 213. As Program Chief, Namey supervised appellant and Horowitz. N.T. p. 142.

[5] Golondrina is the appointing authority's Human Resources Manager. N.T. pp. 234-235. Golondrina has held this position for five years. N.T. p. 235. In his capacity as Human Resources Manager, Golondrina is responsible for investigating employee complaints, as well as employee disciplinary proceedings. N.T. p. 236.

[6] Buannic is an Employee Relations Coordinator for the Allegheny County Human Resources Department. N.T. pp. 308-309. Buannic has held this position for approximately two and a half years. N.T. p. 309. In that capacity, Buannic reviews potential violations of the Anti-Discrimination, Harassment, and Retaliation Policy, which are referred by the various departments. N.T. p. 310. Specifically, Buannic is the liaison between the County's Human Resource Department and the appointing authority. N.T. p. 311.

[7] Sugar is presently employed by the NSABP Foundation, which is a cancer research organization. N.T. p. 337. Prior to that, Sugar served as the appointing authority's Acting Director, for approximately seven months. N.T. pp. 338-339. Before serving as the Acting Director, Sugar was the appointing authority's Deputy Director for over five years. N.T. p. 339. As Acting Director, Sugar was responsible for determining the level of discipline in the present matter. N.T. pp. 276, 302.

worker and had explicit materials on his work computer, to include nude photographs of women and a video containing a racial slur. Evidence presented by the parties pertaining to these charges, as well as appellant's prior disciplinary history and information obtained through Right to Know Law requests, has been reviewed by the Commission and is summarized below.

Charges of Sexual Harassment and Explicit Materials on a Work Computer

There is no dispute that on July 23, 2019, appellant was working with Program Manager Lori Horowitz in the back part of the office, which is referred to as the warehouse. N.T. pp. 49, 406-407. Horowitz stated she was wearing a sleeveless blouse, which she described as work appropriate, because the warehouse does not have air conditioning. N.T. p. 49. Horowitz noted the tattoos on her shoulder were visible because the blouse was sleeveless. N.T. p. 49.

Horowitz testified appellant made a comment to her about her tattoos and asked if she had "documented" herself. N.T. p. 50. Horowitz asked appellant what he meant, and he clarified by asking, "Have you ever taken naked pictures?" N.T. pp. 50, 111, 120. Appellant then proceeded to say, "You know everything goes downhill after a certain age, and you're going to want to document that." N.T. p. 50. Horowitz responded she was not planning on doing that, and if she did, it would only be for her husband's eyes. N.T. p. 50. She then walked away because she felt very uncomfortable. N.T. pp. 50, 71, 120.

At the hearing on the present matter, appellant provided the following version of events. Appellant recalled that on July 23, 2019, he was in the backroom with Horowitz and was "making some conversation" about her upcoming wedding. N.T. pp. 406-407. Appellant indicated Horowitz had lost weight and he was complimenting her in that he said, "You're looking great these days." N.T. p. 407. Appellant explained he was feeling horrible about himself because he had injured himself training for a triathlon. N.T. p. 407. Appellant testified he said to Horowitz, "You might want to consider taking some artistic pictures of yourself, because you're getting married, you'll get pregnant, life goes on, things will change. Do it now while you look great." N.T. p. 408. Appellant denied using the word "naked." N.T. p. 408.

Appellant further testified that "long ago," when Horowitz began working for the appointing authority, she described her tattoos for him. N.T. p. 409. Appellant said she described the tattoos "as a series of twining, vining things with flowers and leaves that went down across her back, down her arms, down her sides, across her hip and down her thighs." N.T. p. 409. Appellant said it occurred to him that, "Yeah, I'd like to see a picture of the way this is on your body." N.T. p. 409. Appellant claimed he envisioned it as a close-up of the artwork, like something that would be posted on social media. N.T. pp. 409-410. Appellant stated he was not suggesting Horowitz be naked in the photographs and noted Horowitz could cover private areas of her body with a blanket, bathing suit, lingerie, or an athletic outfit. N.T. pp. 410-411.

Appellant stated the conversation ended with Horowitz saying, "That's not a bad idea, Bill. But if I do, I'll probably just show them to my husband," after which Horowitz picked up her things and left. N.T. pp. 411-412. Appellant stated

the issue never came up again until he was informed in October 2019 that a sexual harassment complaint had been filed against him. N.T. pp. 412, 414. Appellant intimated that he was surprised by the allegations because Horowitz is a person who stands up for herself and she had never said anything about it to him. N.T. p. 412.

At the hearing on this matter, Horowitz explained she did not confront appellant at the time he made the comments because she felt very uncomfortable and did not know what to say. N.T. p. 71. However, that same day, she reported the incident to her supervisor, David Namey, because it made her uncomfortable. N.T. pp. 50-51, 69. Horowitz also informed Namey that appellant had nude photographs on his work computer. N.T. pp. 169, 199. Horowitz provided Namey a link to the photographs and informed him other employees had also seen them and brought it to her attention. N.T. p. 169. The link, provided by Horowitz, was a pathway from appellant's directory on the appointing authority's server. N.T. p. 169.

Namey, who was also appellant's supervisor, encouraged Horowitz to submit an official report of the incident to Human Resources. N.T. pp. 51, 72. Namey also called Human Resources Manager Vladimir Golondrina regarding Horowitz's complaint. N.T. pp. 168-169, 192, 236. Namey testified all complaints of harassment, retaliation, or discrimination are to be referred to Human Resources. N.T. p. 209.

Additionally, Namey turned over the information regarding the nude photographs to Golondrina. N.T. p. 170. Prior to providing this information to Golondrina, Namey opened the files and verified the files contained nude

photographs. N.T. p. 170. Namey noted the pathway by which he accessed the files was accessible to all Housing Division employees because the files were on the appointing authority's server. N.T. pp. 170-171, 199. Namey testified he was concerned that this was creating a hostile work environment. N.T. p. 170.

After receiving the information from Namey, Golondrina contacted Horowitz and asked her to write a report of the incident. N.T. pp. 51, 237; AA Ex. 10. Golondrina sent this request to Horowitz by email dated, July 26, 2019. AA Ex. 10. Golondrina also believed he briefly spoke with Horowitz on the phone about her complaint. N.T. p. 238. In response to Golondrina's request, Horowitz provided details of the incident in an email dated July 31, 2019. N.T. p. 52; AA Ex. 10. Horowitz testified this email was her official report of the incident and noted she did not recall being asked to sign a complaint.[8] N.T. pp. 72-73.

