COMMONWEALTH OF PENNSYLVANIA

William Skelly	:	State Civil Service Commission
	:	
v.	:	
	:	
Torrance State Hospital,	:	
Department of Human Services	:	Appeal No. 30846

Jerome J. Kaharick	Amy Jo Carnicella
Attorney for Appellant	Attorney for Appointing Authority

ADJUDICATION

This is an appeal by William Skelly challenging his Level-Two Alternative Discipline in Lieu of Suspension (hereinafter "ADLS") from regular Psychiatric Aide employment with Torrance State Hospital, Department of Human Services (hereinafter "appointing authority"). A hearing was held on March 22, 2022, via video, before Chairwoman Maria P. Donatucci.

The Commissioners have reviewed the Notes of Testimony and exhibits introduced at the hearing, as well as the appointing authority's Brief.[1] The issue before the Commission is whether the appointing authority has established good cause for appellant's suspension.[2]

[1] While appellant was afforded the opportunity to submit a Brief, he chose not to do so. N.T. p. 106.

[2] Under the Level-Two ADLS, there was no effect on appellant's pay, seniority, or other benefits. The Level-Two ADLS carries the same weight as if appellant served a five-day suspension. Comm. Ex. A. Consequently, the present appeal will be considered by the Commission as an appeal of a five-day suspension.

FINDINGS OF FACT

1. By letter dated October 20, 2021, appellant was issued a Level-Two Alternative Discipline in Lieu of Suspension (hereinafter "ADLS") with final warning equivalent to a five-day suspension, from his position as a Psychiatric Aide, regular status, with the Torrance State Hospital, Department of Human Services (hereinafter "appointing authority"). Comm Ex. A.

2. In its October 20, 2021 letter, the appointing authority charged appellant as follows:

> The reason for this action is **Insubordination (as defined by Department Policy 7174).** Specifically, on September 8, 2021, you refused a direct order to participate in a fact finding.
>
> **Failure to Follow Policy/Procedure (as defined by Department Policy 7174).** Specifically, on August 5, 2021, you did not wear a face mask while in [the] Greizman Building on the first floor.
>
> **Failure to Follow Policy/Procedure (as defined by Department Policy 7174).** Specifically, on August 9, 2021, you did not wear a face mask or eye protection while in [the] Greizman Building on the first floor. When

> informed by the nurse manager that masks and eye protection are required in the building, you responded, "I don't have a mask, I'm leaving the building."

Comm. Ex. A (emphasis in original).

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

4. Appellant is employed as a Psychiatric Aide within the appointing authority's Nursing Department. N.T. pp. 38, 98.

5. Appellant has held the position of Psychiatric Aide for approximately seven years. N.T. p. 98.

6. Appellant works in the appointing authority's Greizman Building. N.T. p. 19.

7. In or around August 2021, the world was in a global pandemic (hereinafter "COVID-19 pandemic"). N.T. p. 82.

[3] Appellant's request for a hearing on the Level-Two ADLS under Section 3003(7)(ii) of Act 71 of 2018 was denied due to an insufficient allegation of discrimination. Comm. Ex. C.

8. By August 2021, the COVID-19 pandemic had been ongoing for approximately one and a half years. N.T. p. 82.

9. Additional policies regarding the use of personal protective equipment (hereinafter "PPE") were in effect for all appointing authority employees during the COVID-19 pandemic. N.T. pp. 39-40.

10. During the COVID-19 pandemic, all appointing authority employees were required to wear PPE in the form of face shields or face masks in the appointing authority's common areas. N.T. pp. 39-41.

11. More restrictive PPE, such as N95 masks, were required on particular wards. N.T. p. 40.

12. The appointing authority's employees, including appellant, were informed of the PPE requirements in effect during the COVID-19 pandemic via numerous emails. Notices were also posted throughout the appointing authority and on each door. N.T. pp. 51, 81.

13. Failure to wear the required PPE during the COVID-19 pandemic put patients and staff at risk of contagion. N.T. pp. 82-83.

14. On August 5, 2021 around 7:55 a.m., Facility Safety Manager Joseph Adkins observed appellant walking down a corridor on the first floor of the Greizman Building without a face covering of any kind. N.T. pp. 41, 43.

15. This corridor where appellant was walking on August 5, 2021 opens into a common-area lobby where employees are screened for COVID-19 upon coming to work. N.T. p. 42.

16. On August 9, 2021, Nurse Manager 1 Jonathan Bobby observed appellant failing to wear a face shield or face mask on the first-floor hallway of the Greizman Building. N.T. pp. 52-55, 100.

17. On September 8, 2021 at 7:00 a.m., appellant was scheduled to attend a fact-finding conference. N.T. pp. 21-23, 26, 28.

18. On September 8, 2021, appellant was working the night shift in the Greizman Building. N.T. pp. 19-20, 22-23, 26.

19. The night shift extends from 11:00 p.m. to 7:30 a.m. N.T. pp. 19, 26.

20. Registered Nurse Supervisor Shawn Hollis is appellant's direct supervisor on the night shift. N.T. pp. 17, 19.

21. On September 8, 2021, appellant and Hollis were working the night shift. N.T. pp. 20, 23, 26.

22. On September 8, 2021 at 6:30 a.m., Hollis telephoned the unit where appellant was working and spoke with appellant (hereinafter "September 8, 2021 telephone call"). N.T. pp. 23, 28-29.