Additionally, Horowitz noted that in the July 31, 2019 email, she tried to excuse appellant's behavior by characterizing it as "waxing poetic about appreciating a youthful body," because she was nervous about reporting it. N.T. pp. 67-68; AA Ex. 10. Horowitz stated she no longer agrees with her initial assessment and no longer feels she needs to make excuses for appellant. N.T. pp. 67-68. Horowitz further testified it does not matter whether appellant was "waxing poetic" because the behavior was not at all appropriate. N.T. p. 67.

[8] At the end of the appointing authority's "Anti Discrimination-Harassment-Retaliation Policy and Complaint and Report Procedure" (hereinafter "Anti-Discrimination Policy"), there is a sample form, which may be used by employees or supervisors when reporting incidents of discrimination, harassment, or retaliation. Ap. Ex. 2. However, there is nothing in the Anti-Discrimination Policy that requires an employee to use this form. Ap. Ex. 2.

Horowitz further explained that, when she first started working for the appointing authority as a Housing Inspector, appellant at least twice pinched her arm and commented, "Men like younger women because the skin is tight." N.T. pp. 60, 62. Horowitz stated she did not report this behavior at the time because she was young and in an entry level position, whereas appellant, at the time, was in a position of power and she knew he had a temper. N.T. p. 62. Therefore, she let her fear prevent her from reporting it. N.T. p. 62. Horowitz asserted she is now more confident and knows she should have reported it back then. N.T. p. 63. Horowitz indicated this is one of the reasons she went forward with the July 23, 2019 incident. N.T. p. 63. Horowitz stated she does not want other women in the office to have to deal with this behavior. N.T. p. 63.

With that said, in the July 31, 2019 email, Horowitz asked Golondrina if he could delay addressing the matter until after raccoon baiting season because she feared that it would make things around the office very unpleasant and she was nervous about moving forward. N.T. pp. 53-54, 238; AA Ex. 10. Horowitz explained raccoon baiting season occurs the last week of July and the first week of August. N.T. p. 54. Horowitz described this as an intense time of year for her and she did not want to deal with another intense issue until after it was completed. N.T. p. 54. Horowitz also noted she was uncomfortable and concerned about whether appellant had learned that she reported the incident and was going to confront her. N.T. pp. 54-55.

After racoon baiting season, Horowitz called Golondrina about the status of her complaint. N.T. pp. 55, 244. During that conversation, Horowitz again told Golondrina that she was uncomfortable at the workplace and concerned about

how appellant would react. N.T. p. 244. Golondrina informed her that he would be following-up with the Allegheny County Human Resources Department, which he did. N.T. pp. 55-56, 244, 271. Specifically, Golondrina contacted Ellen Buannic, who is the liaison for the Allegheny County Human Resources Department. N.T. pp. 244, 271. Golondrina provided Buannic with a copy of Horowitz's July 31, 2019 email and Buannic was also notified of the inappropriate images on appellant's work computer. N.T. pp. 239, 311-312.

Namey had previously provided Golondrina with the network pathway where the nude photograph files were located. N.T. p. 240. However, Golondrina did not have access to the Housing Division's file folders. N.T. pp. 239-240. Therefore, he contacted IT Project Manager Kara Robinson and asked her to provide him access so that he could verify what types of photographs appellant had on his work computer. N.T. pp. 239-240. In addition to fulfilling Golondrina's request, the County's IT Department also blocked the Housing Division staff's access to the files. N.T. p. 197.

Upon receiving access to the Housing Division's files, Golondrina verified that there were hundreds of photographs of naked women on appellant's work computer, as well as a PowerPoint presentation of naked women and inappropriate videos. N.T. pp. 240-243; AA Exs. 18-25. Golondrina stated the photographs were clearly labeled, which allowed him to immediately identify the nature of the photographs. N.T. pp. 262-263. For example, there were files labeled: "CaretoStare;" "hooters;" "ImplantDr;" "JingleBoobs;" "NakedContestant" "playmate;" "Perfect pair;" "Stripper;" "Viagra Commercial;" and "realboobs." AA Exs. 18-25. Golondrina noted the number of photographs exceeded the memory on a standard flash drive. N.T. p. 243.

Because there were so many photographs, Golondrina, Namey, and Buannic conducted a random sampling of the photographs. N.T. pp. 240, 263-264, 312; AA Exs. 18-25. Most of the photographs that they viewed as part of the random sampling were Playboy centerfold pictures and photographs of scantily clad or naked women. N.T. p. 313. Also, on appellant's work computer was a video, in which a comedian used a racial slur as part of a skit. N.T. pp. 240, 263-264, 313.

As part of the investigation, a meeting was scheduled with Horowitz to discuss her complaint, after which a meeting was held with appellant. N.T. p. 245. The meeting with appellant was held on October 23, 2019. N.T. p. 245. In attendance at that meeting were Namey, Buannic, Golondrina, and appellant. N.T. pp. 175, 245.

During the October 23, 2019 meeting, Buannic and Golondrina asked appellant about the July 23, 2019 incident, as well as the nude photographs on his work computer. N.T. pp. 175-176, 196, 245-246. Appellant was not shown the July 31, 2019 email, but Namey testified the contents of the email were discussed. N.T. p. 261. Additionally, Namey, Golondrina, and Buannic all testified that in response to questions about the July 23, 2019 incident, appellant admitted he told Horowitz she should take naked photographs of herself. N.T. pp. 175, 245-246, 315. Specifically, Buannic recalled that when appellant was asked to recount the conversation with Horowitz, he responded "he had complimented her tattoos and recommended that she take some naked photos to show her husband and whomever else she wanted to of how good she looked and what good shape she was in at this point in her life." N.T. p. 315. Buannic also recalled appellant admitted saying to

Horowitz that "if [she] decided to take naked photos of herself, that he would like to see them." N.T. pp. 331-332. Additionally, Namey recalled, during the meeting, appellant asserted he did not mean for the comments to be offensive. N.T. p. 176. Buannic noted appellant indicated he believed he was being complimentary to Horowitz. N.T. p. 315.

Regarding the nude photographs on appellant's computer, Golondrina testified appellant claimed he had forgotten they were there. N.T. p. 246. Namey, Golondrina, and Buannic also recalled appellant stated he did not think the pictures were of a pornographic or offensive nature. N.T. pp. 176, 246, 315. Namey and Buannic further testified appellant said he did not think that there was a work policy against "boobs." N.T. pp. 176, 316.