23. During the September 8, 2021 telephone call, Hollis ordered appellant to attend a fact-finding conference at 7:00 a.m. in the supervisor's office. N.T. pp. 23-24, 28.

24. During the September 8, 2021 telephone call, Hollis told appellant it was a direct order to attend the fact-finding conference and asked appellant if he understood the order. Appellant responded, "Yes." N.T. p. 23.

25. After appellant responded that he understood the order, Hollis reiterated the fact-finding conference was at 7:00 a.m. in the supervisor's office and a union representative would be present. Appellant again indicated he understood. N.T. p. 23.

26. During the September 8, 2021 telephone call, Hollis also told appellant that he could face disciplinary action if he failed to appear. N.T. p. 24.

27. Appellant did not attend the September 8, 2021 fact-finding conference. N.T. pp. 24-25, 28.

28. As appellant's supervisor, Hollis has authority to direct appellant to perform certain tasks and duties, including requiring appellant to attend fact-finding conferences. N.T. p. 19.

29. All employees are required to attend fact-finding conferences. N.T. pp. 19-20.

30. Pursuant to Rule 41 of the appointing authority's Rules and Regulations, "[a]ll employees are required, as a condition of employment to cooperate fully in any investigation that may be conducted." N.T. pp. 72-73; AA Ex. 3 (p. 4).

31. On April 10, 2015, appellant signed an acknowledgment indicating he read and understood the Rules and Regulations. By his signature, appellant also agreed he would conduct himself in accordance with the Rules and Regulations and acknowledged a violation could result in disciplinary action, suspension, dismissal, or criminal prosecution. N.T. p. 74; AA Ex. 3 (p. 6).

32. By letter dated September 24, 2021, the appointing authority notified appellant that a pre-disciplinary conference (hereinafter "PDC") was scheduled for September 29, 2021 at 7:00 a.m. N.T. p. 56; AA Ex. 1.

33. To be discussed at the September 24, 2021 PDC were appellant's failure to wear a face mask on August 5 and 9, 2021, as well as his refusal to participate in the September 8, 2021 fact-finding conference. N.T. p. 56; AA Ex. 1.

34. The purpose of the September 24, 2021 PDC was to provide appellant with an opportunity to answer the charges. N.T. p. 60; AA Ex. 6 (pp. 7-8).

35. Appellant did not attend the September 24, 2021 PDC. N.T. p. 90.

36. Pursuant to Policy 7174, the charge of "Insubordination" requires the following elements of substantiation:

> Employee was given a direct and legitimate order by an appropriate supervisor, and:
>
> #1 Employee refused to obey, but did not become argumentative or compound the offense in any other manner. Consequences of employee's failure to obey were not substantive.
>
> OR
>
> #2 Employee refused the order and became argument and/or abusive; the consequences of the employee's failure to act were substantial and employee was aware, or employee's refusal was willful.

AA Ex. 4 (p. 2) (emphasis in original).

37. The level of discipline for "Insubordination" depends upon whether prior discipline has been issued and which requirement is substantiated. AA Ex. 4 (p. 2).

38. Pursuant to Policy No. 7174, for a first offense of "Insubordination" after probation, a written reprimand is appropriate where the elements under #1 are substantiated, and discharge is appropriate where the elements under #2 are substantiated, unless considerable mitigation is present. AA Ex. 4 (p. 2).

39. Policy 7174 indicates the following matters should be considered in mitigation or extenuation of "Insubordination:"

> Generally, an employee's only defense for failing to follow a direct order is that, in so doing, there would be a clear and present danger to his/her health or safety, or that the order was illegal. Consider:
>
> - Did employee understand the order and did the supervisor insist on compliance?
> - Did the employee understand the consequences of his/her noncompliance?
> - What reasons did the employee give for refusal?
> - Employees past work history.

AA Ex. 4 (p. 2).

40. For the charge of "Failure to Follow General Instructions and Procedures," Policy 7174 provides the following elements of substantiation are required:

- Employee was aware of, or could reasonably have been expected to have been aware of, the general instruction(s) or procedure(s) in question.
- Employee failed to properly comply with or follow the general instruction or procedure (either by act or omission).

AA Ex. 4 (p. 3).

41. Pursuant to Policy 7174, discharge is appropriate for a first or second offense after probation for "Failure to Follow General Instructions and Procedures" if the nature of the conduct is serious. AA Ex. 4 (p. 3).

42. Alternatively, a one to three-day suspension may be issued under Policy 7174 for a first offense of "Failure to Follow General Instructions and Procedures." If a three-day suspension is issued, a final warning shall be included. A written

reprimand could also be issued for a first offense after probation if sufficient extenuation or mitigation exists. AA Ex. 4 (p. 3).

43. Pursuant to Policy 7174, matters to be considered in mitigation or extenuation of the charge of "Failure to Follow General Instructions and Procedures" include:

- Length and nature of employee's service.
- Extent or degree of injury, harm, damage, or potential thereof to patients/individuals, coworkers, the public, or property as a result of the employee's failure to follow instructions or procedures.
- Did employee have proper understanding of the instructions or procedures? Any previous training?
- Circumstances surrounding the incident. Employee's explanation.
- Level of employee's responsibility.

N.T. p. 82; AA Ex. 4 (p. 3).

44. Appellant signed an acknowledgment indicating he received and reviewed Policy 7174 on May 12, 2015. AA Ex. 5.

45. There is no evidence appellant was previously disciplined for "Insubordination" or "Failure to Follow General Instructions and Procedures."

DISCUSSION

By letter dated October 20, 2021, the appointing authority issued a Level-Two Alternative Discipline in Lieu of Suspension (hereinafter "ADLS") equivalent to a five-day suspension to appellant. Comm. Ex. A. The charges set forth in the October 20, 2021 letter included one count of "Insubordination" and two counts of "Failure to Follow Policy/Procedure." Comm. Ex. A. The issue before the Commission is whether the appointing authority has established good cause for the discipline.

In an appeal challenging the suspension of a regular status employee, the appointing authority bears the burden of establishing good cause for the personnel action. *White v. Commonwealth, Department of Corrections*, 110 Pa. Commw. 496, 532 A.2d 950 (1986); 71 Pa.C.S.A. §§ 2603(c), 3003(7)(i). Good cause must be based upon meritorious criteria and be related to one's competency and ability to execute job duties properly. *White*, 110 Pa. Commw. at 498, 532 A.2d at 951.

In support of its charge, the appointing authority presented the testimony of Registered Nurse Supervisor Shawn Hollis,[4] Facility Safety Manager Joseph Adkins,[5] Nurse Manager 1 Jonathan Bobby,[6] and Labor Relations Coordinator Lauren Franko.[7] Appellant testified on his own behalf. The evidence provided by the parties has been reviewed by the Commission and is summarized below.

Summary of Evidence

Appellant is employed as a Psychiatric Aide within the appointing authority's Nursing Department. N.T. pp. 38, 98. Appellant has held this position for approximately seven years. N.T. p. 98. Appellant presently works in the appointing authority's Greizman Building. N.T. p. 19. On October 20, 2021, appellant received a Level-Two ADLS equivalent to a five-day suspension for failing to wear required personal protective equipment (hereinafter "PPE") on two occasions while working in the Greizman Building, as well as insubordination for failing to attend a fact-finding conference. Comm. Ex. A.

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[4] Hollis is employed by the appointing authority as a Registered Nurse Supervisor and serves on the night shift. N.T. p. 17. Hollis has held this position for almost four years and has worked for the Commonwealth for twenty-five years. N.T. pp. 17-18. Prior to serving as a Registered Nurse Supervisor, Hollis worked as a Registered Nurse and Licensed Practical Nurse. N.T. p. 18. Hollis is appellant's direct supervisor on the night shift. N.T. p. 19.

[5] Adkins is employed by the appointing authority as the Facility Safety Manager and has held this position for the past six years. N.T. p. 36. As the Facility Safety Manager, Adkins is responsible for the appointing authority's safety program for both patients and employees. N.T. p. 37. Adkins also directly supervises the Fire Safety Marshall and Security Officers, who work at the appointing authority. N.T. p. 37

[6] Bobby is employed by the appointing authority as a Nurse Manager 1. N.T. p. 48. Bobby has held this position for over three years and has worked for the appointing authority for thirteen and a half years. N.T. pp. 48-50. As the Nurse Manager 1, Bobby supervises the Nursing staff and Psychiatric Aides, including appellant, who work in the Greizman Building. N.T. pp. 50-51. Generally, Bobby works the 6:00 a.m. to 2:30 p.m. shift. N.T. p. 50.

[7] Franko is employed by the Office of Administration as a Human Resource Analyst 3. N.T. p. 64. Her working title is Labor Relations Coordinator. N.T. pp. 64-65. In that capacity, she is responsible for advising management on disciplinary actions, among other matters. N.T. pp. 65-66.

Facility Safety Manager Joseph Adkins is responsible for implementing policies and protocols related to the appointing authority's accident and injury prevention program. N.T. p. 39. This includes selecting appropriate PPE, as well as ensuring employees are utilizing the appropriate PPE for tasks they are completing. N.T. p. 39. Adkins stated the use of appropriate PPE is required at all times, not only during pandemic situations. N.T. p. 39. However, Adkins noted additional policies regarding the use of PPE were in effect during the COVID-19 pandemic. N.T. pp. 39-40.

Adkins stated during the COVID-19 pandemic, all appointing authority employees were required to wear face shields or face masks in the appointing authority's common areas. N.T. pp. 40-41. Adkins further indicated, around August 2021, occlusive eye protection was added to the required PPE for all employees. N.T. pp. 39-40. More restrictive PPE, such as N95 masks, were required on particular wards. N.T. p. 40. With that said, Adkins noted employees working in individual offices where they would not be in contact with other individuals were not required to wear the level of PPE required in the common areas. N.T. p. 41.

Nurse Manager 1 Jonathan Bobby testified all staff who he supervises, including appellant, were informed of the appointing authority's mask policies as described by Adkins. N.T. pp. 51-52. Staff were informed of these requirements via numerous emails and notices were posted throughout the appointing authority and on the outside of each door. N.T. p. 81.