After the October 23, 2019 meeting, a *Loudermill* hearing was scheduled for October 28, 2019. N.T. p. 246; AA Ex. 5. By letter, dated October 25, 2019, appellant was informed of the hearing date and the charges. N.T. pp. 247-248; AA Ex. 5. Golondrina noted appellant was specifically informed he was being charged with sexual harassment and misuse of computer resources. N.T. p. 249.

In attendance at the October 28, 2019 *Loudermill* hearing were Buannic, Golondrina, Namey, Jim Kelly, who is the Deputy Director of Environmental Health, appellant, and a co-worker who appellant brought with him to the meeting. N.T. pp. 177, 249, 316. Namey indicated appellant brought the co-worker for support and as a character witness. N.T. p. 177. However, Namey could not recall specifically what the co-worker said, but noted it was nothing significant. N.T. pp. 177-178.

Namey, Golondrina, and Buannic testified that during the October 28, 2019 hearing, the comments appellant made to Horowitz, as well as the nude photographs and the video were discussed. N.T. pp. 178, 249-250, 252, 317; AA Ex. 9. Namey stated appellant's response was the same as the prior meeting. N.T. p. 178. Namey and Golondrina noted appellant again indicated he did not mean to offend anyone and he did not think the photographs were an issue. N.T. pp. 178, 250. Buannic stated the only charge that appellant denied was the video. N.T. pp. 317-318. Buannic testified appellant indicated he did not recall the video and stated it was not his. N.T. pp. 317-318. Regarding the nude photographs, Buannic recalled appellant commented, "200 photos over 45 years I've been here, that equates to 4 pictures a year, no big deal." N.T. p. 319; AA Ex. 9 (p. 2). Golondrina testified appellant also attempted to excuse his comments to Horowitz by noting he was injured training for a triathlon and was on medication. N.T. p. 250.

After the October 28, 2019 *Loudermill* hearing, Golondrina spoke with then Acting Director[9] Ronald Sugar, who was responsible for determining the level of discipline. N.T. pp. 250, 276, 302, 341. Following the conversation with Sugar, appellant was suspended pending further investigation of the matter. N.T. pp. 178-179, 251-252, 343; AA Ex. 7. The letter suspending appellant reiterated the charges which were discussed at the October 28, 2019 hearing. N.T. pp. 251-252; AA Ex. 7.

[9] The position of Health Director for a county department of health is not a civil service position. Pursuant to Section 12008 of the Local Health Administration Law:

> The board of health shall appoint a health director for the county department of health. No appointment shall be final until the State Secretary of Health certifies that the appointee meets the qualifications prescribed by the State Department of Health.

16 P. S. § 12008.

Prior to appellant's suspension pending further investigation, Horowitz continued to come to work and perform her duties. N.T. p. 69. In doing so, she had occasion to interact with appellant a couple of times a month. N.T. pp. 112-113. Horowitz acknowledged that, during that time, appellant did not make any more comments to her about her tattoos or taking pictures. N.T. p. 70. Horowitz also acknowledged she did not ask for her and appellant to be separated. N.T. pp. 69, 112. Horowitz explained it is a small office. N.T. p. 69. So, it would not have been possible to separate them. N.T. pp. 69, 112. Horowitz further noted she did not have authority to take such action and believed any actions taken in response to appellant's conduct would be up to management. N.T. pp. 127, 131.

After appellant was suspended, the appointing authority continued to investigate whether there were any other inappropriate files on appellant's work computer. N.T. p. 253. Additional discussions were also held between Human Resources and Sugar, followed by a second *Loudermill* hearing. N.T. p. 253; AA Ex. 6. Notice of the second *Loudermill* hearing date and charges were provided to appellant on November 4, 2019. N.T. p. 254; AA Ex. 6.

On November 7, 2019, the second *Loudermill* hearing was held. N.T. p. 179. It is undisputed that at this hearing, appellant was given an opportunity to present information and offer mitigating evidence regarding Horowitz's sexual harassment complaint and the inappropriate pictures and videos found on his work computer. N.T. pp. 179, 347, 451-452. There is also no dispute that appellant was represented by counsel at this hearing, and that he did not make any statements, other than through counsel. N.T. pp. 179-180, 254, 256, 452-453.

With that said, at the hearing on the present matter, appellant claimed he was not aware of what he had been accused. N.T. p. 416. Appellant asserted, contrary to the testimony provided by the appointing authority's witnesses, there was no mention of "naked pictures" until the second *Loudermill* hearing. N.T. pp. 415-416, 446, 451. Appellant stated had he known the specifics of the allegation, he would have denied it. N.T. p. 418. Appellant further testified he did not provide any responses at the second *Loudermill* hearing because his response would have been to put his hands around the throat of the appointing authority's attorney. N.T. pp. 452, 454-455.

Additionally, appellant asserted he believes when people hear the phrase "artistic pictures of yourself" and they know the person has tattoos, they automatically assume the person would be naked in the picture. N.T. p. 447. Appellant denies that was his intent. N.T. p. 447. However, appellant acknowledged he had Playboy centerfold pictures on his work computer. N.T. p. 419. Appellant explained in the year 2000, people began using email to send "jokes, cartoons, poems, limericks and naked photographs." N.T. p. 420. Appellant stated he has "friends in low places" who sent him the naked photographs and the video. N.T. p. 420. Appellant explained to view these, he needed to download the images, which resulted in the images remaining on his computer. N.T. p. 420. Appellant denies forwarding the pictures or video and claimed they had been deleted. N.T. pp. 420-421. Appellant stated if he had he been informed they were on his work computer, he would have deleted them. N.T. p. 421. Appellant described the nude photographs, which were on his work computer, as: "Just happy, pretty girls, pleasantly posed, confidently posed, and happy to be so pretty that someone is going to take a picture of them and put it in a magazine." N.T. p. 448.

Appellant further asserted he did not provide any explanations at the second *Loudermill* hearing because none of his prior explanations made a difference. N.T. pp. 452. Appellant indicated this is why he agreed to let his attorney speak for him at the hearing. N.T. pp. 452-453. Golondrina noted that at the second *Loudermill* hearing, appellant's counsel claimed appellant was being harassed by Horowitz, which Golondrina found surprising. N.T. pp. 254-255. Subsequently, Buannic investigated appellant's counterclaim and found no evidence to support the allegations.[10] N.T. pp. 61, 326; AA Ex. 27.

Following the second *Loudermill* hearing, a termination letter was sent to appellant. N.T. p. 180. Sugar was responsible for making the decision to terminate appellant. N.T. pp. 347, 350. Specifically, appellant was terminated for violating both the appointing authority and County's policies. N.T. p. 349.