Adkins and Bobby testified they observed appellant without a mask in contravention of the PPE requirements on August 5 and 9, 2021. Adkins recalled on August 5, 2021 around 7:55 a.m., he was walking down a corridor on the first

floor of the Greizman Building when he encountered appellant who was coming from the opposite end of the corridor. N.T. pp. 41, 43. Adkins noticed appellant was not wearing a face covering of any kind and advised appellant he needed to wear a face covering. N.T. p. 41. Adkins stated he was approximately ten feet away from appellant during this encounter. N.T. p. 41. Therefore, he concluded appellant should have been able to hear him. N.T. pp. 41-42. However, appellant ignored him and continued to walk toward the exit of the building. N.T. p. 42.

Adkins stated the direction in which appellant was walking opens into a common-area lobby where employees are screened upon coming to work.[8] N.T. p. 42. Adkins indicated he repeated his statement to appellant about wearing a face covering as appellant was walking away from him. N.T. p. 42. Adkins recalled he raised his voice to the point where anyone in the lobby area could have clearly heard him. N.T. pp. 42-43. Adkins recalled saying, "You need to be wearing a face covering while you're in a facility building." N.T. p. 43. Adkins stated appellant again ignored him. N.T. p. 43.

Adkins testified he reported the incident to his direct supervisor, Chief Operating Officer John McDonald, and Nurse Manager 1 Bobby. N.T. pp. 43, 55. Adkins noted Bobby is in appellant's direct line of supervision. N.T. p. 43.

[8] Adkins explained pursuant to the appointing authority's COVID-19 screening process, employees were asked a series of questions and had their temperature taken prior to entering the building. N.T. p. 42.

Four days later, on August 9, 2021, Bobby observed appellant again failing to wear a face shield or face mask in the Greizman Building as required under the appointing authority's policy. N.T. pp. 52-55. Bobby testified he informed appellant masks were required within the building. N.T. p. 54. Appellant responded, "I don't have a mask. I'm leaving the building." N.T. p. 54.

Appellant denied violating the appointing authority's PPE policies. Appellant claimed the PPE policies only applied to the ward, not the first floor of the Greizman Building.[9] N.T. p. 101. Additionally, appellant provided an alternate version of his encounters with Adkins and Bobby.

Appellant testified the only time he saw Adkins was when he was coming out of the shower five days earlier. N.T. pp. 101-102. Appellant stated Adkins came into the locker room, exited, and then returned. N.T. p. 101. Appellant asserted Adkins was "leering" at him and encroaching on his personal space as he was taking a shower and getting dressed. N.T. pp. 101-102.

Appellant stated he told Adkins to leave him alone and said, "What are you doing? You're just creeping me out." N.T. p. 102. According to appellant, Adkins replied, "I'm not the one that's an asshole here. You are," to which appellant responded, "I don't know what you're talking about." This allegedly prompted

[9] A copy of the PPE policy was not entered into evidence by either party. However, we find credible the testimony presented by the appointing authority pertaining to the scope of the PPE policy. *State Correctional Institution at Graterford, Department of Corrections v. Jordan,* 505 A.2d 339, 341 (Pa. Commw. Ct. 1986)(holding it is within the purview of the Commission to determine the credibility of the witnesses).

Adkins to say, "You're not wearing a mask." N.T. p. 102. Appellant claimed he responded, "I was taking a shower. I don't normally shower with a mask on, okay, and you don't either." N.T. p. 102. Appellant stated after this exchange, Adkins left and he got dressed. N.T. p. 102.

Appellant testified when he left the locker room, Adkins was waiting next to the door. N.T. p. 102. Appellant stated this is the only time he recalls Adkins making an allegation that he was not wearing a mask. N.T. p. 102. Appellant further asserted Adkins' testimony was untrue. N.T. p. 103.

Regarding the incident with Nurse Manager 1 Bobby, appellant asserted he put his PPE in his locker before exiting the building. N.T. pp. 100-101. Appellant explained the staff locker room is on the first floor adjacent to the backdoor of the building. N.T. p. 100. Appellant stated there is approximately twenty feet between the locker room and the exit. N.T. p. 100. Based on the proximity of the locker room to the exit, appellant believed there was no real possibility of encountering any patients or other staff. N.T. p. 100.

Appellant further stated he believed Bobby was "lying in wait" in an alcove. N.T. p. 100. Appellant asserted Bobby jumped out from the alcove and said, "Ah-hah, you're not wearing a mask. You're in trouble." N.T. p. 100. Appellant claimed he replied, "I'm just on my way out the door. I'll see you later." N.T. p. 100.

Appellant asserted both Bobby and Adkins have a vendetta against him and have been conducting "a year-and-a-half-long witch hunt." N.T. p. 103. Appellant specifically testified Adkins does not like him because he tried to raise a

sexual harassment claim against Adkins. N.T. p. 103. Appellant also claimed the targeted harassment by Bobby and Adkins resulted in eleven fact-finding conferences and numerous pre-disciplinary conferences (hereinafter "PDC"). N.T. pp. 103-104. Appellant did not provide any specifics regarding the alleged fact-finding conferences, PDCs, or the underlying conduct thereto. With that said, appellant's direct supervisor, Registered Nurse Supervisor Shawn Hollis, testified regarding the fact-finding conference scheduled to address the August 5 and 9, 2021 incidents. N.T. pp. 18-28.

Hollis testified he was informed by his direct supervisor, Nurse Manager 1 Bobby, that he needed to conduct a fact-finding conference for appellant on September 8, 2021.[10] N.T. pp. 21-22. Hollis recalled he and appellant were working the night shift on September 8, 2021. N.T. pp. 20, 22. Night shift hours are from 11:00 p.m. to 7:30 a.m. N.T. pp. 19, 26. Hollis stated he checked the schedule, determined on which unit appellant was working, and called the unit to speak to appellant. N.T. p. 23. Hollis noted he called appellant around 6:30 a.m. N.T. p. 29.

Hollis stated upon speaking to appellant, he directed appellant to attend a fact-finding conference at 7:00 a.m. in the supervisor's office upstairs.[11] N.T. pp. 23, 28. Hollis also informed appellant that a union representative would be

[10] Hollis did not specify the time or date when Nurse Manager 1 Bobby informed him of appellant's September 8, 2021 fact-finding conference. However, Hollis noted Bobby usually informs him the day before the fact-finding conference is to be conducted. N.T. p. 22. Hollis stated he then prepares for the fact-finding conference and makes arrangements for the union representative and another supervisor to be present. N.T. p. 22.

[11] During his testimony, Hollis interchangeably refers to the location of the fact-finding conference as "the supervisor's office" and "Mr. Houser's office." N.T. pp. 23-24. Mr. Houser, whose first name was never provided, is the daylight supervisor for the Greizman Building. N.T. pp. 24, 30. Therefore, based on the context of the testimony, this appears to be a distinction without a difference. Furthermore, there is no evidence to suggest the two terms were confusing to appellant. As such, it has no bearing on our findings.

present.[12] N.T. p. 23. Hollis stated this was a direct order and asked appellant if he understood the order. N.T. p. 23. Appellant responded, "Yes." After appellant responded that he understood, Hollis reiterated the fact-finding conference was at 7:00 a.m. in the supervisor's office and a union representative would be present. N.T. p. 23. Appellant again responded, "Yes." N.T. p. 23. Hollis also told appellant that he could face disciplinary action if he failed to appear. N.T. p. 24.

Hollis noted all employees are required to attend fact-finding conferences. N.T. pp. 19-20. Additionally, Hollis stated, as appellant's supervisor, he has authority to direct appellant to perform certain tasks and duties, including requiring appellant to attend fact-finding conferences. N.T. p. 19. Hollis indicated direct orders such as these may be done verbally. N.T. p. 20. He further noted if an employee fails to comply with a direct order, disciplinary action may result. N.T. p. 20. Appellant failed to comply with Hollis' direct order to attend the fact-finding conference on September 8, 2021. N.T. pp. 25, 28.

Hollis recalled after ordering appellant to attend the fact-finding conference, he retrieved the paperwork from Bobby and went upstairs to the supervisor's office. Present in the office were Daylight Supervisor Houser and Union Representative Mike Potts. N.T. pp. 24, 30. When appellant failed to appear at 7:00 a.m., Hollis waited about fifteen minutes and then called the unit to determine appellant's whereabouts. N.T. p. 24. Hollis spoke with the Registered Nurse (hereinafter "R.N.") on the unit, Mr. Laufer, who informed him appellant was still on the ward.[13] N.T. pp. 24, 27. Hollis directed the R.N. to instruct appellant to come

[12] The union representative is scheduled to work from 7:00 a.m. to 3:00 p.m., which is why appellant's fact-finding conference was scheduled for 7:00 a.m. N.T. p. 29.

[13] Hollis did not identify the first name of the R.N.

to the supervisor's office, which the R.N. did. N.T. pp. 24-25, 27-28. However, appellant never appeared. N.T. pp. 25, 28. Hollis noted appellant's shift would have ended at 7:30 a.m. N.T. p. 26.

At 7:25 a.m., Hollis called Bobby and informed him appellant never appeared. N.T. pp. 25, 28. Bobby instructed Hollis to bring the paperwork back to the nursing office and complete a witness statement. N.T. pp. 25, 28. Hollis followed these instructions. N.T. p. 25.

Appellant denied receiving any communication from Hollis, by phone or letter, directing him to attend the fact-finding conference. N.T. p. 99. Hollis denied this accusation. Hollis explained employees are informed of fact-finding conferences by phone, which Hollis asserted he did. N.T. pp. 23-24, 27. Hollis stated letter notification is reserved for scheduling the PDC. N.T. p. 27.

By letter dated September 24, 2021, the appointing authority notified appellant that a PDC was scheduled for September 29, 2021 at 7:00 a.m. N.T. p. 56; AA Ex. 1. To be discussed at the PDC were appellant's failure to wear a face mask on August 5 and 9, 2021, as well as his refusal to participate in the September 8, 2021 fact-finding conference. N.T. p. 56; AA Ex. 1. Nurse Manager 1 Bobby testified the purpose of the PDC was to provide appellant with an opportunity to answer the charges. N.T. p. 60; AA Ex. 6 (pp. 7-8). Appellant failed to attend the PDC. N.T. p. 90.

By letter dated October 20, 2021, appellant was issued a Level-Two ADLS with a final warning, which was equivalent to a five-day suspension, for the same charges listed in the September 24, 2021 PDC notice. Comm. Ex. A; AA Ex. 1.