Determination of the Level of Discipline

Golondrina and Sugar explained that depending on the severity of the offense, progressive discipline does not need to be strictly followed, particularly if the severity of the offense merits a higher level of discipline. N.T. pp. 290, 296,

[10] During the investigation of the counterclaim, Buannic interviewed both appellant and Horowitz. N.T. p. 325. When she interviewed appellant, she asked him what Horowitz did to create a hostile work environment. AA Ex. 28. Appellant responded that "it was all a big misunderstanding and he regrets what happened." N.T. pp. 324-325; AA Ex. 28 (p. 1). Appellant also said that "he and [Horowitz] had a good working relationship over the years, and he felt like he was complimenting her." N.T. pp. 324-325; AA Ex. 28 (p. 1). Additionally, Buannic learned from Horowitz that appellant made inappropriate comments over the years, which everyone excused as "Bill being Bill." N.T. pp. 58, 325-326; AA Ex. 28 (p. 1). Horowitz also told Buannic about the incidents where appellant twice pinched her arm and commented "men like younger women because the skin is tight." N.T. pp. 60, 62, 326.

301, 376; Ap. Ex. 5 (p. 13). As such, termination may be appropriate based on the gravity of the offense. N.T. p. 373. Golondrina also noted termination may be appropriate where other forms of discipline have not achieved the desired result. N.T. p. 301; Ap. Ex. 5 (p. 13).

Golondrina testified another Health Department employee received a one-day suspension for having only one photograph of a naked woman on his computer. N.T. pp. 277-278. Golondrina stated this disciplinary action was used as a gauge when determining the level of discipline for appellant, who sexually harassed another employee and had hundreds of nude photographs and other inappropriate files on his work computer. N.T. pp. 278-279, 282. Golondrina denied giving preferential treatment to the employee, who had only one nude photograph on his computer, or other employees based on their membership in a bargaining unit. N.T. p. 277.

Golondrina further noted appellant's years of service was not considered a mitigating factor based on the severity of the offense. N.T. p. 299. Also, this was not the first nor only time appellant had been counseled or reprimanded based on inappropriate behavior. On October 30, 2018, Namey orally reprimanded appellant regarding inappropriate comments he made to an elderly woman. N.T. p. 151; AA Ex. 13. Namey explained the woman called for advice about a bug problem and spoke to appellant several times. N.T. p. 151. The woman subsequently contacted Namey and filed a complaint regarding inappropriate comments appellant made to her. N.T. p. 151; AA Ex. 13. Specifically, appellant told her that women her age sometimes imagine bug problems. N.T. pp. 152-153.

Appellant also told her that women of her age have hormone changes, and she should join a gym, get healthy, and think about signing up for medical marijuana. N.T. pp. 151-153; AA Ex. 13. Additionally, appellant told her to stop emailing him and that she should get on with her life. N.T. p. 153; AA Ex. 13.

Namey testified that when he counseled appellant about these inappropriate comments, appellant did not deny making the comments. N.T. p. 154. Rather, appellant told Namey he did not think he was being offensive, and asserted the lady was crazy and had "some kind of disease." N.T. p. 154. During the hearing on the present matter, appellant provided a similar justification for his behavior. Specifically, appellant suggested the woman had "delusory parasitosis," which he described as a stress or drug-related affliction, causing a person to feel as if bugs are crawling on or emerging from their skin, ears, eyes, food, or other places. N.T. p. 427. Appellant further asserted he was trying to give the woman advice on how to "make her skin function as an organ of excretion, not something to pick at." N.T. p. 431. Appellant did not deny telling her that a lot of women her age complain about imaginary bugs or that women her age have hormone changes. N.T. p. 445. Appellant only denied telling the woman to sign up for medical marijuana. N.T. p. 445.

Regardless of whether or not the woman had "delusory parasitosis" or some other affliction, Namey stated he instructed appellant to treat all people with respect and dignity. N.T. p. 154. Namey also informed appellant, during the October 20, 2018 counseling session, that he was aware of other incidents where employees were offended by comments appellant made. N.T. pp. 154-155. Namey

recalled appellant merely responded that he did not believe the employees were offended. N.T. p. 155. The October 30, 2018 oral counseling regarding appellant's unprofessional behavior was documented in a memorandum dated November 21, 2018. N.T. p. 151; AA Ex. 13.

Appellant was also previously warned about having nude photographs at the office. Namey explained, prior to his supervision of appellant, a subscription to Playboy magazine was being delivered to the office. N.T. p. 174. Appellant was ordered to stop the subscription. N.T. p. 174. However, renewal notices continued to be sent to office for approximately two years. N.T. p. 174. In addressing these notices, appellant sent a letter, dated February 7, 2007, to Playboy Publications on the appointing authority's letterhead. N.T. pp. 172-173; AA Ex. 11. In this letter, appellant acknowledged the appointing authority informed him such photographs were inappropriate, and he acknowledged his female co-workers were offended by the photographs on the renewal notices. N.T. pp. 172-173; AA Ex. 11.

Additionally, appellant was reprimanded on October 18, 2016, April 19, 2019, and October 15, 2019 for failing to follow his supervisor's instructions. AA Exs. 12, 14, 15. On October 18, 2016, appellant received a verbal reprimand for failing to attend mandatory training pertaining harassment, discrimination, and retaliation. N.T. p. 146; AA Ex. 15. Namey testified he twice directed appellant to attend the mandatory training, which was required for all employees. N.T. p. 146. The second time Namey directed appellant to attend the training, he warned appellant that if he did not attend, disciplinary action would likely be taken. N.T. p. 146. Appellant failed to attend thereby resulting in the October 18, 2016 verbal reprimand, as well as a written performance improvement plan. N.T. p. 146; AA Ex. 15. Appellant did subsequently take the training. N.T. p. 221.

At the hearing on the present matter, appellant acknowledged he received counseling for not attending the training. N.T. p. 424. However, he disagrees with the action taken and does not believe he should have been disciplined. N.T. pp. 425-426. With that said, it was noted that the memorandum documenting the verbal reprimand informed appellant that improvement must occur immediately and must be maintained. N.T. pp. 146-147; AA Ex. 15. Additionally, appellant was notified violations of the improvement plan or other County Work Rules may result in disciplinary action up to and including termination. N.T. pp. 146-147; AA Ex. 15. Appellant was also specifically informed it is a violation of the County Work Rules to fail to follow instructions from your supervisor. N.T. p. 147; AA Ex. 15.