Labor Relations Coordinator Lauren Franko was responsible for recommending the level of discipline issued to appellant. N.T. p. 66. In determining the level of discipline, Franko reviewed the notes from appellant's PDC and the relevant policies, to include the appointing authority's Rules and Regulations, Policy 7174, and Management Directive 590.1 Amended.[14] N.T. pp. 69, 71-88; AA Exs. 2, 3, 4, 6.

Franko testified all staff are trained on the appointing authority's Rules and Regulations, including appellant as evidenced by his signed acknowledgement dated April 10, 2015. N.T. pp. 71, 73-74; AA Ex. 3. By signing the acknowledgment, appellant affirmed he read and understood the appointing authority's Rules and Regulations. N.T. pp. 73-74; AA Ex. 3 (p. 6). Appellant also agreed he would conduct himself in accordance with the Rules and Regulations and acknowledged a violation could result in disciplinary action, suspension, dismissal, or criminal prosecution. N.T. p. 74; AA Ex. 3 (p. 6). Franko asserted Rules 1, 34, and 41 were implicated in the present matter. N.T. pp. 71-73.

Pursuant to Rule 1, staff are required to conduct their assigned duties and responsibilities in a professional manner. N.T. p. 71; AA Ex. 3 (p. 1). Franko asserted appellant's failure to twice wear a mask as required by the appointing authority's PPE policies and procedures implicated this Rule. N.T. p. 71.

[14] Management Directive 590.1 Amended is the Commonwealth's Labor Relations Policy which delineates the policies, responsibilities, and procedures for the administration of the Commonwealth's labor relations program. AA Ex. 6. This policy facilitates consistency across agencies in dealing with various labor relations matters. AA Ex. 6 (p. 1).

Under Rule 34, "[a]ll employees are also expected to conduct themselves at all times, including off duty hours, so as to demonstrate the public's trust and confidence inherent in their position as a public servant." N.T. p. 72; AA Ex. 3 (p. 3). Franko asserted staff who chose not to wear masks while working around patients were irresponsible, which is contrary to this Rule. N.T. p. 72.

Pursuant to Rule 41, "[a]ll employees are required, as a condition of employment to cooperate fully in any investigation that may be conducted." N.T. pp. 72-73; AA Ex. 3 (p. 4). Franko indicated this Rule relates to appellant's failure to attend the fact-finding conference. N.T. p. 72. Franko explained all employees are required to attend fact-finding conferences and answer any and all questions during such conference. N.T. p. 73.

Based on the above violations, appellant was charged with one count of "Insubordination" and two counts of "Failure to Follow General Instructions and Procedures." Comm. Ex. A. Franko indicated the elements and level of discipline for each of these charges are set forth in Human Resource Policy 7174. AA Ex. 4. Franko noted appellant acknowledged receipt of Policy 7174 on May 12, 2015.[15] N.T. pp. 85-86; AA Ex. 5.

[15] We note the version of Policy 7174 that the appointing authority referenced during the hearing was issued on September 4, 2015, approximately three months after appellant signed the acknowledgment. AA Ex. 4. The September 4, 2015 version replaced the August 23, 2013 version of the Policy. AA Ex. 4. No testimony, or other evidence, was presented as to what, if any, changes were made when the Policy was reissued on September 4, 2015. However, appellant does not dispute there were changes of which he was unaware. As such, we find there are no notice issues pertaining to the contents of Policy 7174 which are applicable to the present matter.

Pursuant to Policy 7174, the charge of "Insubordination" requires the following elements of substantiation:

> Employee was given a direct and legitimate order by an appropriate supervisor, and:
>
> #1 Employee refused to obey, but did not become argumentative or compound the offense in any other manner. Consequences of employee's failure to obey were not substantive.
>
> OR
>
> #2 Employee refused the order and became argument and/or abusive; the consequences of the employee's failure to act were substantial and employee was aware, or employee's refusal was willful.

N.T. p. 77; AA Ex. 4 (p. 2) (emphasis in original).

Franko asserted appellant violated the second element above in that he willfully refused to obey a legitimate direct order from Registered Nurse Supervisor Hollis to attend a fact-finding conference. N.T. pp. 76-79. Franko concluded appellant's refusal was willful because participation in fact-finding conferences is mandatory for all employees. N.T. pp. 78-79. Franko stated appellant was aware of this rule because he signed off on the appointing authority's Rules and Regulations which informed him he was required to conduct himself in a professional manner and participate in official investigations. N.T. p. 79; AA Ex. 3 (p. 4).

Franko reasoned appellant could have been discharged for the above insubordinate behavior based on the guidelines set forth in Policy 7174. N.T. pp. 79-80; AA Ex. 4 (p. 2). Franko stated this level of discipline would be appropriate even if this was appellant's first offense after his probationary period. N.T. p. 78. Franko could not recall if appellant had previously been disciplined for insubordination.

N.T. p. 78. Therefore, it is unclear whether this was appellant's first offense. However, Franko noted appellant was not discharged, but rather, received a lesser discipline in the form of a five-day suspension.[16] N.T. pp. 78-80.

Regarding the two charges for "Failure to Follow General Instructions and Procedures," Policy 7174 provides the following elements of substantiation are required:

- Employee was aware of, or could reasonably have been expected to have been aware of, the general instruction(s) or procedure(s) in question.
- Employee failed to properly comply with or follow the general instruction or procedure (either by act or omission).

AA Ex. 4 (p. 3).

Franko concluded the above elements were substantiated by appellant's failure to follow the appointing authority's PPE policies and procedures. N.T. pp. 80-82. Regarding the first element, Franko explained all staff were required to wear PPE during the global pandemic and appellant was aware of this based on the numerous emails sent to staff and the notices posted throughout the building. N.T. pp. 80-81. Therefore, Franko reasoned the first element above was substantiated in that appellant was aware of, or could reasonably have been expected to have been aware of, the appointing authority's PPE policies and procedures. N.T. p. 81.

[16] While Franko referred to the discipline as a five-day suspension, the form of the discipline was a Level-Two ADLS for which there was no effect on appellant's pay, seniority or other benefits. Comm. Ex. A. As previously noted, since the Level-Two ADLS carries the same weight as if appellant served a five-day suspension, the Commission will consider the present appeal as an appeal of a five-day suspension.

Additionally, Franko concluded the second element was substantiated in that appellant failed to properly comply with the PPE policies and procedures in that he failed to wear as mask as required on two occasions. N.T. pp. 81-82. Franko further asserted based on the extenuating and mitigating factors, a three to five-day suspension was warranted under Policy 7174. N.T. pp. 82-84; AA Ex. 4 (p. 3).

Policy 7174 provides discharge is appropriate for a first or second offense after the employee's probationary period if the conduct is serious in nature. AA Ex. 4 (p. 3). Franko believed the rubric for a second offense would apply to the present matter because appellant was charged with two infractions of the mask policy.[17] N.T. pp. 83-84. Franko further asserted there were extenuating circumstances which elevated the seriousness of the behavior. N.T. pp. 82-83.

Pursuant to Policy 7174, matters to be considered in mitigation or extenuation include:

- Length and nature of employee's service.
- Extent or degree of injury, harm, damage, or potential thereof to patients/individuals, coworkers, the public, or property as a result of the employee's failure to follow instructions or procedures.
- Did employee have proper understanding of the instructions or procedures? Any previous training?
- Circumstances surrounding the incident. Employee's explanation.
- Level of employee's responsibility.

[17] We note Franko's belief that the second of the two charges equates to a second offense for purposes of progressing the discipline is incorrect. It is axiomatic that discipline may only be progressed upon charges for which prior discipline has been issued. Here, there is no evidence appellant was previously disciplined for failing to wear a mask. While appellant was informed by Facility Safety Manager Adkins on August 5, 2021 that he was required to wear his mask, discipline was not issued.

N.T. p. 82; AA Ex. 4 (p. 3). In applying these factors, Franko noted appellant had been an employee for several years and at the time of the infractions, the world was a year and a half into a global pandemic. N.T. p. 82. Therefore, the PPE requirements were not new policies at the time of appellant's infractions. N.T. p. 83. Franko further asserted by refusing to wear the required PPE, appellant was putting patients and staff at risk. N.T. pp. 82-83. Therefore, Franko concluded a three to five-day suspension with a final warning would be appropriate under the circumstances. N.T. p. 84.

Franko noted discipline is meant to be corrective in nature, not punitive. N.T. p. 67. Franko stated appellant was not the only employee to be disciplined for violating the PPE requirements. N.T. p. 94.

Good Cause for the Level-Two ADLS

Good cause must relate to an employee's competence and ability to perform her job duties, *Department of Corrections v. Ehnot*, 110 Pa. Commw. 608, 532 A.2d 1262 (1987), or must result from conduct that hampers or frustrates the execution of the employee's duties. *McCain v. Department of Education*, 71 Pa. Commw. 165, 454 A.2d 667 (1983). Having carefully reviewed the evidence, we find that the appointing authority has established the charges against appellant and has established good cause for the Level-Two ADLS. In support of our conclusion, we find credible[18] the testimony provided by the appointing authority's witnesses and resolve any conflicts in evidence in favor of the appointing authority.

[18] 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).

Here, appellant was charged with two counts of "Failure to Follow Policy/Procedure" and one count of "Insubordination." Comm. Ex. A. Policy 7174 sets forth the criteria for establishing each charge and provides a rubric for determining the level of discipline. *See* Findings of Fact 36, 38, 39, 40, 41, 42, 43. We find appellant was aware of the provisions of Policy 7174 as evidence by his signed acknowledgment. *See* Finding of Fact 44. We also find the appointing authority established the criteria for each charge as set forth in its Policy. *See* Findings of Fact 36-43.

For the charge of "Failure to Follow General Instructions and Procedures," we find appellant was aware of the general instructions and procedures in question (*i.e.*, the appointing authority's PPE requirements during the COVID-19 pandemic). *See* Findings of Fact 9, 10, 11, 12. Appellant was informed of the PPE requirements in effect during the COVID-19 pandemic via numerous emails. *See* Finding of Fact 12. Notices were also posted throughout the appointing authority and on each door. *See* Finding of Fact 12.

We further find appellant violated the PPE requirements in effect during the COVID-19 pandemic when he failed to wear a face mask or face shield while on the first-floor hallway of the Greizman Building on August 5 and 9, 2021. *See* Findings of Fact 14, 15, 16. We do not find credible appellant's alternate versions of these two incidents.