On April 19, 2019, appellant was again verbally reprimanded for failing to follow his supervisor's instructions. N.T. p. 156; AA Ex. 12. Appellant was working on a project that required the use of heat. N.T. p. 156. Specifically, appellant had been asked by the Center for Disease Control (hereinafter "CDC") to raise 2000 mosquitos for a meeting in April that the CDC was sponsoring through the National Association of City and County Health Departments. N.T. pp. 435, 439. Appellant was informed several times by Namey that the heating elements for this project could only be on when people were in the office, no earlier than 7:30 a.m. and no later than 4:30 p.m. N.T. p. 156; AA Ex. 12 (p. 1). Appellant was also informed by Horowitz, who was in charge when Namey was not present, that he needed to turn off the heaters overnight. N.T. p. 157. Appellant refused to carry out Horowitz' instruction, until he later spoke with Namey, but the following day, Namey found the heaters on after close business. N.T. pp. 157-158; AA Ex. 12.

Therefore, appellant was verbally reprimanded for failing to carry out the instructions of a supervisor, which is a violation of the County Work Rules. N.T. p. 159; AA Exs. 3 (p. 21), 12 (p.1). The verbal reprimand was documented in a memorandum to appellant, dated April 19, 2019. AA Ex. 12.

At the hearing on the present matter, appellant did not contradict the series of events that led to the verbal reprimand. N.T. pp. 435-438. However, he characterized the issue with the heater as a "turf battle" because the staff wanted him to turn it off. N.T. p. 436. Appellant asserted because he was unable to use the heater as he saw fit, he was unable to fulfil the CDC's request, which resulted in the need to obtain live mosquitos by mail. N.T. pp. 438-439. With that said, appellant acknowledged the CDC had what it needed for the meeting. N.T. p. 439.

Six months later, on October 15, 2019, appellant received a written reprimand for failing to comply with the appointing authority's Media Policy. N.T. pp. 160, 222, 225; AA Ex. 14. Specifically, appellant sent information directly to a reporter without first providing that information to the Health Department's Public Information Office and other staff persons, as required under the Media Policy. N.T. p. 223; AA Ex. 14. When Namey spoke with appellant about the issue, appellant indicated he "didn't think it was any big deal" to respond directly to the media before the answers were vetted. N.T. p. 226. At the hearing on the present matter, appellant acknowledged he failed to follow protocol, but asserted his action was permissible because it resulted in a quick turnaround and the responses did not deal with any confidential or privileged information. N.T. pp. 433-434.

Appellant was also disciplined in 2012 and 2018; however, these disciplinary actions were not documented in writing. N.T. pp. 163-165. Namey was also unsure if these disciplines were in the form of counseling or a reprimand. N.T. pp. 163-165. Namey recalled in or around 2012, appellant backed into a resident's fence, while he was working. N.T. p. 164. Appellant did not report the incident, and when confronted by Namey about the incident, appellant said, "The fence was old. It wasn't a big deal. So, I left it." N.T. p. 164. Additionally, in 2018, appellant was disciplined for mishandling the processing of vector control complaints. N.T. p. 165. Appellant was responsible for operating the appointing authority authority's Vector Control Program. N.T. pp. 181-182.

Right to Know Law Requests

The appointing authority received a number of Right to Know Law requests from appellant's attorney, which included requests for all photographs on each employee's work computer. N.T. pp. 265-266. Neither Golondrina nor Buannic reviewed any of the documents provided as part of these requests. N.T. pp. 267, 329. The documents were provided to appellant's counsel by Elizabeth Rubenstein.[11] N.T. pp. 266. Golondrina also noted he did not participate in any disciplinary actions based on the Right to Know Law requests. N.T. p. 267. Additionally, no evidence was presented which would suggest the appointing authority was aware of the information, which was provided in response to the Right to Know requests, prior to appellant's termination.

[11] None of the witnesses testified as to what position Rubenstein holds.

With that said, the parties stipulated that as a result of a Right to Know Law request, it was discovered that an employee by the name of Nicole Barnett had approximately 600 personal photographs on her work computer. N.T. p. 471. The parties also stipulated that there were six non-work-related photographs on Horowitz's work computer—four wedding-related photographs, a photograph from an office social event, and a photograph from a Zoom video. N.T. pp. 93-99. Horowitz testified she did not know her wedding photographs were on her work computer and speculated they may have accidentally downloaded when she attempted to save them somewhere else, such as the cloud. N.T. pp. 91-92, 101. It is unclear whether other employees were able to access these photographs, nor is there any evidence management knew of these photographs. N.T. pp. 200-201.

Additionally, Sugar provided testimony regarding documents and pictures which were found on his work computer as a result of a Right to Know Law request. Sugar admitted that, during the time he worked for the appointing authority, he used his work computer for personal reasons on several occasions. N.T. pp. 352-353. Sugar explained, in addition to his employment with the appointing authority, he was also a practicing attorney and taught a finance class at the University of Phoenix. N.T. p. 353. Sugar stated, on occasion, when he was working after hours or on a lunch break, he would grade a paper or complete other work for his law practice using OneDrive, which is a shared network. N.T. pp. 353, 362. Sugar explained he used OneDrive because it allowed him to access files from his laptop when he was not in the office. N.T. p. 368. Sugar explained, he also used OneDrive to grade papers and when using that program, it somehow saved other documents to his work computer. N.T. p. 368.

Sugar also admitted to having photographs of his daughter and a picture of his daughter and her friends on his work computer, as well as personal emails between himself and a co-worker regarding the sale of his boat. N.T. pp. 369-370. Sugar explained he and the co-worker often talked about boats and when he was selling his boat, the co-worker happened to be looking to purchase a boat. N.T. p. 370. Sugar denied using his work email for solicitation of selling his boat. N.T. p. 370. Sugar also denied ever using his work computer to download nude photographs. N.T. p. 357.

Motion to Dismiss

At the conclusion of the appointing authority's case-in-chief, appellant moved to dismiss the matter, arguing the appointing authority failed to meet its burden. N.T. pp. 387-389. Appellant reiterates this motion is his post-hearing brief. Ap. Bf., pp. 12-16. Since the appeal was initiated by appellant, dismissing the appeal would have the adverse effect that appellant is seeking. Therefore, the Commission believes appellant intended to request that the appeal be sustained.

At the hearing, ruling on the Motion was deferred pending review by the full Commission. N.T. p. 389. Following our review, we find the appointing authority met its burden. Accordingly, the Motion is hereby denied for the reasons set forth in the following section of this adjudication.

Credibility/Evidentiary Determinations

To show just cause for the removal of a regular status civil service employee, the employer must show that the actions resulting in the removal are related to an employee's job performance and touch in some rational and logical manner upon the employee's competence and ability. *Mihok v. Department of Public Welfare, Woodville State Hospital*, 147 Pa. Commw. 344, 348, 607 A.2d 846, 848 (1992). Furthermore, just cause is established where the employee is unfit, making dismissal justifiable and for the good of the service. *Szablowski v. State Civil Service Commission (Pennsylvania Liquor Control Board)*, 111 A.3d 256, 261 (Pa. Commw. Ct. 2015). Having carefully reviewed the evidence, we find the appointing authority has established the charges against appellant and established just cause for his removal. In support of our conclusion, we find credible[12] the testimony provided by the appointing authority's witnesses.

Specifically, we find the appointing authority presented credible evidence establishing appellant made comments of a sexual nature to Horowitz while they were working together in the appointing authority's warehouse. N.T. pp. 50, 111, 120. We also find the appointing authority presented credible evidence establishing appellant downloaded numerous nude photographs, as well as a video containing a racial slur, to his work computer. N.T. pp. 169-171, 199, 240-243, 262-263, 313; AA Exs. 18-25. Such behavior violates Allegheny County's Anti-Discrimination Policy, Computers Use Policy, and Work Rules.

[12] It is within the purview of the Commission to determine the credibility of the witnesses. *State Correctional Institution at Graterford, Department of Corrections v. Jordan,* 505 A.2d 339, 341 (Pa. Commw. Ct. 1986).

Section A(2) of the Anti-Discrimination Policy prohibits sexual harassment in the workplace. AA Ex. 2 (p. 2). This Policy also provides:

> Any unwelcome and/or offensive conduct, whether deemed illegal or not, by anyone towards another including someone of the same gender is prohibited by this policy.

AA Ex. 2 (p. 2).

Additionally, Section B of the Policy warns employees that violations of the Anti-Discrimination Policy or any equal opportunity law will result in "disciplinary action, up to and including discharge, without warning." AA Ex. 2 (p. 3). Section G of the Policy further explains:

> *If it is determined that a violation of this policy or of the law or other inappropriate conduct has occurred, Allegheny County will take actions appropriate under the circumstances* to address and correct the misconduct and to otherwise remedy the situation. *Remedial action* is intended to prevent further violations and to undo the effects of the violation of this policy and *will vary depending on the situation.* Disciplinary action for any violation of this policy may range from counseling and/or training to discharge, and may include any other form of corrective action Allegheny County deems to be appropriate under the circumstances.

AA Ex. 2 (pp. 4-5) (emphasis added). All employees are required to comply with the Anti-Discrimination Policy. AA Ex. 2 (p. 4).

Appellant's comments to Horowitz on July 23, 2019 are clearly unwelcome verbal conduct of a sexual nature. N.T. p. 110. We find credible Horowitz's testimony that, when she asked appellant to clarify what he meant when he suggested she "document" herself, he responded:

> Have you ever taken naked pictures? You know everything goes downhill after a certain age, and you're going to want to document that."

N.T. pp. 50, 111, 120. We further find these comments were unwelcome. Horowitz repeatedly told management the comments made her uncomfortable and she immediately reported the conduct. N.T. pp. 50-51, 69, 244; AA Ex. 10. Thus, appellant's behavior on July 23, 2019 is a clear violation of the prohibitions set forth in the Anti-Discrimination Policy.

Additionally, by downloading numerous nude photographs over the years, as well as non-work-related and inappropriate video content, appellant violated the Computer Usage Policy. The Computer Usage Policy provides employees shall not use county computer systems for personal or non-county business related purposes. Ap. Ex. 3 (p. 4). Employees are also prohibited from using county computer systems for purposes of harassment or discrimination. N.T. p. 88; Ap. Ex. 3 (p. 4). The Policy further provides failure to observe the guidelines contained therein may result in disciplinary action "depending upon the type and severity of the violation." Ap. Ex. 3 (p. 6). Here, appellant downloaded numerous nude photographs and a video with inappropriate content to a shared server which was accessible by other employees. N.T. pp. 169-171, 199, 240-243, 262-263, 313; AA Ex. 18-25. This is clearly a misuse of the county computer system and, as such, a violation of the Computer Usage Policy.

Appellant's behavior is also a violation of the Work Rules. The Work Rules specifically prohibit unprofessional behavior in dealing with other employees and the public. N.T. p. 153; AA Ex. 3 (p. 21). The Work Rules also reiterate that disciplinary action up to and including termination is warranted where an employee violates the Anti-Discrimination Policy or any Allegheny County or Department policy. AA Ex. 3 (p. 21). These Rules are set forth in the Allegheny County Employee Handbook and apply to all employees of the appointing authority, including appellant. N.T. pp. 147-148, 150; AA Ex. 3 (pp. 21-22).

Appellant clearly failed to conduct himself professionally as required under the Work Rules when he suggested Horowitz take nude photographs of herself. Likewise, appellant acted unprofessionally when he downloaded nude photographs and a video with inappropriate content to a shared server which was accessible by other employees. N.T. pp. 169-171, 199, 240-243, 262-263, 313; AA Exs. 18-25. Moreover, at the October 23, 2019 meeting and both *Loudermill* hearings, appellant did not deny making the comments to Horowitz, nor did he deny the subject of the photographs. N.T. pp. 175-176, 178, 245-246, 315-316, 319, 331-332. Such behavior is undeniably a violation of the prohibition regarding unprofessional behavior under the Work Rules. Furthermore, as established previously, this behavior is a violation of the Anti-Discrimination and Computer Usage Policies, which by effect is also a violation of the Work Rules.

Nonetheless, appellant asserts the appointing authority has failed to establish just cause for its actions. In support of this assertion, appellant raised numerous claims in his post-hearing brief. The Commission is not persuaded by appellant's arguments. Each of appellant's claims are discussed below.

Appellant asserts the appointing authority failed to follow its progressive discipline process, and a lesser discipline should have been imposed because the conduct was not serious in nature. In support of his belief that the conduct was not serious in nature, appellant asserts: 1) Horowitz did not reduce the July 23, 2019 incident to writing until seven days after it occurred; 2) he was not asked about the July 23, 2019 incident until three months after it occurred; 3) he was permitted to work with Horowitz until he was suspended pending investigation, which was months later; and 4) the nude photographs were on his computer for over a decade before he was asked about them. Ap. Bf., pp. 23-26, 29-30. Appellant also asserts he should have been given an opportunity to delete the photographs and video. Ap. Bf., pp. 30-31.