Additionally, we find the two counts of "Failure to Follow General Instructions and Procedures" alone are sufficient to support the level of discipline based on the seriousness of the conduct. *See* Finding of Fact 41, 43. We find appellant's conduct was serious in that: 1) appellant was a long-term employee; 2) at

the time of the infractions, the world was in a global pandemic that had been ongoing for approximately one and a half years; 3) appellant's failure to wear the required PPE had the potential to put patients and staff at risk of contagion; 4) there is no credible evidence appellant was unaware of or did not understand the PPE requirements; and 5) as a healthcare worker, appellant has an inherent duty to conduct himself in a professional manner consistent with public's trust and confidence. *See* Findings of Fact 4, 5, 7, 8, 13. We are not persuaded by appellant's claim that he did not believe he would encounter anyone in the hallway. Nor do we find credible appellant's accusations against Facility Safety Manager Adkins and Nurse Manager 1 Bobby.

Furthermore, we note removal would have been appropriate under the Policy for these two charges alone. *See* Findings of Fact 41. Since removal would have been appropriate, a lesser discipline of a five-day suspension is clearly permissible. Moreover, we find no mitigating circumstances exist to support a further reduction of the discipline. *See* Finding of Fact 42.

Additionally, we find the appointing authority established the charge of "Insubordination." As noted in the Findings of Fact, there are two ways this charge may be established. *See* Finding of Fact 36. We find the appointing authority substantiated the charge under the first option. *See* Finding of Fact 36.

In support of our conclusion, we find appellant's supervisor gave him a direct and legitimate order to attend a fact-finding conference at 7:00 a.m. on September 8, 2021. *See* Findings of Fact 21, 22, 23, 24, 25, 26, 28. This order was clearly legitimate as the appointing authority's Rules and Regulations require all employees cooperate fully in investigations that may be conducted, to include fact-

finding conferences. *See* Findings of Fact 29, 30. Appellant signed an acknowledgment affirming he understood the appointing authority's Rules and Regulations and agreeing he would conduct himself accordingly. *See* Finding of Fact 31. Nonetheless, appellant refused to obey the order in that he failed to appear at the fact-finding conference. *See* Finding of Fact 27.

We further find appellant was not argumentative when he refused to obey the order, nor did he compound the offense in any other manner. We also find the consequences of appellant's failure to obey were not substantive as no harm resulted from appellant's inaction. As such, we find the appointing authority presented sufficient evidence to establish "Insubordination" under the first option only. *See* Finding of Fact 36.

Where the elements under the first option are substantiated, a written reprimand is appropriate if it is the employee's first offense. *See* Findings of Fact 37, 38. There is no evidence appellant was previously disciplined for "Insubordination." *See* Finding of Fact 45. Thus, this is his first offense. Also, there do not appear to be any mitigating factors.

Generally, "an employee's only defense for failing to follow a direct order is that, in so doing, there would be a clear and present danger to his health or safety, or that the order was illegal." *See* Finding of Fact 39. Here, there is no evidence attending the fact-finding would present a clear and present danger to appellant's health or safety, nor is there any evidence the order was illegal. To the contrary, the order was consistent with the appointing authority's policies, which warned appellant disciplinary action could result from his non-compliance. *See* Findings of Fact 29, 30, 31. Likewise, appellant's supervisor warned him of the

consequences of non-compliance when he twice reiterated the order which appellant twice acknowledged he understood. *See* Findings of Fact 23, 24, 25, 26. Appellant did not give any credible reason for his refusal of this direct and legitimate order. Furthermore, no credible evidence of mitigation related to appellant's work history was presented. Thus, it was appropriate to discipline appellant for his failure to attend the September 8, 2021 fact-finding conference.

We further find it was appropriate for the appointing authority to issue a five-day suspension based on the consolidation of all three charges. As we previously noted, the two counts of "Failure to Follow General Instructions and Procedures" would alone have supported removal. Thus, we find there is good cause for the lesser discipline of a five-day suspension based on all three counts.

In conclusion, we find the appointing authority established meritorious criteria related to appellant's competency and ability to perform his job duties. Specifically, on three separate occasions, appellant displayed a willful disregard of the appointing authority's policies and procedures, as well as the directives repeatedly given to him by supervisory personnel. Thus, for the reasons articulated above, we find the appointing authority had good cause to issue the Level-Two ADLS in lieu of a five-day suspension to appellant. Accordingly, we enter the following:

CONCLUSION OF LAW

The appointing authority has presented evidence sufficient to establish good cause for suspension under Section 2603(c) of Act 71 of 2018.

ORDER

AND NOW, the State Civil Service Commission, by agreement of its members, dismisses the appeal of William Skelly challenging his Level-Two Alternative Discipline in Lieu of Suspension from regular Psychiatric Aide employment with Torrance State Hospital, Department of Human Services, and sustains the actions of Torrance State Hospital, Department of Human Services in issuing the Level-Two Alternative Discipline in Lieu of Suspension of William Skelly from regular Psychiatric Aide employment.

State Civil Service Commission

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Maria P. Donatucci
Chairwoman

_____

Gregory M. Lane
Commissioner

_____

Bryan R. Lentz
Commissioner

Mailed: October 25, 2022