Contrary to appellant's claim, whether the July 23, 2019, incident was promptly reported or investigated does not affect the seriousness of the behavior. The nature of the conduct dictates whether it rises to a level of seriousness which would merit removal. The same is also true of the hundreds of nude photographs and the video containing a racial slur, which were on appellant's work computer. Furthermore, there is no credible evidence that management, prior to beginning its investigation of the July 23, 2019 incident, was aware appellant had downloaded nude photographs or inappropriate videos to his work computer. Indeed, Namey credibly testified that, while some of the photographs had been on appellant's work computer for many years, he was not aware of anyone having knowledge that they were there. N.T. pp. 198-199.

Furthermore, in support of the level of discipline, the appointing authority compared appellant's conduct to a recent one-day suspension issued to an employee who had one nude photograph on his work computer. N.T. pp. 276-278. Unlike the employee who received the one-day suspension, appellant had hundreds of nude photographs on his work computer, as well as a video containing a racial slur. N.T. pp. 278-279. Also, unlike the other employee, appellant had made inappropriate sexual comments to a co-worker. Additionally, appellant had previously been warned such conduct was inappropriate, and he had completed sexual harassment training. N.T. pp. 154, 221; AA Ex. 13.

Therefore, the Commission finds the nature of appellant's conduct, coupled with his disregard of prior warnings, elevates his behavior to a level of seriousness for which progressive discipline is not required. Imposing a lesser form of discipline would only inhibit management's ability to maintain order because appellant has demonstrated a consistent disregard for management's directives. This is evidenced by the prior disciplinary actions against him and his continued assertions that management was wrong in addressing his inappropriate comments, insubordinate behavior, and disregard for policies and procedures. N.T. pp. 164, 181-182, 425-462, 433-434, 436; AA Exs. 12, 13, 14, 15.

Appellant has consistently refused to acknowledge or take responsibility for his actions. Indeed, the comments appellant made at the October 23, 2019 meeting and October 28, 2019 *Loudermill* hearing are illustrative of this mindset. Specifically, appellant commented he did not think that there was a work policy against "boobs" and stated, "200 photos over 45 years I've been here,

that equates to 4 pictures a year, no big deal." N.T. pp. 176, 316, 319; AA Ex. 9 (p. 2). Thus, we find the level of discipline issued by the appointing authority was appropriate based on the seriousness of the behavior and appellant's repeated resistance to direction from management.

In addition to challenging the level of discipline, appellant argues the discipline was disproportionately applied because others violated the same rules and were not terminated. Ap. Bf., pp. 21-22, 28. Appellant asserts another employee was given a one-day suspension for having one picture of an unclad woman on his work computer. Ap. Bf., p. 22. Also, appellant notes Sugar occasionally used his work computer for his private law practice, his teaching job, to sell personal property, to store personal photographs, and to send personal emails. Ap. Bf., pp. 10, 22, 28. Additionally, appellant asserted Horowitz had hundreds of personal pictures from her wedding on her work computer.[13] Ap. Bf., pp. 10, 22.

None of the examples provided by appellant are suitable comparators. First, the conduct in each of the examples is less egregious than appellant's conduct. Also, Sugar was not a civil service employee. Therefore, he is not similarly situated. Furthermore, there is no indication that the appointing authority was aware of the content on Sugar's or Horowitz's work computer at the time appellant was removed. This information appears to have been discovered as a result of subsequent Right to Know Law requests from appellant. Indeed, Horowitz testified she did not know her

[13] The parties only stipulated that there were six non-work-related photographs on Horowitz's work computer—four wedding-related photographs, a photograph from an office social event, and a photograph from a Zoom video. N.T. pp. 93-99. It is also unclear whether other employees were able to access these photographs. N.T. pp. 200-201.

wedding photographs were on her work computer and speculated they may have accidentally downloaded when she attempted to save them somewhere else, such as the cloud. N.T. pp. 91-92, 101. Similarly, Sugar speculated some of the non-work-related documents found on his work computer may have inadvertently downloaded because he used OneDrive when he worked from home and during his lunch break. N.T. p. 368. Thus, there is no credible evidence to support appellant's claim that the appointing authority did not consistently apply the discipline.

Next, appellant claims he was denied procedural due process because: 1) his *Loudermill* rights were violated in that he did not receive adequate notice of the charges against him; 2) the appointing authority did not follow the procedures set forth in Discipline Policy No. 100; and 3) Horowitz did not report the harassment in accordance with the appointing authority's Anti-Discrimination Policy. Ap. Bf., pp. 24, 29, 31-34. Regarding his *Loudermill* rights, appellant asserts he was never told the specifics of the comments that he was alleged to have made, nor was he provided with a copy of the written harassment complaint at or prior to the *Loudermill* hearings. Ap. Bf., pp. 31-32.

The purpose of a pre-disciplinary conference, which is commonly referred to as a *Loudermill* hearing, is to afford the employee the opportunity to respond to the charges and to act as a check against an erroneous determination by the employer to terminate an employee. *Veit v. North Wales Borough*, 800 A.2d 391, 398 (Pa. Commw. Ct. 2002). In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Supreme Court indicated that the pre-disciplinary

conference need not be elaborate; something less than a full evidentiary hearing is sufficient. To that end, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546.

Prior to each of his Loudermill hearings, appellant received written notice of the charges. AA Exs. 5, 6. Moreover, prior to receiving these notifications, the charges were discussed with appellant at the October 23, 2019 meeting. Therefore, appellant was clearly aware of the issues to be discussed at each *Loudermill* hearing, well in advance. Also, at each *Loudermill* hearing, appellant was afforded an opportunity to provide a justification for his behavior.

There is no requirement that appellant receive the written harassment complaint. The only requirement is that appellant receive an explanation of the employer's evidence, which he did. Indeed, we find credible the testimony of the appointing authority's witnesses that at the October 23, 2019 meeting and the first *Loudermill* hearing, appellant admitted he suggested Horowitz take naked photographs of herself and that he downloaded the nude photographs on his work computer. N.T. pp. 175, 245-246, 315, 317-319, 331-332.

Furthermore, at no time during either *Loudermill* hearing or the October 23, 2019 meeting did appellant indicate he did not understand the allegations. N.T. p. 303. If there was any confusion about the charges, this could have been easily clarified and appellant could have responded. Appellant chose not

to make any statements at the second *Loudermill* hearing, other than through counsel. This voluntary choice does not negate the due process which was afforded to appellant at the second *Loudermill* hearing. Consequently, we find appellant received adequate due process.

Additionally, we find the appointing authority did not violate the procedures set forth in Discipline Policy No. 100. Appellant argues this Policy was violated because: 1) his supervisor was required to make the decision regarding discipline, not the Director; and 2) his supervisor is required to address the situation within three days of its occurrence. Ap. Bf., pp. 21, 28, 30. Appellant's claims are a mischaracterization of the Policy.

Under the Policy, the Director is responsible for approving discipline where the violation is severe and progressive discipline is not followed. AA Ex. 4 (p. 2). This is what occurred in the present matter. Also, the Policy does not require the supervisor to address the situation within three days. The Policy provides the violation should be addressed within three days *or* as soon as practical. AA Ex. 4 (p. 3). The violations in the present matter were addressed as soon as practical. Thus, the appointing authority did not violate its procedures when disciplining appellant. Nonetheless, even if a violation had occurred, there is nothing in the Policy or Civil Service Act or Commission's Rules which would require the discipline be removed.

Appellant next claims he did not violate the appointing authority's Anti-Discrimination Policy. Appellant argues: 1) the Anti-Discrimination Policy's standard is not objective; 2) he only had one brief and "innocent" conversation with

Horowitz; 3) in her email detailing what occurred, Horowitz speculated appellant was just "waxing poetic;" 4) Horowitz changed her testimony at the hearing because, at the hearing, she indicated she feels the conduct is more serious than what she said in her email; 5) there is no evidence Horowitz's job performance or the job performance of other employees was affected by the harassment or the photographs; and 6) the appointing authority did not follow the investigative procedure set forth in the Anti-Discrimination Policy. Ap. Bf., pp. 16-20.

First, there is nothing subjective about the prohibitions set forth in the Anti-Discrimination Policy. Section A(1) of the Policy definitively states:

> All personnel must behave in a non-discriminatory and business-like manner in all dealings with co-workers and all non-employees of Allegheny County contacted in the course of employment.

AA Ex. 2 (p. 1). Additionally, Section A(2) specifically prohibits sexual harassment, as well as other types of harassment. AA Ex. 2 (pp. 2-3). To that end, "[a]ny unwelcome and/or offensive conduct, whether deemed illegal or not, by anyone towards another, including someone of the same gender, is prohibited." AA Ex. 2 (p. 2).

Suggesting to a female co-worker that she take nude photographs and share them is a clear violation of the above prohibitions. There is no requirement that the behavior affect an individual's work performance. Whether an individual's work performance is affected is merely one manner in which to establish a violation of the Policy. AA Ex. 2 (p. 2). Furthermore, it is irrelevant whether Horowitz initially thought appellant was "waxing poetic" or upon further reflection felt the conduct was more serious. The nature of the conduct is what controls.

Additionally, there is nothing in the appointing authority's Anti-Discrimination Policy which would prevent the issuance of discipline where a complainant of sexual harassment failed to follow the reporting procedures or where the investigation was not conducted with strict adherence to the Policy. As previously noted above, pursuant to Section B, employees who violate this Policy are subject to disciplinary action, up to and including discharge, without other warning. AA Ex. 2 (p. 3). Likewise, Section G notes remedial action will vary depending on the situation and may range from counseling and/or training to discharge. AA Ex. 2 (pp. 4-5). Based on the severity and gravity of appellant's behavior, along with his repeated disregard of his supervisor's instructions, removal was an appropriate form of discipline based on appellant's conduct.

Lastly, appellant asserts he did not violate the Computer Usage Policy. Ap. Bf., pp. 21-23. Appellant argues he should not be disciplined for having explicit content on his work computer because sexually explicit content is routinely shown on national television. Ap. Bf., p. 22. Appellant further asserts he should not be disciplined because Sugar and Horowitz were not disciplined for having personal content on their work computers. Ap. Bf. p. 22. Additionally, appellant suggests his actions in downloading the photographs and video were not intentional because, at the time he viewed them, he needed to download the content to view it. N.T. p. 420; Ap. Bf. p. 21.

Contrary to appellant's belief, downloading images for the purpose of viewing them is the very definition of intentional because appellant knew he was downloading the photographs and video. Furthermore, regarding the personal content on Sugar and Horowitz's work computers, there is no credible evidence Sugar and Horowitz intentionally downloaded the content, nor is there any evidence

the appointing authority knew of the content prior to appellant's termination. Moreover, appellant's attempts to compare his behavior, which occurred at work, to that of entertainment viewed outside of work misses the key point—that he was engaging in behavior at work, which he was specifically told was inappropriate. Appellant has refused to correct his behavior and repeatedly demonstrated a disregard for management's instruction by continuing to download such content to his work computer.

Based on the above, we find the appointing authority had just cause to remove appellant. The appointing authority presented credible evidence appellant engaged in the unprofessional and harassing behavior in violation of its Anti-Discrimination Policy, Computers Use Policy, and Work Rules. We find appellant's unprofessional and harassing behavior reflects negatively upon his competence and ability to perform his job duties, thereby providing just cause for removal. *Mihok, supra.*

Furthermore, we find the level of discipline is appropriate based on appellant's repeated refusal to follow management's directives. As explained in detail above, every time management counseled or reprimanded appellant, appellant argued the offending conduct was "no big deal." Appellant exhibited the same dismissive attitude when confronted about the comments to Horowitz and the nude photographs. Appellant had previously been warned such conduct was inappropriate. Yet, he asserted he did not think there was a work policy against "boobs" and stated it was "no big deal." N.T. pp. 176, 316, 319; AA Ex. 9 (p. 2). Appellant has consistently demonstrated he has no intention of conducting himself professionally, despite repeated warnings from management. Therefore, removal was appropriate. Accordingly, we enter the following:

CONCLUSION OF LAW

The appointing authority has presented evidence establishing just cause for removal under Section 2607 of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of William S. Todaro challenging his removal from regular Public Health Entomologist employment with the Allegheny County Department of Health and sustains the action of the Allegheny County Department of Health in the removal of William S. Todaro from regular Public Health Entomologist employment, effective October 30, 2019.

State Civil Service Commission

Maria P. Donatucci
Chairwoman

Gregory M. Lane
Commissioner

Bryan R. Lentz
Commissioner

Mailed: July 29, 2021